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219 Cal.App. 50

ELLIS v. UNION TRUST CO. OF SAN DIEGO et al.

L. A. 13398.

Supreme Court of California.
Sept. 18, 1933.

1. Vendor and purchaser 🔑341(3).

Evidence *held* sufficient to show that old woman entered into contract to purchase through mistake induced by fraudulent representations as to location and value of lots, warranting rescission of contract and return of purchase money.

2. Appeal and error 🔑1012(1).

Weight of testimony is for trial judge and not Supreme Court.

3. Appeal and error 🔑173(10).

Defense of laches cannot be raised for first time on appeal.

In Bank.

Appeal from Superior Court, San Diego County; Benjamin F. Warmer, Judge.

Action by Anna J. Ellis, an incompetent person, by the San Diego Trust & Savings Bank, a corporation, as guardian of the estate of the incompetent, against the Union Trust Company of San Diego and others. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Jos. H. Egermayer, D. L. Ault, Stearns, Luce & Forward, and Fred M. Kunzel, all of San Diego, for appellants.

George H. Stone, Stone, Munkelt & Gazlay, Glen H. Munkelt, and Frank A. Gazlay, all of San Diego, for respondent.

IRA F. THOMPSON, Justice.

This action was commenced for the purpose of having adjudicated a rescission of a contract for the purchase of real property, alleged to have been entered into by plaintiff through mistake on her part induced by the fraudulent representations of an agent of defendant, Roy C. Lichty, and the Southern California Realty Corporation, who were engaged in subdividing and selling lots in tracts commonly called Talmadge Park, Units Nos. 1, 2, and 3, and Talmadge Park Estates. The Union Trust Company of San Diego held the legal title to the property under a trust agreement for the benefit of the Southern California Realty Corporation. Judgment was rendered for the plaintiff canceling the contract and awarding her the purchase money paid on account thereof. This appeal is taken by the defendants from that judgment.

While their arguments and assignments of error are stated in greater detail, they amount to an attack upon the sufficiency of the evidence to support the findings, a charge that the court failed to find upon certain material issues, and erred in holding the defendants liable with respect to two lots, the subject of a special contract strictly between the agent and respondent.

[1, 2] It appears from the record that on July 1, 1928, the time the contract was executed, the respondent was a woman past 70 years of age and that subsequently and on August 15, 1930, the San Diego Trust & Savings Bank was appointed guardian of her estate by order of the superior court in San Diego county. The trial court, however, found that she was not incapable of transacting business at the time of the execution of the contract in question. In this connection it is to be observed that Mrs. Ellis gave most of the testimony upon which the findings are based. In effect she said that a Mr. Hegyi, the agent, called upon her for the purpose of interesting her in the lots; that he took her out to the property; showed her first where the private homes were to be built, where the high school was going to be; told her that one side was for residences and the other for business purposes; and advised her that it would be a good thing for her to buy some of the lots and put up an apartment house, as the high school was coming very soon. In more or less detail

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

she described the situation of the lots with respect to the proposed high school, tract office, and a house constructed for exhibition purposes. She said that the sidewalks were not constructed in front of the lot at which she looked, a fact upon which appellants place much reliance, because they introduced evidence that the sidewalks were constructed in the particular block described by Mrs. Ellis, but not in the one where the lots were located which were subsequently described in the contract. The trial judge made a visit to and an inspection of the property. The contract as executed called for five lots on Forty-Ninth street, a distance of more than five blocks from the lots which Mrs. Ellis says she was shown and a little farther than that from the site of the proposed high school. She also testified that she only intended to buy three lots, but, upon Mr. Hegyi's statement that he would like to have her take two more and hold the two for a friend of his who wanted to purchase them, five were included. Also she said that the contracts were put in her safe deposit box and that she did not know that the wrong lots were described until her brother discovered that fact in May, 1930. Mr. Hegyi died about sixty days after the consummation of the deal. The court concluded that respondent was shown one group of lots and sold another which were far less valuable. Considering respondent's age and the attending circumstances, the above-recited facts were sufficient to warrant the court in granting relief. Regardless of the impression which the testimony, recorded upon the cold page, may make upon us, the rule which properly confers upon the trial judge the responsibility of weighing the testimony precludes us from weighing the notion that Mrs. Ellis entertained, that there were no sidewalks along the block where she selected the lots, with other testimony given by her. And, while it is true, as appellants contend, that no one gave specific testimony concerning the values of the respective groups of lots, yet the fact remains that the trial judge visited the property and made his inspection and, in connection with the testimony which indicated the relative proximity to the proposed school and their desirability as an apartment house site, determined, as a matter of fact, that the lots selected by Mrs. Ellis were much more valuable than those specified in the contract.

Nor can it be said that, because two additional lots were included in the contract by the persuasion of the agent and upon the statement that they were for a friend, rescission and recovery of the purchase price should not result. The contract was tainted with fraud—it was vitiated from the beginning. Providence Jewelry Co. v. Nagel, 157 Cal. 497, 503, 108 P. 312; 12 Cal. Jur. 721. Certain it is, if the testimony of the respondent is credited, that she would not have executed the contract for two lots or three lots or five lots had she not believed she was securing lots in the block near the proposed high school.

[3] It is also claimed by appellants that the court should have found that respondent was guilty of laches. It is to be noticed that laches was not pleaded, for which reason it was not an issue at the trial. Consequently, there was no occasion for a finding. Aside from this fact we cannot find that appellants raised the point in the trial court. In truth the trial judge, upon the occasion of an objection to a question propounded to Mrs. Ellis, asked, "Is there any laches pleaded?" to which counsel for appellants replied, "No, I think not." Under such circumstances the argument comes too late. Parkside Realty Co. v. MacDonald, 166 Cal. 426, 433, 137 P. 21; Cooke v. Darnell, 100 Cal. App. 482, 488, 280 P. 383.

The other specifications of failure to find upon issues have been examined, and in fact discussed, under the treatment of the sufficiency of the evidence. Further treatment thereof is unnecessary.

Judgment affirmed.

We concur: WASTE, C. J.; SEAWELL. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

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218 Cal. 780

MOREY v. BOVEE et al.

L. A. 13224.

Supreme Court of California.

Sept. 15, 1933.

1. Fraud ⚷58(4).

Evidence *held* to sustain finding that misrepresentation of orange acreage was material factor in inducing exchange of realty.

Evidence disclosed that purchaser knew he would receive 30 acres more or less, but neither property description nor his inspection of ranch could have divulged to him the number of acres planted to orange trees which he was receiving in exchange for apartment house.

2. Fraud ⚷59(2).

In action for fraud in exchange of realty, court properly based award of damages on difference between actual value of property and value it would have had if it were as represented.

3. Evidence 🔑434(11).

In action for fraud in exchange of realty, evidence of parol representations as to fruit acreage was admissible where representations induced execution of written contract.

4. Fraud 🔑31.

Purchaser who was defrauded under contract which was partially completed could rescind contract or complete it and sue for damages.

In Bank.

Appeal from Superior Court, Orange County; Jas. L. Allen, Judge.

Action by B. J. Morey against Thaddeus F. Bovee and another, and cross-complaint by defendants. Judgment for plaintiff, and the named defendant appealed.

Affirmed.

For prior opinion, see 17 P.(2d) 166.

Drumm, Tucker & Drumm, of Santa Ana, for appellant.

L. F. Coburn, of Orange, for respondent.

PRESTON, Justice.

In this action to recover damages resulting from alleged fraud and misrepresentation practiced by defendants on plaintiff in connection with an exchange of real properties, judgment was rendered in favor of plaintiff and against defendant Thaddeus F. Bovee. Said defendant appealed. The court below found the facts material to this discussion to be substantially as follows:

Plaintiff owned two apartment houses in Los Angeles, which he desired to exchange for real property in Orange county. Defendants owned an orange grove in said county. The parties were brought together through the efforts of two licensed realtors. On July 16, 1930, plaintiff, with his son and said realtors, called at the ranch residence of defendants; the parties met; terms of exchange were discussed; and plaintiff walked some distance over the ranch property and inspected it. The evidence which supports the findings of fraud and misrepresentation is found in conflicting accounts, given by witnesses upon trial of the cause, as to the conversation had at this meeting. This evidence was sufficient, however, to warrant the court in concluding that plaintiff was induced to enter into the exchange wholly by the false and fraudulent statements and representations of appellant and of his agents to the effect that there were 23 acres of Valencia orange trees standing upon the land, 3 acres of walnut trees, and 4 acres of lemon trees, whereas there were in truth and fact but 17.899 acres of orange trees, 4.02 acres of lemons, and 3.507 acres of walnuts; the balance of the 30.002 acres comprising said ranch consisting of road and railway rights of way, house site, vacant land, etc.

A short time after the above-mentioned meeting, defendants inspected the apartment house properties of plaintiff, and thereafter and on July 23, 1930, the terms of the transfers were placed in writing. Plaintiff paid off a mortgage of $5,000 on part of the property he was to receive and placed $12,500 in escrow for the benefit of appellant. Possession of the properties was exchanged on August 7, 1930. A few days later plaintiff and appellant called at the bank to examine their respective guaranties of title. Plaintiff testified that when he saw the map attached to the title guaranty for the Orange county property, he became aware for the first time that there was something amiss with his idea of the boundary lines of the orange grove. He immediately made a more minute inspection of the property and in the latter part of August had it surveyed, which survey resulted in discovery of the aforesaid shortage in the acreage planted to orange trees. The court found that the value of the property received by plaintiff was $76,000; that had said property been as represented by appellant, its value would have been $88,600; hence plaintiff had been damaged in the sum of $12,600 and was entitled to judgment in that amount less certain set-offs in favor of appellant.

Appellant's main contention is that plaintiff could not have been misled by and should not have relied upon the statement that there were 23 acres of oranges, 4 of lemons, and 3 of walnuts, because plaintiff had been told and knew, not only from the oral negotiations, but definitely from the written instruments, that he was to get but a 30-acre ranch and he had seen with his own eyes that the entire acreage was not planted to trees, but that some of it at least was in use for a home site, railway right of way, roads, etc. At most, appellant urges, plaintiff might have been misled as to the existence of vacant land across the track, which covered less than two acres. Appellant also pleads the insufficiency of the evidence in general to support the findings and judgment.

[1-3] We are not disposed to indulge in a lengthy discussion of the numerous contentions urged by appellant. It appears that the evidence is sufficient to support the findings in every particular. The misrepresentation of orange acreage, to the full extent of the shortage discovered, was a material factor in inducing the exchange, as the real value of the ranch to plaintiff lay in the land which he would receive planted to these trees. Although he knew, and the written instruments showed, that he would receive but 30 acres "more or less," neither the property description nor his inspection of the ranch could

have divulged to him the number of acres planted to orange trees. The court properly based its award of damages on sufficient and competent evidence relative to the difference between the actual value of the property and the value it would have had if it had been as represented. Furthermore, there was no error in admitting evidence of the parol representations as to the fruit acreage, for these representations induced execution of the written instruments.

[4] It was not incumbent upon plaintiff to attempt to rescind upon discovery of the fraud. The transaction had been partially completed. He therefore had an election of remedies; he could either rescind or complete the exchange and sue for damages. He elected the latter remedy.

The several remaining points made by appellant, relative to errors in admission and exclusion of evidence, agency of the realtors, etc., will not be separately discussed. We have examined the record with care and find that appellant suffered no prejudice whatsoever in any of his substantial rights. The action of the court below has ample support in the record.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

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218 Cal. 760

GENEUSZ v. HARRINGTON et al.

L. A. 12967.

Supreme Court of California.

Sept. 13, 1933.

1. Appeal and error ⚷891.

Appeal on judgment roll alone does not permit a review of evidence; hence appellant's motion for permission to be allowed to take additional testimony was denied.

2. Appeal and error ⚷110.

Appeal does not lie from order denying motion for new trial (Code Civ. Proc. § 952, as amended by St. 1915, p. 205, § 3).

3. Appeal and error ⚷931(1).

Presumption exists that trial court's findings are supported by evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Suit by Paul Geneusz against Fred C. Harrington and Mary Jane Joyce. From a judgment in favor of plaintiff and from an order denying a motion for a new trial, the second defendant appeals, and also files a motion for permission to be allowed to take additional testimony.

Motion denied. Appeal from order denying motion for a new trial dismissed. Judgment affirmed.

George M. Pierson and Sylvan G. Bay, both of Los Angeles (H. E. Allport, of Hollywood, of counsel), for appellant.

Thomas R. Lynch, of Los Angeles, and Paul Geneusz, for respondent.

WASTE, Chief Justice.

Plaintiff, the respondent here, entered into an arrangement to trade and transfer certain real property to the defendants in exchange for a promissory note of the alleged face value of $4,900, secured by a second incumbrance by way of a deed of trust on property on which there was a prior incumbrance of $40,000. The trial court found that all the representations made by defendants to plaintiff as to the ownership and value of the property subject to the incumbrance securing the note for which plaintiff traded his property were untrue. On discovery of the fraud, plaintiff gave notice of rescission. As a conclusion of law, the court found that plaintiff is entitled to judgment canceling the deed to the property transferred by him to the defendants, and entered judgment accordingly, canceling, vacating, and setting aside the deed, and granting other relief prayed for by the plaintiff. Defendants appealed on the judgment roll alone.

[1] Prior to the hearing here, appellants made application for leave to produce additional evidence concerning facts occurring prior and subsequent to the entry of judgment. When the application came on for hearing, the appellants made no appearance. There is no showing by affidavit or otherwise as to the nature or relevancy of the testimony sought to be taken, other than an affidavit by an officer of a corporation not a party to the suit. In view of the fact that the appeal is on the judgment roll alone, there is no evidence before the court which might be considered in connection with the testimony sought to be offered. An appeal on the judgment roll alone does not permit a review of the evidence.

[2, 3] The appeal is from the judgment, together with an attempted appeal from an order denying a motion for a new trial. The record fails to disclose that any motion for a new trial was made. Furthermore, since the Code amendment of 1915 (Code Civ. Proc. § 952, as amended by St. 1915, p. 205, § 3), an appeal does not lie from an order denying such motion. While the findings might be

more specific, it must be presumed that they are supported by the evidence. They sufficiently support the conclusions of law and the judgment entered.

The motion for permission to be allowed to take additional testimony is denied. The purported appeal from the order denying a motion for a new trial is dismissed. The judgment is affirmed.

We concur: SHENK, J.; THOMPSON, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

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218 Cal. 775

JONES v. UNION OIL CO. OF CALIFORNIA et al.

L. A. 13170.

Supreme Court of California.
Sept. 14, 1933.

1. Statutes ⚷263.

Statute will be construed to operate prospectively unless legislative intent to contrary is clearly expressed.

2. Constitutional law ⚷152.

Judgment is "contract" as contemplated by Constitution.

[Ed. Note.—For other definitions of "Contract," see Words & Phrases.]

3. Judgment ⚷137.

Lien created by statute providing for automatic imposition of lien on docketing of judgment *held* inseparably connected with judgment and not subject to impairment by Legislature (Code Civ. Proc. § 671, as amended by St. 1927, p. 829).

4. Judgment ⚷800(1).

Judgment lien attaching to property under statute providing for automatic imposition of lien *held* not removed by amendatory statutes omitting automatic imposition of lien and requiring recording of abstract of judgment to create lien (Code Civ. Proc. §§ 671, 674, as amended by St. 1927, pp. 829, 830).

In Bank.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by G. H. Jones against the Union Oil Company of California and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

William H. B. Haymond and Walter B. Kibbey, both of Los Angeles, and Hickcox & Trude, of El Centro, for appellant.

Cooney & Kelley, of Los Angeles, for respondents.

SHENK, Justice.

This is an appeal by the plaintiff from a judgment for the defendants in an action to enjoin the sale of certain real property under execution. The cause was submitted to the trial court on a stipulation of facts, and the appeal is on the judgment roll alone.

In June, 1926, in the superior court in and for the county of Imperial, the Union Oil Company of California recovered a judgment against Frank P. Hovley in the sum of $546.54. That judgment was docketed on June 16, 1926, and no appeal was taken. On that date Hovley was the owner of the real property situate in Imperial county sought to be sold under execution, and he continued to be such owner until May, 1928, when for a valuable consideration he deeded it to the plaintiff, Jones.

In April, 1930, execution was issued, and the defendant sheriff was instructed to levy the same and to proceed to sell said property. The plaintiff then commenced the present action to enjoin the defendants from so proceeding. Judgment went for the defendants.

The sole question presented is whether the judgment lien which attached to said real property when the judgment was docketed, under section 671 of the Code of Civil Procedure as it then stood, was removed from said property by the amendment of said section 671 and section 674 of the same Code in 1927. Stats. 1927, pp. 829, 830.

When the judgment was docketed in June, 1926, section 671 of the Code of Civil Procedure provided for an automatic imposition of the lien upon such docketing and that said lien should, with certain exceptions not material, continue for five years. On that date section 674 of the same Code provided that the filing of a certified transcript of the judgment docket with the recorder of any other county would impose a judgment lien upon the real property of the judgment debtor in such other county and that the lien should continue for five years. In 1927 section 671 was so amended (St. 1927, p. 829) as to omit the provisions thereof providing for the automatic imposition of the lien upon the docketing of the judgment and section 674 was amended (St. 1927, p. 830) to provide that the judgment lien should attach only upon the filing with the recorder of a certified abstract of the judgment in whatsoever county the real property might be situated, and that such lien should continue for five years, unless the enforcement thereof was stayed or the judgment otherwise satisfied or discharged as in the section provided.

It is the position of the plaintiff that the judgment lien involved herein was discharged by said amendments by operation of law. It is urged that the judgment lien is purely statutory; that it is merely a remedy provided for the enforcement of the judgment; that the effect of the Code amendments was to repeal the remedy; and that the failure of the plaintiff to record an abstract of the judgment after the effective date of the amendments resulted in loss to him of the benefit of the lien.

The plaintiff relies on People v. Bank of San Luis Obispo, 159 Cal. 67, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148, Moss v. Smith, 171 Cal. 777, 155 P. 90, and other cases of similar import in support of the general proposition that a remedy created by statute and unknown to the common law falls with the repeal of the statute without a saving clause, where it remains inchoate, is not reduced to possession, or protected by final judgment. With this general rule as a premise it is argued that the judgment lien involved herein was entirely wiped out by the Code amendments.

[1] The amendments did not purport to abolish the right to judgment liens on lands owned by the judgment debtor situate in the county in which the judgment was rendered and docketed. They merely changed the method by which such lien might come into being. Since the right to the judgment lien was continued and the method of perfecting it merely changed, and assuming that the subject-matter of the amendments might have been made retroactive in operation, it is of importance to discover whether they were so made. It is settled that every statute will be construed to operate prospectively unless the legislative intent to the contrary is clearly expressed. Krause v. Rarity, 210 Cal. 644, 655, 293 P. 62, 77 A. L. R. 1327; 23 Cal. Jur., p. 628. There is nothing in the amendments which would indicate that they were intended to be retroactive, and it has been held in numerous cases in other jurisdictions that similar statutory amendments with reference to judgment liens must be deemed prospective only. See U. S. v. Kendall (D. C.) 263 F. 126; McCance v. Taylor, 10 Grat. (51 Va.) 580; Commercial Bank of St. Louis v. Eastern Banking Co., 51 Neb. 766, 71 N. W. 1024; Woodson v. Collins & Douglas, 56 Tex. 168; Rock Island National Bank v. Thompson, 74 Ill. App. 54; Raught v. Lewis, 24 Wash. 47, 63 P. 1104, and Merchants' Bank of Danville v. Ballou, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715.

[2, 3] The rule that a statute is presumed to operate prospectively only, unless an intent to the contrary clearly appears, is especially applicable to cases where retroactive operation of the statute would impair the obligations of contracts or interfere with vested rights. Hoyt Metal Co. v. Atwood (C. C. A.) 289 F. 453. It is well established in this state that a judgment is a contract as contemplated by the Constitution. Scarborough v. Dugan, 10 Cal. 305; Miller v. Murphy, 186 Cal. 344, 199 P. 525; 14 Cal. Jur. p. 852. One of the incidents of the judgment contract under section 671 of the Code of Civil Procedure prior to the amendment thereof was the lien thereby created by operation of law. See Beatty v. Cook, 192 Iowa, 542, 185 N. W. 360. The lien thus created was inseparably connected with the judgment and the Legislature had no power to impair it. Massingill v. Downs, 7 How. (47 U. S.) 760, 12 L. Ed. 903. Considered in the sense of a remedy for the enforcement of the judgment, such remedy was nevertheless a part of the obligation of the contract and subject to constitutional protection against impairment. Gunn v. Barry, 15 Wall. (82 U. S.) 610, 21 L. Ed. 212.

[4] From any angle of the present controversy, the conclusion is inescapable that the Code amendments in 1927 did not destroy the judgment lien asserted by the defendants herein. This conclusion renders it unnecessary to pass upon other points discussed in the briefs.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; IRA F. THOMPSON, J.; CURTIS, J.

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218 Cal. 763

ATOWICH et al. v. ZIMMER et al.

L. A. 12785.

Supreme Court of California.

Sept. 13, 1933.

1. Contracts ⚷305(2).

Owners' acceptance and taking of possession of building on settlement of contractor's claim for extras, and owners' claim for changes, alterations, and omissions, waived owners' claim for noncompliance with plans and specifications prepared at owners' request.

2. Contracts ⚷295(1).

Substantial performance of building contract was sufficient since strict performance is no longer required.

3. Principal and surety ⚷66(2).

Where contractor was not liable to owners under building contract, his surety was not liable.

In Bank.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Action by Kevo Atowich and Lena Atowich against Max Zimmer and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Joseph M. Wapner and Goldman & Lieberman, of Los Angeles, for appellants.

Henry O. Wackerbarth, Wheeler & Wackerbarth, and Henry E. Carter, all of Los Angeles, for respondents.

WASTE, Chief Justice.

The appellants, husband and wife (plaintiffs below), entered into a contract with respondent Max Zimmer (one of the defendants below), hereinafter referred to as the contractor, wherein and whereby the latter agreed to erect and construct for plaintiffs a certain building, and to remove and remodel another structure situated on the same premises, for the agreed sum of $23,400. The respondent Fidelity & Deposit Company of Maryland executed a bond in favor of plaintiffs containing the usual guaranties that all things incumbent upon the contractor would be done and performed in accordance with the contract, plans, and specifications. The contractor did not construct the building entirely according to the plans and specifications. On completion of the building, however, plaintiffs took possession and accepted it from the contractor. Some time after its acceptance and occupancy by the plaintiffs, it was discovered that the walls of the building had settled, and that there was a noticeable deflection in the floor of the second story. Plaintiffs brought this action against the contractor and his surety to recover damages caused by reason of the omission of certain features called for by the plans and specifications, the cost of making necessary repairs to the walls and floor of the second story, and depreciation in value of the property by reason of the alleged faulty construction. Incidentally, also, relief was sought against other parties in relation to certain payments made by plaintiffs to the contractor on account of the contract. Judgment was rendered for the defendants.

The trial court has made lengthy and explicit findings, including therein, in some instances, practically a recital of the testimony educed at the trial. The first and general contention of appellants is that the findings are not supported by, and are contrary to, the evidence, and that the evidence is insufficient to support the judgment. A reading of the record of the evidence and an examination of the contentions of both appellants and respondents lead us to the belief that the contention is not borne out by the record. So far as the record is concerned, the evidence material to the issues presents, rather, a question of the weight to be given to the testimony of the various witnesses. For that reason, we deem it unnecessary to enter into a discussion of the testimony in the case.

An objection to the sufficiency of the findings of fact and conclusions of law urged by the appellants relates to the second finding of the trial court, the effect of which is that the plans and specifications for the work to be performed by the contractor were, in fact, prepared at the instance and request of the plaintiffs. We are of the view that the evidence as a whole supports the trial court, and that its conclusions in that regard were correct.

It appears from the findings that, after the plans and specifications were submitted to the owners, and after bids had been received by them for the doing of the work, certain changes had to be made to meet the objections of the building inspector of the city of Glendale. That matter being settled, the contractor entered upon the performance of his contract, and proceeded with the work. After part of the work had been performed, the plaintiffs secured the services of Elmer Elliott, a man of experience, as an inspector or foreman, to supervise for them the erection and construction of the building from that point to its completion. The work was completed, and the plaintiffs accepted the building and took possession on or about the 11th day of December, 1928. Between that time and the date of the trial of the action, it was discovered that a portion of the brick walls on the northerly and westerly sides of the building had settled. The finding of the trial court on this matter is that the walls "settled as a result of the soil or dirt under said walls not being of sufficient strength or texture to sustain the weight thereof upon a foundation of the width supporting said walls, and in this respect the court finds that the foundation under said walls was of the width and thickness as provided by the plans and specifications, and that said defendant Max Zimmer in the erection and construction of said brick walls and the foundation thereunder fully complied with said plans and specifications and that * * * the settlement occurring in said walls and foundation was not the result of a failure on the part of said defendant Max Zimmer to comply with said plans and specifications. Evidence supporting this finding is that the contractor who performed the brick work in the construction and erection of the building and his foreman plumbed the outside brick walls after the walls had been erected to the second story, and after the second story walls had been finished, and again upon the completion of the building, on which occasions they found the walls to be perpendicular; on which evidence the court finds "that upon the completion of the erection and construction of the building the brick walls were plumb and perpendicular and that none of said walls were out of plumb or leaning."

Some time after the plaintiffs took possession of and accepted the building, a deflection or settlement occurred in the floor of the second story. As to this matter the court finds that there was no such deflection or settlement at the time the plaintiffs took possession and accepted the building, but that such deflection when it did occur was "due to the failure to use a sufficient number of joists and timbers to support or maintain the second floor and that said joists and timbers were not placed close enough together"; but that in this respect the joists and timbers used and installed "were of the size as provided for in the plans and specifications and the same were spaced at the distance provided for in the plans." From these facts the court further finds that the deflection or settlement in the floor of the second story of the building "was not due to the failure of the defendant Max Zimmer to install said joists or timbers or to erect and construct the second story or any part of the building in accordance with the plans and specifications," but that in the erection and construction of the second floor and the use of joists, timbers, flooring, and other lumber the defendant fully complied with the plans and specifications under which the building was erected and constructed.

The contractor did not construct the building in exact accordance with the plans and specifications, in that four telephones leading from apartments to the lobby entrance were omitted, one electric door opener was omitted, certain storerooms and garages were omitted, and certain work was done in a manner and form slightly different from that called for in the plans and specifications. In this behalf the court finds that, before making any changes and before performing work in a manner and form different from that called for in the plans and specifications, the contractor conferred with and consulted Elliott, the agent and superintendent of the plaintiffs, and the changes, alterations, and omissions were made with the consent and approval of the plaintiffs given by and through their agent Elliott. There is a further finding that in the erection and construction of the building "there was a substantial compliance with the contract, plans and specifications by the defendant Max Zimmer." Before leaving this subject, we may note that there is evidence, including that of the plaintiffs' expert, Taylor, that the contractor erected the building "in the way it was designed," and that the plans and specifications conformed to the ordinances of the city of Glendale.

Upon the completion of the building, the contractor made a demand for payment for certain services and extra work not called for in the contract, plans, and specifications. At a meeting, at which were present the plaintiff Lena Atowich, the plaintiffs' superintendent, Elliott, and their attorney, this claim was adjusted by the amount being reduced and by the allowance by the contractor to the plaintiffs of certain credits for omissions and changes in the work. Any and all deviations and omissions by the contractor from the contract, plans, and specifications were found by the trial court to have been consented to and approved by Elliott, the agent and superintendent for the plaintiffs. Also, that at the time the contractor delivered possession of the premises to plaintiffs, certain defects complained of in the action were not present or apparent.

[1] In view of the conclusion we have reached, that the findings noted, and others of less importance, dispose of the issues joined by the parties, and that the evidence as a whole supports the findings and judgment, little need be said on the questions of law raised on the appeal. The contractor erected the structure according to the plans and specifications except in the particulars found by the trial court to have had the approval of the plaintiffs, and there was a substantial compliance with the contract. As to the changes, alterations, and omissions, those items were adjusted, and, in the settlement between the contractor and the owners, the owners accepted a credit of $800 on the contractor's claim for extras in settlement of their counterclaims for the changes, alterations, and omissions. Furthermore, the owners' acceptance and taking possession of the completed structure was coincident with the settlement of the contractor's claim and the counterclaims of the owners for changes, alterations, and omissions, and, in the absence of any showing of fraud or mistake, neither of which is urged, was a waiver of any claim of damages on account of nonperformance in any particular. Mannix v. Wilson, 18 Cal. App. 595, 601, 123 P. 981.

[2] The right of the contractor in this case to recover on his contract as against the owners, and to defend against the claims of the owners asserted in this action, is, we think, fully established in this jurisdiction. Aside from the fact that the failure to strictly comply with the contract in the particulars noted was settled and adjusted in the determination of the reciprocal claims of contractor and owners for extras, on the one side, and omissions, changes, and alterations on the other, the old rule of strict compliance urged by the appellants has been modified and relaxed in this jurisdiction. A complete discussion of that subject will be found in Thomas Haverty Co. v. Jones, 185 Cal. 285, 288–291, 197 P. 105. The question of the application of the relaxed interpretation of the rule seems definitely concluded by the finding of the trial court that there was a substantial performance of the contract in this case.

Having reached this conclusion, we deem

it unnecessary to discuss other features of the transaction which tend to support the conclusions and judgment of the trial court, further than to say that the authorities appear to support the respondents in their assertion that the settling of the walls and the deflection in the second floor, after possession of the structure was delivered to the owners, could not be held as a liability against the contractor. See Miller & Sons Co. v. Homeopathic, etc., Hospital, 243 Pa. 502, 90 A. 394; Portable Elevator Mfg. Co. v. Dutton, 224 Ill. App. 123; United States v. Spearin, 248 U. S. 132, 39 S. Ct. 59, 63 L. Ed. 166; McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929, 8 L. R. A. (N. S.) 1171.

[3] The contractor, Zimmer, being found not liable for the claim for damages presented by the plaintiffs, the defendant Fidelity & Deposit Company of Maryland, being merely the surety upon the contractor's bond, cannot be held liable. The condition of its obligation is that, if the contractor shall faithfully perform the work contracted to be done under the contract, the obligation shall be void. The findings of the trial court and the judgment exempted the contractor from liability, which released the surety from the claim of damages asserted by the plaintiffs.

The judgment is affirmed.

We concur: SHENK, J.; IRA F. THOMPSON, J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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219 Cal. 54

PASCOE v. MORRISON.

L. A. 13443.

Supreme Court of California.

Sept. 18, 1933.

1. Reformation of instruments 🔑36(1).

To state case for revision of written instrument, pleader must show by direct averment that writing for some reason failed to express intention of parties (Civ. Code, § 3399).

2. Reformation of instruments 🔑36(3).

Complaint failing to allege that any terms of realty exchange agreement were omitted from writing through fraud or mistake of party or parties, *held* not to state cause of action for reformation (Civ. Code, § 3399).

3. Evidence 🔑385.

Courts will not resort to extrinsic evidence to read into writing terms and conditions other than those intended by parties.

4. Evidence 🔑400(2).

That unambiguous written realty exchange agreement was incomplete and so deficient in terms as to preclude relief by specific performance, *held* not to warrant extrinsic evidence to vary or add to agreement concededly executed as parties intended.

5. Specific performance 🔑28(1).

Greater degree of certainty is required in terms of agreement to be specifically executed in equity than in contract which is basis of action for damages.

6. Pleading 🔑49.

Where complaint sought reformation and specific performance of realty exchange agreement, or damages for failure to perform, and stated cause of action for damages but not for reformation and specific performance, trial court erred in not receiving evidence on damages and granting relief warranted thereby (Code Civ. Proc. § 307).

7. Election of remedies 🔑11.

Plaintiff undertaking to avail himself of remedy to which he is not entitled is not thereby prevented from availing himself of remedy to which he is entitled.

In Bank.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by E. L. Pascoe against H. H. Morrison. From the judgment, plaintiff appeals.

Reversed in part, and remanded.

Sanders & Jacques, of San Diego, for appellant.

P. A. Whitacre, of San Diego, for respondent.

WASTE, Chief Justice.

By this action plaintiff seeks to have a written agreement for the exchange of real properties reformed and, as reformed, specifically enforced or, in the event specific performance cannot be had, an award of damages based on defendant's alleged failure to comply with the terms of the agreement. At the inception of the trial the defendant objected to the introduction of any evidence, on the ground that the complaint fails to state a cause of action. This objection was sustained, and from the judgment on the pleadings the plaintiff prosecutes this appeal.

Appellant does not contend that the agreement as executed is capable of specific performance. The very purpose of this action is to revise the instrument by adding thereto certain terms and conditions the absence of which is concededly fatal to its specific enforcement. We therefore direct our attention to the sufficiency of the complaint to state a cause of action for reformation. Section 3399 of the Civil Code provides that: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

[1] To state a case for the revision of a written instrument, it is therefore incumbent upon the pleader to show, by direct averment that, by reason of fraud practiced by one of the parties, or of the mutual mistake of the parties or of a mistake of one of them, which the other at the time knew or suspected, there were omitted from the instrument certain material terms and conditions. In other words, that the language of the writing failed, for some reason, to express the intention of the parties. Carr v. King, 24 Cal. App. 713, 724, 142 P. 131; Auerbach v. Healy, 174 Cal. 60, 63, 161 P. 1157.

[2] The complaint in the present case does not measure up to this requirement. Nowhere is it alleged that any of the terms of the exchange agreement were omitted from the written instrument by or through fraud or the mistake of the parties or either of them. When this deficiency in the complaint was urged at the commencement of the trial by an objection to the introduction of any evidence, counsel for the plaintiff (appellant here) frankly admitted that he was unable to allege or prove that fraud or mistake had crept into the execution of the agreement. He conceded that the writing was intentionally executed in its present form, and that none of its terms or provisions had been inadvertently or otherwise omitted. This being so, the complaint fails to state a cause of action for reformation under the above-quoted Code section. Carr v. King, supra; Auerbach v. Healy, supra.

[3, 4] The courts will not resort to extrinsic evidence for the purpose of reading into a writing terms and conditions other than those intended to be included therein by the parties. We have no quarrel with the rule under which parol evidence is admitted to explain ambiguities in a writing. That principle is without application here. There is no ambiguity or uncertainty in the written provisions of the exchange agreement here involved. The writing is merely incomplete and so deficient in its terms as to preclude relief by way of specific performance. This alone does not warrant the introduction of extrinsic evidence to vary or add to an agreement concededly executed exactly as intended by the parties. The complaint therefore fails to allege, and appellant by his admissions indicates his inability to prove, a case for equitable interposition.

Respondent asserts that this is fatal to appellant's second cause of action for damages for breach of the agreement. In support thereof we are referred to Morgan v. Dibble, 43 Cal. App. 116, 122, 184 P. 704, wherein it is declared that a court of equity will not grant pecuniary compensation in lieu of specific performance, unless the case presented is one for equitable interposition. Reference is made to this rule in Hansen v. Hevener, 69 Cal. App. 337, 344, 231 P. 361, 363, but it is there concluded that, "In this state, so far as the form of action is concerned, a bill in equity is not distinguishable from an action at law. 'There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs.' Section 307, Code Civ. Proc. As is said in the case of Spect v. Spect, 88 Cal. 437, 26 P. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314: 'Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought.' It is only necessary that the complaint show a state of facts entitling plaintiff to some relief, and thereupon (assuming the evidence to justify it) the court will afford such relief without reference to the manner or form of the pleading. Carpentier v. Brenham, 50 Cal. 549. In the case of Merriman v. Walton, 105 Cal. 403, 38 P. 1108, 30 L. R. A. 786, 45 Am. St. Rep. 50, the statement is made that 'under the system of procedure which obtains in this state, where the various kinds of relief are administered by the same tribunal, and where there is but one form of civil action for the enforcement or protection of civil rights, * * * a party who presents a complaint showing his right to the relief asked is not to be denied that relief because he might have sought it under a different form of action.' * * * Speaking of the rule which in suits for specific performance formerly prevented an award of damages, where the plaintiff either pleaded defendant's disability to specifically perform, or had knowledge of such inability, in the case of Haffey v. Lynch, 143 N. Y. 241, 38 N. E. 298, it is said: 'The rule has been modified since the Code Practice which authorizes the joinder of legal and equitable causes of action, and, while the equitable relief will be denied in such a case, now the action will be retained and the issue as to the breach of contract and damages will be sent to a jury for trial.' * * * *In addition thereto, the facts as pleaded, without reference to any question of specific performance, entitled plaintiff to damages;* and, as shown by the cases heretofore cited, the court was not only authorized, but it was its duty, to grant such relief as the evidence warranted." (Italics ours.)

[5] Though the written agreement here sued on is too indefinite to permit of its specific enforcement, in our opinion it is sufficiently certain and complete in its terms to warrant an action for damages for its breach it is settled that "'a greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages. An action at law is founded upon a mere nonperformance by a defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of nonperformance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before the performance can be enforced.'" Durst v. Jolly, 35 Cal. App. 184, 190, 169 P. 449, 451; Pomeroy's Specific Performance of Contracts (3d Ed.) § 159; 6 Cal. Jur. 220, § 145.

[6, 7] The complaint in the present case, without any reference to the question of specific performance, adequately alleges, in a separate count, a cause of action for damages based on the respondent's breach of the agreement. In view of our simplified procedure, which admits of but one form of action and in which legal and equitable relief are administered by the same tribunal, it was incumbent on the court below to receive evidence addressed to the cause of action for damages and to grant such relief as the evidence warranted. Hansen v. Hevener, supra. This reasoning would appear to be in accord with the principle which recognizes that a plaintiff who has undertaken to avail himself of a remedy that he is not entitled to, is not thereby prevented from availing himself of a remedy that he is entitled to under the facts of the case. McGibbon v. Schmidt, 172 Cal. 70, 75, 155 P. 460. Appellant's abortive attempt to procure a decree specifically enforcing an agreement which, as we have seen, cannot be specifically enforced, should not of itself preclude him from obtaining relief by way of damages.

The judgment is reversed in so far as the cause of action for damages is concerned, and the cause is remanded, with directions to the court below to proceed to trial thereon.

We concur: SEAWELL, J.; THOMPSON, J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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219 Cal. 47

MACBETH v. MACBETH.

L. A. 13312.

Supreme Court of California.

Sept. 18, 1933.

Rehearing Denied Oct. 16, 1933.

1. Divorce 🔑161.

Motion to set aside defendant's default in divorce action and vacate interlocutory decree *held* not amendable after order denying motion became final.

2. Divorce 🔑161.

Where service in divorce action was by publication, motion for relief from default must be made within one year, unless judgment is void on face (Code Civ. Proc. § 473).

3. Divorce 🔑161.

Where motion to set aside defendant's default and divorce decree was not made until after expiration of one-year period, motion was governed by rules applicable to collateral attack, requiring invalidity to appear on face of judgment roll (Code Civ. Proc. § 473).

4. Judgment 🔑153(1).

Entry of default fixes beginning of period within which motion to set aside default and judgment based thereon must be made (Code Civ. Proc. § 473).

5. Divorce 🔑161.

Date of interlocutory rather than final default decree determines time within which relief from former on ground of fraud must be sought (Code Civ. Proc. § 473).

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Ethel D. Macbeth against Joseph Malden Macbeth. From an order refusing to set aside defendant's default and to vacate a decree of divorce, defendant appeals.

Affirmed.

Joseph Malden Macbeth, in pro per.

Frank Lober and Harry C. Hickok, both of Los Angeles, for respondent.

WASTE, Chief Justice.

This is an appeal from an order refusing to set aside defendant's default and vacate a decree of divorce entered thereon.

[1] On March 30, 1928, plaintiff commenced this action for divorce alleging, as grounds therefor, desertion and willful neglect. Service by publication was had. An interlocutory decree was granted to the plaintiff on July 27, 1928. On June 14, 1929, defendant moved to have his default set aside and the decree vacated on the ground of extrinsic fraud.

The requested relief was denied. An appeal from the order of denial was dismissed by this court on March 4, 1930. On April 11, 1930, a final decree of divorce was entered in favor of plaintiff. On June 25, 1930, approximately twenty-three months subsequent to the taking of defendant's default and the entry of the interlocutory decree, defendant filed what is designated as "Notice of Amended Motion * * * to Set Aside Default, etc." This motion was based on substantially the same grounds as its predecessor, viz., extrinsic fraud in the entry of defendant's default and in the procurement of the interlocutory decree. Of course, despite its designation, this later motion must be regarded as an independent and separate request for relief. The original motion was no longer capable of amendment for the order denying it had become final.

[2, 3] Without pausing to consider the propriety of filing a second motion for relief under the circumstances above narrated, we are satisfied that the court below properly denied such motion. Where, as here, service has been had by publication, a motion for relief from default, whether made under section 473 of the Code of Civil Procedure or not, must, when the judgment is not void on its face, be made within the one-year period prescribed in the cited Code section. Smith v. Jones, 174 Cal. 513, 515, 516, 163 P. 890. The motion, from the order denying which this appeal was prosecuted, was not made until long after the expiration of the one-year period. This being so, the motion is to be governed by the rules applicable to collateral attack and must therefore be presented and determined upon the judgment roll alone. City of Salinas v. Luke Kow Lee (Cal. Sup.) 18 P.(2d) 335; In re Morehouse, 176 Cal. 634, 636, 169 P. 365. In other words, the invalidity must appear on the face of the judgment roll (Whitney v. Daggett, 108 Cal. 232, 235, 41 P. 471), which, in the present case, fails to disclose any impropriety in the entry of defendant's default or in the entry of the interlocutory decree.

[4, 5] Defendant seeks to evade the effect of the one-year period above mentioned by urging that the "amended" motion was made within one year from the entry of the final decree. The point is without merit. With respect to default judgments, inasmuch as the default as well as the judgment based upon it must be set aside if any effective relief is to be secured, the entry of the default fixes the beginning of the period within which the motion to set aside the default and judgment must be made. Title Ins. & Trust Co. v. King Land & Imp. Co., 162 Cal. 44, 120 P. 1066; McLain v. Llewellyn Iron Works, 56 Cal. App. 58, 60, 204 P. 869. In divorce cases, it is the date of the interlocutory rather than the final decree which determines the time within which relief from the former must be sought. Andreen v. Andreen, 15 Cal. App. 728, 115 P. 761; 9 Cal. Jur. 747, § 100.

In the case now before us, defendant's default and the interlocutory decree were entered approximately twenty-three months prior to the noticing of the motion here under review. The motion was therefore properly denied, in the absence of invalidity appearing on the face of the judgment roll.

The order appealed from is affirmed.

We concur: SHENK, J.; LANGDON, J.; PRESTON, J.; IRA F. THOMPSON, J.; SEAWELL, J.; CURTIS, J.

218 Cal. 770

MERCANTILE INV. CO. et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 13999.

Supreme Court of California.

Sept. 14, 1933.

1. Dismissal and nonsuit 🔑60(6).

Stipulation to effectively extend time for trial, whether made before or after expiration of five years from commencement of action, must be in writing in order not to invoke statute providing for dismissal if not prosecuted within five years (Code Civ. Proc. § 583).

2. Dismissal and nonsuit 🔑60(6).

Oral stipulations extending time for trial for convenience of parties may not be set up in opposition to proceeding to compel dismissal, though initiated by parties seeking dismissal (Code Civ. Proc. § 583).

3. Dismissal and nonsuit 🔑60(1).

Five-year period, in statute providing for dismissal of actions not prosecuted within five years, begins to date from legal filing of last answer or pleading which becomes part of answer (Code Civ. Proc. § 583).

4. Dismissal and nonsuit 🔑60(1).

Where defendants in writing consented to filing of amended complaint and that defendants' former answer should constitute answer to amended complaint, five-year period under statute requiring dismissal of actions for want of prosecution dated from filing of amended complaint (Code Civ. Proc. § 583).

5. Dismissal and nonsuit 🔑60(1).

Requirement for dismissal of action unless tried within five years after answer is filed *held* not applicable to action which was partially tried within five-year period (Code Civ. Proc. § 583).

In Bank.

Application for writ of mandate prayed to be directed to the Superior Court of Los Angeles County; Isaac Pacht, Judge.

Application by the Mercantile Investment Company and others for a writ of mandamus requiring the Superior Court of California, in and for the County of Los Angeles, to dismiss an action against petitioners.

Writ denied.

Prior opinion, 14 P.(2d) 314.

A. L. Abrahams, Frank H. Love, and Cooper & Collings, all of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

Louis N. Whealton, Fred Miller, and Raymond J. Kirkpatrick, all of Long Beach, amici curiæ.

WASTE, Chief Justice.

Application for a writ of mandamus directing the respondent superior court to dismiss a pending civil action for an alleged failure of the plaintiff therein to bring the same to trial within the five-year period prescribed in section 583 of the Code of Civil Procedure. Under this section a dismissal is mandatory where there has been a failure to bring the cause to trial within five years after answer filed, except where the parties have stipulated in writing that the time may be extended.

The cause which it is here sought to have dismissed was commenced November 5, 1924; the petitioners Townsend and Parkford being named defendants therein. It was continued from time to time and was partially tried on April 12, 1926, at which time a further continuance was found necessary in order to permit the plaintiff to amend his complaint to include the petitioner Mercantile Investment Company as a defendant. Answers to the amended complaint were respectively filed on April 27 and 29, 1926. The cause was thereafter set down for trial on June 28, 1926, at which time it went off calendar and was indefinitely continued upon motion of the defendants, supported by affidavits, to the effect that it should await the decision of a pending appeal in another action involving certain of the parties. The appeal referred to having been decided, plaintiff had the cause set down for trial on October 19, 1931. A few days prior to this latter date, counsel for one of the defendants requested a continuance on the ground that he was engaged in another trial. Pursuant to this request a written stipulation was prepared, signed by counsel for all of the parties to the action, and filed in the respondent court. The stipulation reads: "It is hereby stipulated by and between the plaintiff above named and defendants [petitioners herein] that the trial of the above entitled action heretofore set for the 19th day of October, 1931, * * * may be continued to and tried on the 10th day of November, 1931, or to such day subsequent thereto as may suit the convenience of the court." In conformity with the foregoing stipulation, the trial court continued the trial of the cause to November 10, 1931. Prior to November 10, 1931, counsel for one of the defendants requested a further continuance on the ground that he was engaged in another trial. By reason of such request "the cause was continued, by oral agreement of the attorneys for the parties to November 24, 1931." On November 21, 1931, plaintiff filed his notice of motion for leave to file a third amended complaint. Attached thereto and filed therewith was plaintiff's proposed third amended complaint. Congestion of the calendar precluded the cause from going to trial on November 24th, whereupon the court, of its own motion, continued the trial to February 10, 1932. On February 3, 1932, the respondent court dismissed the action of its own motion. On February 15, 1932, the defendants Parkford and Mercantile Investment Company stipulated in writing that the plaintiff "may file his Third Amended Complaint, and that the answer of said defendants now on file shall be deemed to be the answer to said Third Amended Complaint." Subsequent to the filing of this stipulation and on motion of the plaintiff made under section 473 of the Code of Civil Procedure, the trial court on April 27, 1932, vacated and set aside the dismissal theretofore entered. Defendants thereupon noticed a motion to dismiss, which was denied May 20, 1932. This proceeding in mandamus to compel such dismissal followed.

[1, 2] Preliminarily it should be said that the several continuances, excluding the first one of April, 1926, which was well within the five-year period, and the last one, to suit the convenience of the court, were had not at the request of the plaintiff, but at the request of one or more of the defendants who are now seeking to compel a dismissal for delay in the prosecution of the cause. Aside from the legal problem involved, such a course does not appeal to our sense of propriety. However, the authorities tend to indicate that petitioners are correct in their conclusion that a stipulation to effectively extend the time for trial beyond the five-year period, whether made before or after the expiration of such period, must be in writing. Section 583, Code Civ. Proc.; Miller & Lux v. Superior Court, 192 Cal. 333–341, 219 P. 1006; Pacific States Corp. v. Grant, 87 Cal. App. 108, 261 P. 1100. The only written stipulation here involved, quoted above, extended the time for trial to November 10, 1931, unless the "convenience of the court" required a further continuance. It

necessarily follows that the subsequent oral stipulations extending the time for trial beyond November 10, 1931, and intended only to suit the convenience of parties, may not be set up in opposition to a motion to dismiss or to a proceeding to compel such dismissal, even though initiated by the parties now seeking to compel the dismissal.

[3, 4] This is not, however, determinative of the present proceeding. It is settled that the five-year period prescribed in section 583, supra, "begins to date from the legal filing of the last answer or pleading which becomes a part and parcel of the defendants' answer." Southern Pac. Co. v. Superior Court, 69 Cal. App. 106, 111, 230 P. 952, 954. In view of the written stipulation of February 15, 1932, above referred to, consenting to the filing of plaintiff's third amended complaint, a copy of which complaint was actually filed in the respondent court on November 21, 1931, in connection with the motion for leave to file same, it is immediately apparent that the cause sought to be dismissed will go to trial on such third amended complaint and the answers thereto. The stipulation provided further that the answers then on file should be deemed answers to such third amended complaint. This being so, and under the decision last above quoted from, we are of the opinion that the five-year period prescribed in section 583, supra, commenced to run from the date of the filing of such third amended complaint. viz., November 21, 1931, and will not expire until November 21, 1936. It would be hypertechnical to conclude that such third amended complaint has not, as yet, been formally filed. For all practical purposes, in view of the subsequent written stipulation agreeing that it might be filed, the third amended complaint should be deemed to have been filed when submitted and filed with the motion. To require a second and formal filing under the circumstances above recited would be to require a useless and idle act. What has been said would appear to be fatal, at least, to the claims of the petitioners Parkford and Mercantile Investment Company, parties to the stipulation agreeing to the filing of the third amended complaint.

[5] There is an additional reason, applicable alike to all the petitioners herein, suggesting the denial of a writ of mandate to compel a dismissal. That portion of section 583, supra, relied on by petitioners has application to such cases only as are not brought to trial within five years after answer filed. The chronological history of the cause which it is here sought to have dismissed shows that the action was commenced November 5, 1924, and was partially tried on April 12, 1926, within two years after its commencement. The mandatory provisions of section 583, supra, are therefore without application. In Allyne v. Superior Court, 200 Cal. 661, 664, 254 P. 564, 565, it is declared: "The plain and obvious purpose of the foregoing section [583, Code Civ. Proc.] is to regulate the matter of compulsory dismissals only under one set of circumstances, to wit, where an answer has been filed and the action has not been brought to trial within five years thereafter. * * * Section 583 was intended, no doubt, to compel expedition in the trial and disposition of causes. While this is admittedly so, we find no warrant in its language that would justify us in reading into the section words which would clearly compel a dismissal if an action be not retried within five years after a new trial has been granted. The words in the section are to be interpreted according to their common acceptation."

Though the factual situation presented in the quoted case differs from that here involved, the principle of law there laid down is equally applicable here, viz., section 583, supra, purports to cover such cases only as are not brought to trial within five years after answer filed. The cause which it is here sought to have dismissed was tried, though only partially, within the five-year period. The section is without application to the circumstances with which we are here confronted. It is not our province to read words into the statute in order to cause it to cover a situation where there has been a trial, though incomplete, within five years after answer filed.

The alternative writ is discharged, and the petition is denied.

We concur: SHENK, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; IRA F. THOMPSON, J.; SEAWELL, J.

134 Cal.App. 171

HAGUEWOOD v. BARNES.

Civ. 9294.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1933.

Appeal and error ⚷371.

Where, at time of motion to dismiss appeal, 93 days had elapsed since appellate court clerk notified appellant of necessity of payment of filing fee before transcript might be filed and fee was never paid and transcript never filed, appeal was dismissed (Rules of Supreme Court and District Courts of Appeal, Rules 1, 5, 6; Code Civ. Proc. § 954).

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Action by Ruth Haguewood against Howard Barnes. From a judgment in favor of plaintiff, defendant appeals. On motion to dismiss the appeal.

Appeal dismissed.

George P. Kinkle, of Los Angeles, for appellant.

Wilbert C. Hamilton, of Los Angeles, for respondent.

HOUSER, Acting Presiding Justice.

The respondent herein moves to dismiss the appeal on the ground that the appellant failed to file a transcript on appeal within forty days after notice of appeal was filed, or within forty days after said appeal was perfected, or at all. Also that the notice of appeal in said action was not filed within ten days after notice of entry of the judgment was given to the defendant, nor filed within ten days after notice of denial of motion for a new trial was given to him.

By satisfactory evidence presented herein, it appears that, after the rendition and entry of judgment by the superior court in favor of the plaintiff and against the defendant, the plaintiff served the defendant with notice of the entry of said judgment and filed said notice with the clerk of said court; that thereafter, following an order by said court by which a motion for new trial was denied, the plaintiff likewise served on the defendant and filed with the clerk of said court a notice of such order; that thereafter, in due course, a transcript on appeal was settled by a judge of the superior court, and filed with said clerk, who thereupon, in accordance with his duties in the premises, transmitted the said transcript to, and the same was received by, the clerk of this court; that, although immediately after the said transcript had been thus received, the clerk of this court not only notified the defendant of said fact, but as well directed his attention to the rule which requires the payment of a filing fee before a transcript on appeal may be filed, a period of 93 days elapsed after said defendant was thus notified before the instant motion was presented to this court; and that at no time has said filing fee been paid to, or said transcript filed by, the clerk of this court. In such circumstances, the motion of respondent for dismissal of the appeal should be granted. Rules I, V, VI; section 954, Code Civ. Proc.

It is ordered that the appeal be, and it is, dismissed.

We concur: YORK, J.; DESMOND, Justice pro tem.

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134 Cal.App. 192

LA VINA LAND CO. v. LONGLEY et al.

Civ. 510.

District Court of Appeal, Fourth District, California.

Appeal and error ⚷773(2).

Appeal was dismissed where appellant neither appeared on order to show cause why appeal should not be dismissed nor filed briefs (Rules of Supreme Court and District Courts of Appeal, Rule 5).

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by the La Vina Land Company against W. D. Longley and others. From the judgment, plaintiff appeals.

Appeal dismissed.

Todd, Pawson & Watkins, of Long Beach, for appellant.

A. E. Moore and E. Marion Crawford, both of Los Angeles, for respondents.

MARKS, Justice.

The record on appeal was filed in the Supreme Court on September 20, 1930, and this case was transferred to this court on October 4, 1930. As no brief was filed, an order to show cause was issued directing appellant to show cause before this court on September 12, 1933, why the appeal should not be dismissed. No appearance was made in response to this order, and, no briefs having been filed, under authority of rule V of the Rules for the Supreme Court and District Courts of Appeal, the appeal is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

134 Cal.App. 92

DAY v. PICKWICK STAGES SYSTEM et al.

DE VITO v. PETERSON et al.

Civ. 7932, 7933.

District Court of Appeal, Second District,
Division 2, California.

Sept. 5, 1933.

1. **Automobiles 🔑245(24).**
In guest's action for injuries sustained in intersectional highway collision, whether defendant exercised reasonable care in passing tow car *held* for jury.

2. **Automobiles 🔑244(20).**
In guest's action for injuries sustained in intersectional highway collision, evidence sustained finding that defendant was negligent in passing tow car.

> Evidence disclosed that defendant, going from 40 to 50 miles per hour, passed tow car to his right and turned suddenly to left and collided with approaching automobile, which was traveling at reasonable speed on right side of highway.

3. **Negligence 🔑136(30).**
In guest's action for injuries sustained in intersectional highway collision, whether guest who sat in rumble seat was engaged in joint enterprise with driver *held* for jury.

4. **Negligence 🔑89(1).**
Community of interest required to impute negligence of one person to another must be such that maxim, qui facit per alium facit per se, directly applies.

5. **Automobiles 🔑244(43).**
In action for injuries sustained in intersectional highway collision, evidence supported finding that plaintiff was not contributorily negligent.

> Evidence disclosed that when within 100 feet of tow car, which made left turn, plaintiff slowed down to 20 miles per hour and was suddenly confronted with defendant's automobile going at rate of 40 to 50 miles per hour; that plaintiff turned to right to avoid defendant's automobile, and defendant turned to left and collided with plaintiff's automobile.

6. **Automobiles 🔑245(80).**
In action for injuries sustained in intersectional highway collision, whether plaintiff was contributorily negligent *held* for jury.

7. **Appeal and error 🔑1053(2).**
In automobile accident case, admitting evidence that girl sat on boy's lap in coupé could not be complained of by defendant, where court instructed jury to disregard such fact.

8. **Appeal and error 🔑1064(1).**
Instruction in automobile collision case, that if defendant passed automobile without giving warning he violated law, *held* not prejudicial, where automobile did not collide with tow car, which it passed, but with another automobile 50 feet away.

9. **Negligence 🔑56(1).**
Negligence is immaterial unless it is proximate cause of accident.

10. **Trial 🔑296(3).**
In automobile collision case, instruction as to liability of two persons if their concurrent negligence contributed to and "resulted" in injury *held* not erroneous, where court instructed upon proximate cause, and instruction itself carried saving word "resulted."

11. **Trial 🔑260(1).**
Refusal to give correct instructions *held* not error, where instructions requested were fully covered by others given.

12. **Trial 🔑194(16).**
In automobile collision case, refusing to instruct that defendant negligently operated tow car and turned without giving warning, and that such act proximately contributed to accident, *held* proper under evidence.

13. **Appeal and error 🔑1078(5).**
On appeal from order denying motion for judgment notwithstanding verdict where no point was made on appeal in briefs, reviewing court must consider same as abandoned.

Appeals from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Actions by Aileen Day, a minor, by Avis D. Day, her guardian ad litem, against the Pickwick Stages System and others, and by Rena De Vito against Jack Peterson and others. Judgment for plaintiff in both actions, and Jack Peterson and others appeal.

Affirmed.

See, also, De Vito v. Peterson (Cal. App.) 25 P.(2d) 19.

Kidd, Schell & Delamer, of Los Angeles, for appellants Peterson, Shapiro, and Thompson.

Harold E. Thomas, of Los Angeles, for respondent Aileen Day.

P. V. Davis, of Los Angeles, for respondent Rena De Vito.

ARCHBALD, Justice pro tem.

These appeals from judgments in favor of different plaintiffs involving the same accident were consolidated for convenience and economy.

Aileen Day had asked Edna Shapiro and her sister Miriam to visit Miss Day's sister at Chatsworth, Cal. Each of the girls asked a boy friend to go with them, one of whom was the defendant Jack Peterson. Edna Shapiro took her Buick coupé and gathered up those who were invited, stopping at the home of Peterson last, apparently. There Edna requested Jack to drive, and he did so. With Jack in the front seat sat Edna and Newton House. Miriam Shapiro sat on young House's knee. Plaintiff Day and one Don Reed sat in the "rumble" seat of the car. The Buick was driven out Cahuenga boulevard from Hollywood, toward their destination. At a point on that boulevard Mulholland highway is parallel with it on the west and separated from it by a bank of dirt approximately ten feet wide, Cahuenga having a grade of about 5.6 per cent. up, toward the north, in which direction the Buick was progressing, and Mulholland an ascending grade of 5.5 per cent. toward the south at the same point. At the bottom of the grade on Mulholland highway Woodrow Wilson drive, which is also parallel with Cahuenga boulevard on the west, runs into Mulholland on a descending grade of 11.4 per cent., and where the two come together the dirt bank is cut away for a distance of 64 feet, making an opening into the boulevard from the west at the bottom of both grades. In front of the Buick as it approached said intersection and about 15 feet to its right was a Pickwick tow car owned by defendant Pickwick Stages System and driven by one Charles C. Cheesbrough, an employee of said company, who was driving such vehicle in the course of his employment. The tow car turned left at the center of the intersection above described, and the Buick turned left with it, when Peterson increased his speed to 40 miles per hour, according to his testimony and that of three others, and to 45 or 50 miles, according to Cheesbrough, in an attempt to pass in front of the tow car. The Buick passed "very close" to the tow car and "close" to the west curb of the boulevard north of the intersection. The tow car at the time was within 10 feet of the west curb line extended. After passing Cheesbrough's vehicle the Buick collided with the car of plaintiff De Vito, which she was driving south on Cahuenga boulevard toward said intersection. Aileen Day was injured in the collision and brought suit against Peterson and Edna Shapiro, as well as against said Pickwick Stages System and Charles C. Cheesbrough. The jury returned a verdict of $1,000 in favor of said plaintiff, and defendants Peterson and Shapiro have appealed therefrom. Rena De Vito, for injuries sustained by her, brought suit against the same defendants and Ruth E. Thompson, the mother of Jack Peterson, who had signed the application of said minor son for an operator's license. From a judgment in favor of said plaintiff in the sum of $3,500, defendants Jack Peterson, Ruth E. Thompson, and Edna Shapiro have appealed. A separate appeal is being prosecuted by said Pickwick Stages System and Charles Cheesbrough from said judgment. De Vito v. Peterson (Cal. App.) 25 P.(2d) 19. The cases were consolidated for trial.

Appellants here claim that reversible error exists in both cases (1) because of the refusal of the trial court to direct a verdict in their favor; (2) because of the insufficiency of the evidence to sustain the verdicts and judgments; (3) in the admission of certain evidence; and (4) in the giving and refusing of certain instructions.

[1] 1 and 2. We are of the opinion that the jury could only have found, under the evidence and instructions, that Peterson did not turn onto the left side of Cahuenga boulevard until the tow car had turned to the left. That being the case, we agree with appellants that the only two questions left for the jury, as to both plaintiffs, was: (a) Did the turning of the tow car place defendant Peterson in a position of sudden danger? and (b) Was Peterson's conduct thereafter negligent? We believe that reasonable minds might well differ as to whether under the circumstances shown by the evidence the driver of the Buick exercised the care required of him in speeding up and passing the tow car as he did. There is evidence from which the jury might well have concluded that no ordinarily prudent man would do as he did. Defendant Cheesbrough testified as follows, with regard to Woodrow Wilson drive and Mulholland highway:

"Q. Mr. Cheesbrough, at any time while you were proceeding west did you look toward the west? A. Yes sir.

"Q. Did you see any cars at all coming out of Woodrow Wilson drive or Mulholland highway at that time? A. No sir.

"Q. As far as you could see it was absolutely clear? A. Yes sir."

Giving the effect to that evidence that the trial court was required to do, we fail to see how it could be said that the question of defendant Peterson's negligence could be taken from the jury.

[2] Considering the fact that the Buick car came so close to the tow car and the west curb after speeding up to pass, as it did, and the evidence of plaintiff De Vito that after passing the tow car the Buick turned toward the right and that after she turned toward the right and toward the curb to avoid it the Buick turned suddenly to the left again, colliding with the left front of the De Vito car, we cannot say there is not ample evidence to support the verdict and judgment in both cases, so far as the negligence of the driver of the Buick car is concerned.

[3-6] Appellants urge that plaintiff Day was engaged in a joint enterprise with defendants Peterson and Edna Shapiro, and also knew of the manner in which the car was being driven, and consequently is charged with the negligence of Peterson. Miss Day was certainly not charged with any knowledge of negligence in Peterson's driving until after the Buick turned to the left at the scene of the accident, and in the few seconds that intervened between then and the crash she could not even have protested, much less directed, assuming she had the right to direct the progress of the car. The question of whether or not the parties were engaged in a joint enterprise was left to the jury by the court under appropriate instructions, and the verdict rendered shows an adverse decision on that question. All the evidence shows is that the parties were to make a visit to the sister of plaintiff Day. They had a common plan in that, but the community of interest required to impute the negligence of one person to another must be such that the maxim, qui facit per alium facit per se, directly applies. Here plaintiff Day was a mere guest, without any right, so far as the evidence shows, entitling her to be heard in the control and management of the Buick. Pope v. Halpern, 193 Cal. 168, 223 P. 470; Meyers v. Southern Pacific Company, 63 Cal. App. 164, 218 P. 284. Under the instructions of the court, if the jury had found Mrs. De Vito guilty of negligence, no verdict could have been rendered in her favor. We are of the opinion that the implied finding that she was not so negligent is amply supported by the evidence. When within about 100 feet of the tow car, which turned across her path, she slowed down to about 20 miles per hour, and then was suddenly confronted with the Buick, coming toward her at the rate of from 40 to 50 miles per hour. She turned to the right to avoid it and it turned to the left and collided with her. Under such evidence, which the jury had a right to believe, we fail to see how the question of her negligence could be a matter of law for the court.

[7] 3. Appellants complain of the action of the court in overruling their objection to the introduction in evidence of the fact that Miriam Shapiro was at the time "sitting in Newton House's lap," making four passengers in the front seat of the coupé. It is urged that such evidence would give to the jury the impression that the group "were on a wild party." We fail to see how such evidence supports any such conclusion. The fact that there were four in the front seat and how they were located might well be an important factor in determining the question of negligence. The court, however, evidently came to the conclusion as the case progressed that it had no bearing, and at appellants' request instructed the jury to "utterly disregard such fact." We do not see how error can still be urged by appellants.

[8-10] 4. At the request of plaintiffs the court instructed the jury that "any vehicle overtaking another proceeding in the same direction is required, outside of a business or residential district, to give audible warning" with the "bell, gong or horn" with which it is required to be equipped, "before passing or attempting to pass a vehicle proceeding in the same direction," and that if they found "that defendant Peterson overtook and passed the towcar" it was his, Peterson's, duty to give such audible warning, and "the failure of said defendant Peterson so to do constituted a violation of law." It is the latter part of such instruction of which appellants complain, as "it does not take into consideration emergencies which may have necessitated such passing and which may have prevented the giving of such warning." Such instruction correctly states the law. Whether or not it applies under the evidence, which seems to picture the defendant Peterson making a sharp right turn in front of the tow car instead of passing it under the conditions of the instruction, would seem to be questionable. However, we fail to see how the jury could be confused or appellants prejudiced in view of the evidence. The purpose of such warning is to warn the driver of the vehicle being passed. The Buick did not collide with the tow car, and we do not see how the failure to sound the horn, even if negligence as a matter of law, could possibly be construed by the jury as being in any way related to the accident, which occurred 50 feet beyond where the Buick passed in front of the tow car. It could not be a proximate cause of the accident under any consideration, and the jury was correctly instructed that negligence was immaterial unless it was the proximate cause of the accident. The jurors were also instructed as to the meaning of proximate cause, and we see nothing in the case indicative of a failure to do their duty under the instructions in that regard. In view of these last instructions we see no merit in appellants' criticism of an instruction requested by plaintiff Day as to liability of two persons if their concurrent negligence contributes to and results in injury to a third person. The instruction itself carries the saving fact that it results in the injury. Furthermore, the court instructed the jury at appellants' request that the sole importance of the question as to whether Peterson sounded his horn, in the Day case, was the effect such sounding might or might not have had on the movements of the tow car, and that so far as the De Vito case was concerned it was entirely immaterial if Peterson did not go onto the westerly half of the road until after the tow car turned.

[11] Two instructions, refused by the court, were requested stating in substance that if the jury found that the sole proximate cause of the accident was the negligence of the driver of the tow car, then while they could bring in a verdict against the driver and owner of the tow car, their verdict would have to be in favor of defendants Peterson, Shapiro, and Thompson. The instructions requested were fully covered by others given by the court.

[12] We see no merit in appellants' contention that the court erred in refusing instructions requested by them in effect advising the jurors that they "must consider it to be a fact" that defendant Cheesbrough negligently operated his tow car and turned it without giving any signal or warning of his intention so to do, and that such act "proximately contributed to the happening of the accident." To state the substance of the instruction is to show its unsoundness in instructing on two very controversial facts upon which there was very conflicting evidence.

[13] Appeals were also taken from the order of the court denying defendants' motions for judgments notwithstanding the verdict, but no point is made on such appeal in the briefs. We must therefore consider same as having been abandoned. Mayne v. San Diego Electric R. Co., 179 Cal. 173, 179, 175 P. 690. In view of our opinion as to the action of the trial court in denying appellants' motion for a directed verdict, however, we see no merit in such appeals.

Appeals from orders dismissed. Judgments affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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134 Cal.App. 100

DE VITO v. PETERSON et al.

Civ. 7967.

District Court of Appeal, Second District, Division 2, California.

Sept. 5, 1933.

1. Automobiles ⚷238(8).

Complaint alleging that defendant was negligent in making left turn without warning did not state cause of action, where accident occurred by third motorist's passing defendant's automobile and colliding with plaintiff's automobile.

2. Negligence ⚷134(11).

To prove "proximate cause" it is insufficient to show that injury would not have resulted in absence of negligent omission, but plaintiff must show that negligent omission was efficient cause from which injury followed in natural and continuous sequence unbroken by any efficient intervening cause.

[Ed. Note.—For other definitions of "Proximate Cause," see Words & Phrases.]

3. Automobiles ⚷244(36).

In action for injuries sustained in intersectional highway collision, evidence failed to show that defendant's negligence in making left turn without warning proximately contributed to plaintiff's injuries.

Evidence disclosed that plaintiff was injured by automobile driven by another who made a left turn while defendant made a left turn without giving warning, and that such third motorist had enough room to pass defendant's automobile without injuring plaintiff, but instead turned to his left and collided with the plaintiff.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Rena De Vito against Jack E. Peterson and others. Judgment for plaintiff, and defendants Pickwick Stages System and another appeal.

Reversed.

Bryce P. Gibbs, of Los Angeles (Harry C. Lucas, of San Francisco, of counsel), for appellants.

P. V. Davis, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

This is an appeal by defendants Pickwick Stages System, a corporation, and Charles C. Cheesbrough, from a judgment in the sum of $3,500 against them, entered on the verdict of a jury. The remaining defendants have prosecuted a separate appeal, also decided this day. (Cal. App.) 25 P.(2d) 16.

Cahuenga boulevard is a paved highway 72 feet wide, running approximately north and south, with an upgrade of 5.6 per cent. to the north. Immediately west of this highway, at the point of the accident in question, are two roads paralleling the boulevard for a short distance, known as Woodrow Wilson drive and Mulholland highway, which come together near the scene of the collision and enter the boulevard through an opening in the west curb thereof, 64 feet wide. These roads enter, but do not cross, Cahuenga. On the day in question, while plaintiff was approaching said intersection from the north, driving approximately 10 to 15 feet to the right of the center of the boulevard, defendant Cheesbrough was approaching from the south driving a tow car belonging to defend-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

ant Pickwick Stages System. Back of him about 15 feet, proceeding in the same direction, was a Buick coupé belonging to defendant Edna Shapiro and driven by defendant Jack E. Peterson, containing in addition the plaintiff in another case which grew out of the accident involved here and whose case was the subject of a separate appeal, consolidated with the appeal hereinbefore mentioned. When the tow car reached the center of the intersection above referred to, it made a left turn. The Buick turned with it to the left, and then speeded up from the 30 or 35 miles per hour at which it had been traveling to 40, 45, or 50 miles, depending upon which witnesses are most reliable, in the minds of the jurors. Plaintiff observed the tow car in front of her and slowed down to 20 miles an hour. Reaching a point about 100 feet from the tow car, which was then about 10 feet from the west curb of the boulevard extended, she saw the Buick pass between the tow car and the west curb, coming in her direction at from 40 to 45 miles per hour. She testified she turned to the right to get out of the way of the Buick, which was "headed northeasterly," and that "just as he got up to" her the Buick changed its course to the northwest and "right into my car * * * the left front." Defendant Peterson testified that after he passed the tow car he drove parallel to the west curb. The cars came together about "50 feet north of the north point of the north half of Mulholland drive" and about 5 feet from the west curb line of Cahuenga boulevard.

Plaintiff's second amended complaint, in pleading the negligence of the drivers of the Buick coupé and the tow car, alleged (italics ours): "That as the said tow car driven by said defendant Charles C. Cheesbrough arrived at a point where said Cahuenga Boulevard connects with said Woodrow Wilson Drive and Mulholland Drive, said defendant Charles C. Cheesbrough negligently and unlawfully made and attempted to make a left hand turn off said Cahuenga Boulevard towards and into said Woodrow Wilson Drive and Mulholland Drive *without giving any timely signal or warning or any signal or warning whatever;* that at the same time the said defendants Jack E. Peterson and Edna Shapiro negligently and carelessly proceeded to pass the said tow car to the extreme left hand side of said Cahuenga Boulevard while said tow car was in said intersection and when it was impossible for said Buick coupé or sedan and the said operators thereof to pass said tow car and return to the right hand side of said Cahuenga Boulevard before coming within one hundred feet or any distance whatever of the said vehicle being then operated by this plaintiff, without blowing any horn or giving any signal or warning whatever and operating and driving said car at an unlawful and dangerous rate of speed, to-wit: at a rate of speed approximately forty miles per hour; that as the said Buick car, guided by said defendant Peterson and operated as aforesaid by him and the defendant Edna Shapiro, passed around said tow car, he negligently and unlawfully guided the same so that it ran on the extreme left hand side of said Cahuenga Boulevard and, after the said plaintiff had brought her said car almost to a stop, the said defendant Peterson so negligently and unlawfully guided the said Buick car that the same ran into and collided with the plaintiff's said car, which said plaintiff had brought almost to a stop waiting for the said tow car to make said left hand turn, but the said defendants Peterson and Edna Shapiro made no effort whatever to slow down or stop the said Buick car and thereby permit said tow car to make said left hand turn, but proceeded to guide and operate said Buick car across said intersection so recklessly and negligently that the same crashed into the said car driven by this plaintiff, thereby completely wrecking the same and greatly and permanently injuring the plaintiff, as hereinafter more particularly set forth."

Appellants contend that the second amended complaint does not state facts sufficient to constitute a cause of action, in that it fails to show any causal connection between the alleged negligent act of defendant Cheesbrough and the injury to plaintiff.

[1] It will be seen that the only act of negligence alleged against defendants here is in "negligently and unlawfully making a left hand turn off said Cahuenga boulevard towards and into said Woodrow Wilson drive and Mulholland drive" without giving any timely signal or warning, or any signal or warning at all. The complaint then goes on to allege "that at the same time" defendants Peterson and Shapiro negligently and carelessly proceeded to pass said tow car on the extreme left-hand side of Cahuenga boulevard. No collision with the tow car is alleged, and one of the charges of negligence in the driving of the Buick is that said passing was attempted "without blowing any horn or giving any signal or warning" and in "driving said car at an unlawful and dangerous rate of speed." The complaint shows that the Buick "passed around said tow car" and in so doing ran on the left-hand side of the boulevard, and although plaintiff had almost stopped her car "the said defendants Peterson and Edna Shapiro made no effort whatever to slow down or stop the said Buick car," "but proceeded to operate" the same "across said intersection so recklessly and negligently that the same crashed" into plaintiff's car. We fail to see how the failure on the part of the driver of the tow car to give the required signal in turning could possibly be said to have compelled defendant Peterson to "negligently and carelessly" pro-

ceed to pass the tow car on the left-hand side of the boulevard, in view of the fact that under the allegations of the complaint the tow car was making a left-hand turn off said Cahuenga boulevard toward and into said two connecting highways. If Peterson had time to pass directly across the path of the tow car on the extreme left of Cahuenga boulevard while the tow car was still 10 feet from the highway toward which it was heading, he must certainly have had time to turn left instead of right and pass into Mulholland highway ahead of that vehicle and on the right side of the street; and we do not see, even assuming that the tow car in turning blocked the path of the Buick and compelled it to turn left with the tow car, how the failure to signal caused the driver of the Buick to take the desperate chance of crossing in front of the tow car on the wrong side of the highway, when the other alternative would seem to have been open, from the language of the complaint. Nor does the complaint show how the allegedly negligent act concurred with the other apparently independent, alleged negligent acts of defendant Peterson.

[2] Having safely avoided the question of the peril caused by the failure to signal, the complaint is strangely silent in neglecting to show how such failure to signal could have concurred in any negligent act of defendant Peterson thereafter. One might possibly well say that if the tow car had not turned to the left as it did the accident would not have happened. That might be true, and still, assuming that we could draw such an inference from the complaint, in our opinion it would fall far short of alleging the necessary causal connection with the injury. "It is not enough to prove proximate cause to show that the injury would not have resulted in the absence of the negligent omission. Plaintiff must go further and show that the negligent omission was an efficient cause from which the injury followed in a natural and continuous sequence, unbroken by any efficient intervening cause." Marovich v. Central California Traction Co., 191 Cal. 295, 304, 216 P. 595, 599. This we think the second amended complaint fails to do.

In the case of Smith v. Buttner, 90 Cal. 95, 27 P. 29, the complaint alleged that "defendant wholly failed and neglected to provide any safe and proper means of entrance to or egress from the house" rented by plaintiff from defendant, and that "by reason of the negligence and failure of defendant to provide" a safe and suitable exit plaintiff, in attempting "to descend from said house to the ground," while exercising "due care and diligence," fell and injured herself. There, as here, it might be inferred that the injury probably would not have occurred but for defendant's negligence, but as the court well said (italics ours), "Such complaint does not state the *facts* constituting plaintiffs' cause of action. It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. *But it must appear from the facts averred that the negligence caused or contributed to the injury.*" This, in our opinion, as we have said, the amended complaint here fails to do.

[3] We are of the opinion that the pleader stated all facts bearing on the negligence of appellant, as the evidence fails to show any more. Not only does the evidence show that there were no cars at all coming out of Woodrow Wilson drive or Mulholland highway at the time, but that those roads were clear as far as the only witness testifying concerning them could see, viz., Mr. Cheesbrough, the driver of the tow car, who was driving in that direction, and it supports the conclusion that defendant Peterson could have driven into them without going on the wrong side of either. Furthermore, we fail to see how, under the instructions of the court, the jury could have failed to find plaintiff guilty of contributory negligence unless they believed her story, namely, that when the Buick crossed in front of the tow car it was headed northeasterly toward her car, which was about 100 feet away and from 10 to 15 feet west of the center line of the boulevard, that to avoid it she turned to the right, and that when the cars were close together the Buick turned to the northwest and struck the left front of her car. The evidence shows that she was not disturbed by the way the car came at her, but that she acted calmly and with discretion. If plaintiff's testimony was believed, then in addition to the act of Peterson in speeding up his car to pass the two other vehicles, when it would seem apparent that other ways were open to him, which act could not possibly have resulted from the failure of Cheesbrough to signal, we would have another independent act of negligence on the part of such defendant, not connected in any way with the alleged negligent act of Cheesbrough. We agree with appellants' contention that the evidence fails to show that the negligence of Cheesbrough (which we must assume, although denied by him) proximately contributed to plaintiff's injuries. The conclusion we have reached makes it unnecessary to consider the other contentions of appellants.

Judgment reversed as to defendants Pickwick Stages System and Charles C. Cheesbrough.

We concur: WORKS, P. J.; STEPHENS, J.

134 Cal.App. 131

LUMBERMEN'S MUT. CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 1081.

District Court of Appeal, Fourth District, California.

Sept. 8, 1933.

1. Master and servant 🔑375(1).

There must be some causal connection between injury and employment so that injury results from some risk of employment, to justify compensation (St. 1917, p. 834, § 6, as amended by St. 1929, p. 430; Const. art. 20, § 21).

2. Master and servant 🔑375(1).

Injury sustained by orange picker after hour he was required to report for duty, when struck by automobile when conversing with other pickers on street bounding orchard while awaiting arrival of picking boxes before commencing work as directed by picking boss, *held* not compensable because not resulting from "risk of employment" (St. 1917, p. 834, § 6, as amended by St. 1929, p. 430; Const. art. 20, § 21).

[Ed. Note.—For other definitions of "Risk of Employment," see Words & Phrases.]

Proceeding under the Workmen's Compensation Act by L. V. Wilson, claimant, opposed by the Garden Grove Mutual Orange Association, employer, and the Lumbermen's Mutual Casualty Company, insurance carrier. To review an order of the Industrial Accident Commission awarding compensation for injuries, the insurance carrier brings certiorari.

Award annulled.

Willis I. Morrison, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, and A. B. Harris, of Los Angeles, for respondent Industrial Accident Commission.

MARKS, Acting Presiding Judge.

On the evening of September 13, 1932, L. V. Wilson was hired as an orange picker by the Garden Grove Mutual Orange Association. His hours of employment were to be from 7 o'clock in the morning to 4:30 o'clock in the afternoon of each day, with one-half hour off for lunch. His compensation was to be five cents for each box of oranges picked. His employment was to commence on September 14, 1932. On the morning of that day he called at the residence of the field foreman of the Garden Grove Mutual Orange Association and learned the location of the orchard in which he was to pick, and was given a time book to deliver to the picking boss. He reached the orchard at about five minutes before seven. A public road bounded the orchard on the south. Wilson parked his car on the south side of the road, crossed it, laid his picking sack on the ground, and gave the time book to the picking boss, who assigned him a ladder, which he laid on his picking sack. The picking boss told him that, as there were no picking boxes delivered at the orchard, he would have to await their arrival before commencing work. Wilson crossed to the south side of the road and joined in conversation with about ten other pickers who were standing just inside its south edge. While Wilson was thus engaged, and after 7 o'clock, and before the boxes arrived, another orange picker drove up and struck him with his automobile, breaking one of his legs.

Upon this undisputed evidence the Industrial Accident Commission made Wilson an award against petitioner, which was the insurance carrier for the Garden Grove Mutual Orange Association. A petition for rehearing was denied, and this award is before us for review.

Section 21 of article 20 of the Constitution authorizes the Legislature to create a system of compensation for workmen injured "in the course of their employment." Under this grant of power the Legislature adopted the Workmen's Compensation, Insurance and Safety Act of 1917. Section 6 of this act as amended (Stats. 1929, p. 430) limits the liability of the employer to injuries "arising out of and in the course of the employment. * * * Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment."

[1] It is well established that there must be some causal connection between the injury and the employment so that the injury may be found to have resulted from some risk of the employment. In California Casualty Indemnity Exchange v. Industrial Accident Commission, 190 Cal. 433, 435, 213 P. 257, it was said:

"To entitle the representative of the deceased to recover in this case it must be shown that the employee, at the time of the injury, was not only 'performing service growing out of and incidental to his employment, and acting within the course of his employment,' but also that the injury was proximately caused by such employment. In the very broadest sense, of course, it is true that the injury to the decedent grew out of and was incidental to his employment, since it was necessary that he should return from the place where he lunched to the truck.

The right to an award is not alone founded upon the fact that such is the case, but upon the fact that the service the employee is rendering at the time of the injury grows out of and is incidental to the employment. For instance, it is the rule that an employee going to and from his place of employment is not rendering any service, and begins to render such service only when he arrives at the place of his employment, and proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his task. Ocean Acc., etc., Co. v. Industrial Acc. Com., 173 Cal. 313, 322, L. R. A. 1917B, 336, 159 P. 1041. It was not intended by the Compensation Act that the employer who comes within its provisions shall be the insurer of his employee at all times during the period of his employment. The employer is liable for compensation only when an injury occurs to the employee while performing some act for the employer in the course of his employment, or incidental to it. Fairbank Co. v. Industrial Com., 285 Ill. 11, 13, 120 N. E. 457. There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be some causal connection between the employment and the injury in the sense that, by reason of the employment, there was an unusual or additional exposure of the injured party to the kind or character of hazard and danger (in this case an ordinary street risk) which caused the injury. The injury must have its origin in a risk connected with the employment, and must have flowed from that source as a rational and natural course. In re Betts, 66 Ind. App. 484, 118 N. E. 551. In that case the employee, a furnace repairman, was returning from lunch to the place where he was working. He was riding with his employer. He said: 'I want to get off and get some tobacco.' As the driver stopped the horse, Betts stepped from the wagon into the street to go across to a store. He had taken but two or three steps when he was struck by an automobile and killed. His heirs were awarded compensation against the employer. In reversing the award the court said (at page 487 of 66 Ind. App., at page 552 of 118 N. E.): 'We understand that all of these cases recognize and in effect hold that: "It is not enough for the applicant to say, 'The accident would not have happened if I had not been engaged in that employment, or if I had not been at that particular place.' He must go further and must say, 'The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some particular danger.' " ' "

In the instant case Wilson was required to report for duty at 7 o'clock, which he did. He could not start the active duties of his employment because of the failure of his employer to have picking boxes ready for use by the workmen. He was told to wait, and from 7 o'clock in the morning it must be considered that he was under the control of his employer while he remained at or near the place of employment.

The question remains: Was there any causal connection between the employment and the injury, or, in other words, did the injury result from a risk of the employment?

[2] It must be conceded that Wilson was required to remain near the grove in which he was to pick while waiting for the boxes. He was not required to go into the street, nor did any of his duties require him to loiter in the highway in which he was injured. Nevertheless, he chose this road as his waiting place, and was injured by an automobile being driven along this street. We have concluded that the injury must be attributed to a "risk of the street" and not to a risk of employment.

In Frigidaire Corporation v. Industrial Accident Commission, 103 Cal. App. 27, 31, 283 P. 974, 975, it was said: "The theory upon which compensation is awarded in the class of accidents above mentioned is that the causal connection between the employment and the injury, which is essential to make it compensable, consists in the fact that the employment requires the presence of the employee upon the street and the fact that the injury was caused by some human or mechanical instrumentality incidental to the use of the street. In other words, as said in Globe Indemnity Co. v. Industrial Acc. Com., 36 Cal. App. 280, 171 P. 1088, 1089, with respect to the facts of that case, 'The causative danger was peculiar to the work, in that, had he (the employee) not been upon the street in the course of his duty, he would not have been injured.' And, as held in Larson v. Industrial Acc. Com., 193 Cal. 406, 224 P. 744, the fact that the injuries to the employee are not of a kind to be anticipated nor peculiar to the employment in which he is engaged does not defeat the claim to compensation. To the same effect is General Accident, Fire & Life Assurance Corp. v. Industrial Acc. Com., 186 Cal. 653, 200 P. 419. And under the modern rule now followed in England and all American jurisdictions except Massachusetts (see note II [d] 51 A. L. R. 514), the situation is not altered by the fact that the risk is one to which everyone else upon the street is also exposed (Globe Indemnity Co. v. Industrial Acc. Com., supra); the vital question in such cases being 'whether the employment exposed the workman to the risk by sending him onto the street, common though such risks were to all on the street.' " Katz v. A. Kadans & Co., 232 N. Y. 420, 134 N. E. 330, 23 A. L. R. 401.

The case of Balboa Amusement Producing

Company v. Industrial Accident Commission, 35 Cal. App. 793, 171 P. 108, 109, presents facts very similar to those of the instant case. An employee, while required to wait at his employer's place of business, entered a public street, where he stopped to talk to friends. While engaged in this conversation, he was struck by an automobile and injured. In annulling an award in his favor, the court said: "Even if it were conceded that injuries suffered by Stanley would have been compensable if they had resulted from an accident happening to him while actually traversing the street on the way from changing his coat, for his own convenience, to a contest at chess, for his own pleasure, we have by no means settled the matter. If we admit that his risk in crossing the street was a risk incident to his employment, upon the theory that, for the purpose of crossing and recrossing, the street was a part of the company's lot, we are yet afield. The thoroughfare was certainly not a part of the lot in the sense that Stanley might properly have loitered, or stood in social converse, upon it, as he might very properly have done upon any part of the lot located upon the corners of the intersection. When he stopped in the street he assumed a risk common to all who might sojourn there in the same manner. Under such circumstances his employer is not called upon to make compensation for his injuries. They did not arise out of the employment."

The award is annulled.

I concur: JENNINGS, J.

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134 Cal.App. 173

DE ARMAN et ux. v. CONNELLY et al.

Civ. 1048.

District Court of Appeal, Fourth District, California.

Sept. 13, 1933.

Hearing Denied by Supreme Court Nov. 8, 1933.

1. Automobiles 🔑244(12).

In action for injuries sustained in collision, evidence sustained finding that driver of defendant's automobile was negligent in cutting across pavement directly in path of plaintiff's automobile (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a; St. 1923, p. 560, § 131, as amended by St. 1929, p. 541, § 55).

Evidence disclosed that plaintiff was driving his automobile at 35 miles per hour; that he noticed defendant's automobile on other side of highway going at low speed; that suddenly and without warning driver of defendant's automobile turned to his left directly in path of plaintiff's automobile; and that plaintiff applied brakes but could not stop automobile completely before colliding.

2. Automobiles 🔑245(81).

In action for injuries sustained in collision when defendant's automobile cut across pavement directly in plaintiff's path, plaintiff *held* not contributorily negligent as matter of law (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a; St. 1923, p. 560, § 131, as amended by St. 1929, p. 541, § 55).

Defendant's contention that plaintiff was contributorily negligent was based upon fact that plaintiff noticed automobile in ditch 175 feet away from him; that automobile was parked next to it on soft shoulder of highway and two men were standing near it, and on the fact that defendant's automobile was being operated in compound low gear having maximum rate of speed of six miles per hour, but which evidence was contradicted by plaintiff's testimony that defendant's driver suddenly cut across highway directly in path of plaintiff's automobile.

3. Trial 🔑89.

In automobile collision case, question asked plaintiff whether he saw possibility or semblance of trouble at point 175 feet ahead was correctly stricken as indefinite.

4. Damages 🔑132(1).

$6,000 to school teacher for bruises about her right eye, 2-inch wound on chin, loss of teeth, permanent scar on right leg six inches above ankle, fracture of jawbones, and severe bruises and permanent disfiguration of features, *held* not excessive.

5. Judgment 🔑299(1).

Court trying case without jury could sign modified judgment after lapse of 60 days following filing of notice of intention to move for new trial, since statute authorizing modification contained no time limitation (Code Civ. Proc. § 662).

6. Appeal and error 🔑877(4).

Defendants could not complain of lump sum award to plaintiffs instead of separate awards, since alleged error did not affect defendants.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Frank T. De Arman and his wife against M. M. Connelly and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Harry W. Horton, of El Centro, for appellants.

Glassford & Smith, of El Centro, and H. L. Welch, of Los Angeles, for respondents.

JENNINGS, Justice.

The defendants have prosecuted this appeal from a modified judgment in favor of plaintiffs rendered by the court after a trial of the cause was had before the court, without a jury. The appeal is also taken from an order of the court denying a motion of defendants for a new trial, and directing that findings theretofore made be amended and the judgment entered in conformity with such findings be modified.

The principal contention advanced by appellants upon this appeal is that the evidence which is presented by the reporter's transcript shows that the respondent Frank T. De Arman was guilty of negligence, as a matter of law, which contributed to the occurrence of the collision between the automobile which was being operated by De Arman and a tow car which was the property of appellant Connelly, and which, at the time of the collision, was being driven by appellant Mills, and that the damage to De Arman's automobile and the personal injuries suffered by respondents as a result of the collision were not, therefore, properly recoverable from appellants. Consideration of this primary contention necessitates a brief recital of the circumstances which surrounded the happening of the accident as these circumstances were developed by the evidence which is contained in the reporter's transcript of the trial.

At 6:30 p. m. of April 12, 1931, respondent Frank T. De Arman, accompanied by his wife, Gene Cash De Arman, was driving his Cadillac sedan in a southerly direction on the highway which extends due north and south between the towns of Imperial and El Centro in Imperial county. At the place where the collision occurred the highway consisted of a paved portion which was 20 feet wide and a dirt shoulder on each side of the pavement, each shoulder having a width of approximately 5 feet. The center of the highway was crowned up, leaving a borrow pit or ditch approximately 6 feet deep and 10 feet wide on each side of the highway. Respondent De Arman was driving his automobile at a speed of approximately 35 miles per hour, and as he approached the scene of the accident he observed an automobile which was in the bottom of the ditch on the east side of the highway. At this time the sun had not set and respondent De Arman testified that he was able to see down the highway for a distance in excess of a mile. The dimmer lights of the Cadillac were, however, illuminated. There was no south-bound intervening traffic between the Cadillac automobile and the place where the accident occurred. Except as will hereafter be noted no north-bound traffic was moving on the highway. At the scene of the accident a roadway extended from the west across the ditch and dirt shoulder on the west side of the highway and intersected the highway. This roadway did not extend to the east of the highway. The automobile which was in the bottom of the east ditch was approximately 50 feet north of the point where this roadway intersected the highway. Immediately to the west of the location of the automobile in the east ditch an automobile was parked on the dirt shoulder to the east of the highway. Two men stood in close proximity to the parked automobile. When the Cadillac automobile was approximately 175 feet north of the place where the accident occurred, respondent De Arman observed a Ford coupé automobile approaching him from the south and following close to the rear of the Ford coupé a wrecking car equipped with a crane which was used for the purpose of towing automobiles. The wrecking car or tow car, which was a Chevrolet truck, was the property of appellant Connelly and was being driven by appellant Mills. These two last-mentioned automobiles were proceeding on the east side of the paved portion of the highway at slow speed. Respondent De Arman also observed a third automobile approaching from the south at a distance of between 150 and 550 feet. When De Arman had arrived at a point approximately 25 to 30 feet north of the tow car the driver of this latter automobile suddenly changed the direction in which it was proceeding and caused it to cross the west side of the paved part of the highway, the tow car then being pointed in a direction slightly north of west. In this position the tow car at least partially blocked the west side of the highway. De Arman immediately applied the brakes of his automobile and turned slightly to the west in an effort to avoid colliding wtih the tow car. His endeavor in this regard was unsuccessful, and the front part of the Cadillac collided with the right side of the tow car. The force of the collision caused the Cadillac automobile to leave the highway and it proceeded into the ditch on the west side of the highway, where it overturned.

[1, 2] The above facts which were developed by evidence produced during the trial amply warranted the court in finding that the driver of the tow car, appellant Mills, was guilty of negligence in cutting across the west side of the pavement directly in the path of the approaching Cadillac automobile. As above indicated appellants contend, however, that respondent De Arman was himself guilty of contributory negligence as a matter of law. This contention is based largely on the testimony of De Arman to the effect that, when he arrived at a point which was approximately 175 feet north of the scene of the collision, he saw the wrecked car in the east ditch and observed another automobile on the highway immediately west of the wrecked automobile and two men standing on the highway at this point and

had reason to believe and did believe that danger threatened him, but although he came to this realization he did not check the speed of his automobile, but proceeded in the direction in which he was traveling at a speed of approximately 35 miles per hour. De Arman's failure to slow down in the face of threatening danger realized by him is said to constitute negligence per se which contributed to the happening of the collision.

[3] The contention lacks merit. In the first place, the highly important element of realization by De Arman that danger threatened him is based upon an answer by the witness De Arman to a question propounded to him, which answer was later properly stricken by the court. The question and answer are as follows: "Q. Did you see a possibility or semblance of trouble ahead of you as you reached a point 175 feet north of car number 3 (Ford coupe)? A. Yes sir, a bare possibility of it. The car in the ditch wasn't wrecked, that is it wasn't damaged. It seemed to have run off the road and was in the ditch apparently." An objection was then interposed to the question on the ground that it was indefinite and uncertain, in that it could not be ascertained whether the "trouble ahead" meant trouble for the witness or for some other person. It was requested that the above-quoted answer be stricken and a more definite interrogation propounded. The motion was granted and the answer stricken. It is obvious that the objection to the question was well taken and that the court's action in striking the answer was correct.

Furthermore, it cannot, we think, be successfully urged that respondent F. T. De Arman should have realized that danger threatened him and that he should have checked the speed of his automobile. He was proceeding on his right-hand side of the highway and the path ahead of him was clear of any obstruction. He observed the automobiles approaching him at a low rate of speed on the east side of the highway. He was not required to anticipate that either the Ford coupé or the tow car would suddenly change its course and proceed across the west side of the highway directly in his path. It is not contended that De Arman was operating his automobile at an unlawful rate of speed, and we are entirely unable to discover that a speed of 35 miles per hour was, under the circumstances, excessive, or that his failure to slow down contributed in the slightest degree to the happening of the accident.

It is also urged by appellants that the physical facts disclosed by the evidence conclusively indicate that the respondent F. T. De Arman was guilty of negligence, as a matter of law, which contributed to the occurrence of the collision and the ensuing personal injuries and property damage. In support of this contention counsel for appellants indulges in a somewhat involved mathematical calculation, the result of which is that the Cadillac automobile operated by respondent F. T. De Arman must have been at least 50 feet from the point of collision when the front wheels of the tow car had arrived at the center line of the highway. From this it is argued that respondents were not looking ahead or they must have seen the tow car in ample time to have brought the Cadillac to a complete stop before the collision occurred, assuming that the speed at which the Cadillac was being operated was approximately 30 miles per hour, as the testimony of respondents indicated. The cornerstone of this line of reasoning is the premise that the tow car proceeded across the highway at a speed which did not exceed 6 miles per hour. It is said that it is undisputed that the tow car while crossing the highway was being operated in compound low gear, and that the maximum rate of speed which the car was capable of making in this gear was 6 miles per hour. It is true that the driver of the tow car testified that he placed the tow car in compound low gear before he started across the highway and that he kept it in this same gear during the crossing, and that the maximum speed possible when the car was being operated in this gear was 6 miles per hour. It is also true that appellant Connelly testified that he examined the tow car after the collision and found that it was frozen in compound low gear, and that the maximum speed which the tow car could make in compound low gear was approximately 6 miles per hour. It must be conceded that no witness testified that the tow car was not being operated as it crossed the highway in compound low gear or that the maximum speed of the tow car in this gear exceeded 6 miles per hour. To this extent the evidence mentioned may be said to be undisputed. However, the respondent F. T. De Arman testified that the tow car suddenly shot out from behind the Ford coupé and proceeded very rapidly in front of the Cadillac when the latter automobile was approximately 25 feet distant from the tow car. This testimony is at least inconsistent with the testimony of appellant Mills that he operated the tow car across the highway at a speed of approximately 3 to 4 miles per hour, and furnished ample justification for the court's finding that it was physically impossible for De Arman to have avoided the collision. It is further to be observed that the court found that appellant Mills abruptly turned the tow car to the west across the highway without giving any arm signal of his intention so to do, and that this finding is amply supported by the evidence. The failure of appellant Mills to have given a proper signal before turning to his left was, under the circumstances here appearing, clearly in violation of sections 130 and 131 of the California Vehicle Act (section 130, as amended by St. 1925, p. 412, § 15a, and section 131, as amended by St. 1929, p. 541, § 55), and may not be disregarded. Connerly v. Correia, 66 Cal. App. 570, 226 P. 841.

[4] Complaint is voiced that the sum of $6,000 awarded by the court as compensation for the injuries sustained by respondent Gene Cash De Arman is excessive. The court found that she suffered severe bruises about her right eye and temporal region, a 2-inch incised wound on her chin below the lower lip, which wound left a permanent scar approximately 1½ inches long and very noticeable; that both lips were lacerated on the inside and were cut through from the inside to and through the outer skin; that 4 upper front teeth were knocked completely out and another tooth so loosened as to require extraction; that several other teeth were permanently loosened; that her elbows were bruised and her right ankle and right knee were severely bruised; that she received a deep incised wound on the right leg 6 inches above the ankle which caused a permanent scar approximately 4 inches long on said leg; that she suffered an extreme nervous shock which has caused her to become permanently nervous to such an extent that she cannot drive or even ride in an automobile with comfort, and which hinders her in the pursuit of her occupation as a school teacher; that she suffered great mental anguish and pain because of her injuries and was confined to her bed for a period of 6 weeks, and for several months thereafter it was necessary for her to make use of crutches in moving about; that she suffered a fracture of both upper and lower jawbones and severe bruises and injuries to the left side of her body; that her facial appearance has been changed, disfigured, and marred by the injuries to her mouth and teeth causing her upper lip to protrude to a noticeable degree.

The finding respecting respondent's injuries has ample evidentiary support and the bare recital of these numerous injuries and the effect produced by them upon her nervous system carries satisfactory refutation of the claim that the damages awarded are excessive. It is moreover to be observed that the trial court was given an opportunity to reconsider its first award of $8,000 for this respondent's injuries on the motion of appellants for a new trial, and that it reduced the award to $6,000. We find ourselves unable to declare that the last-mentioned amount is so plainly excessive as to warrant the conclusion that the award was the result of passion or prejudice on the part of the trier of facts. May v. Farrell, 94 Cal. App. 703, 271 P. 789; Bennett v. Hardy, 108 Cal. App. 473, 291 P. 903.

In connection with the court's finding respecting the injuries of respondent Gene Cash De Arman, it is objected that the court found that "the injuries to the right knee appear to be permanent." It is urged that this portion of the finding is entirely unsupported by the evidence. With this contention we cannot agree. The record contains evidence which supports the finding.

[5] It is also urged that the court committed reversible error in signing amended findings and a modified judgment after the lapse of the 60-day period following the filing of a notice of intention by appellants to move for a new trial. The first judgment was entered on February 4, 1932. On February 13, 1932, appellants filed their notice of intention to move for a new trial. The motion for a new trial was heard on April 2, 1932, and on April 5, 1932, the court denied the motion and at the same time ordered that the original findings and conclusions of law be amended in certain particulars, and especially that the amount of recovery be reduced from $10,389 to $7,889. On June 8, 1932, the court signed the amended findings and conclusions of law and a modified judgment ordering and decreeing that respondents recover from appellants the sum of $7,889. The court's action in directing amended findings and a modification of the judgment upon its denial of the motion for a new trial was taken in accordance with the provisions of section 662 of the Code of Civil Procedure. This section of the Code contains no limitation as to the time when the court may actually sign amended findings or a modified judgment. It has been construed by the courts of review on a number of occasions, and in no instance has its scope been limited in accordance with the contention of appellants. Meda v. Lawton, 214 Cal. 588, 7 P.(2d) 180; Heron v. Bray, 122 Cal. App. 79, 9 P.(2d) 513; Holland v. Superior Court, 121 Cal. App. 523, 9 P.(2d) 531; Moore v. Levy (Cal. App.) 18 P.(2d) 362.

[6] Appellants advance the contention that the judgment from which this appeal is taken is for a lump sum for both respondents, and that a separate judgment should have been rendered in favor of each respondent for the injuries sustained by such respondent. It is sufficient answer to this contention to say that this is of no concern to appellants, who are entitled to complain only of such matters as injuriously affect them without regard to errors of which others might complain. 2 Cal. Jur. 840; Fairchild v. Bay Point, etc., R. Co., 22 Cal. App. 328, 134 P. 338.

It is objected that the court's finding that the sum of $654 represents the reasonable amount for expenses necessarily incurred in caring for the injuries suffered by respondent Gene Cash De Arman is lacking in evidentiary support. Careful examination of the record impels us to the conclusion that this contention is not justified and may not be sustained.

The judgment and order from which this appeal has been taken are therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

134 Cal.App. 166

CEINAR v. JOHNSTON et al.

Civ. 9027.

District Court of Appeal, First District, Division 2, California.

Sept. 13, 1933.

Hearing Denied by Supreme Court Nov. 8, 1933.

1. False imprisonment ⚷20(1).

Complainant charging false imprisonment must plead facts showing that arrest was unlawful.

2. False imprisonment ⚷20(1).

Charge that justice of peace indefinitely suspended sentence was in effect allegation that sentence was suspended for maximum term, as regards justice's liability for false imprisonment on ground of having divested himself of jurisdiction and thereafter caused plaintiff's arrest.

3. False imprisonment ⚷7(2).

Judicial officer acts as individual and not as officer, if he has no jurisdiction of person, or if purported charge in complaint is something over which statute has conferred no jurisdiction on officer.

4. Justices of the peace ⚷25.

If justice of peace acquires jurisdiction of person and of subject-matter, his acts thereafter will be considered judicial, for which he will not be held civilly liable.

5. False imprisonment ⚷7(2).

Justice of peace suspending sentence, and thereafter indorsing commitment on abstract of proceedings, causing plaintiff's arrest and imprisonment, *held* not liable for false imprisonment on ground justice had divested himself of jurisdiction and then proceeded to act.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by William T. Ceinar against D. N. Johnston and others. From a judgment in favor of named defendant, plaintiff appeals.

Affirmed.

Elmer E. Robinson and W. A. Lahanier, both of San Francisco, for appellant.

Henry E. Greer, of San Rafael, for respondent.

STURTEVANT, Justice.

The plaintiff commenced an action against the defendants for false imprisonment. The defendants filed a joint general demurrer "to the complaint." The record discloses that as to certain of the defendants the demurrer was overruled, but as to the defendant Johnston the demurrer was sustained. From the judgment entered in favor of the defendant Johnston, the plaintiff has appealed. The record contains the original complaint, and it also contains an amended complaint. We understand the plaintiff relies on the amended complaint, and we will confine our remarks to that document.

The plaintiff alleged that on the 8th day of August, 1931, in answer to a complaint filed in the justices' court of Nicasio township, county of Marin, state of California, charging him with disturbing the peace, that he appeared before the defendant as justice of the peace and pleaded guilty to the complaint; that the defendant suspended plaintiff's sentence indefinitely and entered a judgment that plaintiff's sentence should take full force at any time that plaintiff failed to make monthly payments in the sum of $30 to his wife for the support of their son, who was to remain in the care and custody of his mother; that the plaintiff made certain payments to and including November 14, 1931; that thereafter, on March 8, 1932, the defendant, as justice of the peace, executed an abstract of the proceedings in the action theretofore commenced against him and indorsed thereon a commitment. Both documents are set forth in hæc verba. Continuing, the plaintiff alleged that the plaintiff was arrested by the defendant Armstrong as constable, who delivered him into the custody of the defendant Sellmer as sheriff of Marin county, who received the plaintiff and incarcerated him from March 8, 1932, until March 17, 1932, the full term specified in the sentence imposed by the defendant Johnston on the 8th day of March, 1932.

[1-4] In short, the allegations of the plaintiff's complaint are that the defendant as justice of the peace first divested himself of jurisdiction and thereafter proceeded to act. However, there are two sound answers to the contention. In the first place, whoever may be charged as a defendant for false imprisonment it is necessary for the complainant to plead the facts showing that the arrest was unlawful. Going v. Dinwiddie, 86 Cal. 633, 25 P. 129. Charging that the defendant indefinitely suspended the sentence was in effect to allege that the sentence was suspended for the maximum term. In re Herron (Cal. Sup.) 19 P.(2d) 4. If the defendant in the criminal case consented, there was no irregularity in suspending the sentence until March 8, 1932. Pen. Code, § 1449. If in this case the plaintiff would claim that the postponement of the sentence until March 8, 1932, was unlawful, he was bound to have pleaded the facts. We turn now to the other answer. If a judicial officer has no jurisdiction of the person, the officer acts as an individual and not as an officer. Inos v. Winspear, 18 Cal. 397. If the purported charge contained in a complaint is something over which the statute has conferred no jurisdiction on the officer, the same

rule applies for the same reason. De Courcey v. Cox, 94 Cal. 665, 30 P. 95. If, however, the justice of the peace acquires jurisdiction of the person and jurisdiction of the subject-matter, his acts thereafter will be considered as judicial, and for which he will not be held civilly liable. 35 C. J. 471. In Bradley v. Fisher, 13 Wall. (80 U. S.) 335, 354, 20 L. Ed. 646, Mr. Justice Field, writing the opinion of the court, said: "The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed." In Stephens v. Smith, 159 Okl. 117, 14 P.(2d) 381, on page 382, speaking of the liability of a justice of the peace, the Supreme Court of Oklahoma said: "It clearly appears from this proceeding that the dereliction of the justice complained of was in the performance of a judicial function in a matter over which his court had jurisdiction of the subject-matter and of the parties. The rule of nonliability of judicial officers for their judicial decisions prevails in this state. To allow a disappointed litigant to sue the officer, intrusted by law with the decision of the matter in controversy, and to hold such officer personally liable for mistakes in rendering judicial opinions, would open the floodgates to a torrent that would practically destroy the last bulwark for the protection of human rights." See, also, Grant v. Williams, 54 Mont. 246, 169 P. 286, 287.

In the case of Wertheimer v. Howard, 30 Mo. 420, 77 Am. Dec. 623, it was claimed that the rule would not extend to the issuance of an execution or a warrant because those acts were ordinarily performed by a clerk in most courts, and therefore were ministerial. In reply to that argument, the Supreme Court of Missouri said: "The difficulties in drawing a line of distinction between judicial and ministerial acts, in reference to the duties which our statutes have confided to justices of the peace, are not readily removed; and upon principles of public policy as well as equity, we are not disposed, in determining their responsibilities, to adopt the rules which have been applied to clerks and sheriffs and other mere ministerial officers. The clerical and judicials acts of justices are mingled together from the beginning to the end of a suit, and it is not easy to separate the one from the other. Great inconvenience, we also apprehend, would arise from holding a justice responsible for a blunder in issuing an execution where his intentions have been altogether pure. The office, at least in the great majority of instances, is not one attended with large gains; nor can it generally be relied on for a mere subsistence, but must necessarily be filled by persons whose principal pursuit will not allow an appropriation of much time or labor to the attainment of accurate legal information, even upon those subjects with which they have officially to deal. That the justice is required or allowed to be his own clerk, is not a sufficient reason to divest him of his judicial character whenever he performs an act, which a clerk, under other circumstances, would do. We have not been able to see, therefore, that in issuing an execution he is to be held responsible as a mere ministerial officer, but our inclination is to hold all his acts, which from the beginning to the end of a suit the law requires him to perform, as judicial and involving only that responsibility which attends all judicial officers." Many of the courts have pointed out that an aggrieved defendant in a criminal case has a clear remedy, and therefore that he should not be allowed to harass a judicial officer. 35 C. J. 472. That reasoning may well be applied in the instant case because this plaintiff could have applied immediately for a release. Ex parte Slattery, 163 Cal. 176, 124 P. 856.

[5] If it be asserted that the defendant had lost jurisdiction at the time he rendered the sentence, the rule is the same. In other words, having acquired jurisdiction of the subject-matter and of the person, the judicial officer is not liable merely because his order was made too late. Horton v. Auchmoody, 7 Wend. (N. Y.) 200.

The judgment is affirmed.

We concur: NOURSE, P. J.; OGDEN, Justice pro tem.

134 Cal.App. 194

LOPEZ et al. v. WADSWORTH.

Civ. 639.

District Court of Appeal, Fourth District, California.

Sept. 14, 1933.

Appeal and error ⚷773(2).

Appeal was dismissed where appellant neither responded to order to show cause why appeal should not be dismissed, nor filed briefs (Rules of Supreme Court and District Courts of Appeal, rule 5).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Lola V. Lopez, administratrix of the estate of Gloria V. Lopez, and others, against Luther H. Wadsworth. From the judgment, defendant appeals.

Appeal dismissed.

Voltaire Perkins, of Los Angeles, and Ralph E. Swing, of San Bernardino, for appellant.

Nichols, Cooper & Hickson, of Pomona, for respondents.

MARKS, Justice.

The record on appeal was filed in this court on February 1, 1932. On January 26, 1932, counsel entered into a stipulation giving appellant to March 20, 1932, in which to file his opening brief. As no brief was filed, this court on its own motion issued an order to show cause directing appellant to show cause on September 12, 1933, why the appeal should not be dismissed. No response was made to this order and no briefs have been filed. Under the provisions of rule 5 of the Rules for the Supreme Court and District Courts of Appeal, the appeal is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

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134 Cal.App. 191

COMSTOCK et al. v. KAHEN et al.

Civ. 501.

District Court of Appeal, Fourth District, California.

Sept. 14, 1933.

Appeal and error ⚷773(2).

Where appellants did not file opening brief within time nor thereafter, and made no response to order to show cause why appeal should not be dismissed, appeal was dismissed.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Elsie May Comstock, a minor, by Leon H. Comstock, her father and guardian ad litem, and another against Frederick E. Kahen and another. From an adverse judgment, defendants appeal. On order to show cause why the appeal should not be dismissed.

Appeal dismissed.

Paul Nourse and Forrest A. Betts, both of Los Angeles, for appellants.

Bert L. Irving, of Hollywood, for respondents.

BARNARD, Presiding Justice.

The clerk's transcript and the reporter's transcript were filed on August 19, 1930. By stipulation, the time within which the appellants might file their opening brief was extended to January 15, 1931. No briefs have ever been filed and no response has been made to an order made by this court to show cause on September 12, 1933, why the appeal should not be dismissed.

The appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

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134 Cal.App. 122

PEOPLE v. STANZA.

Cr. 1720.

District Court of Appeal, First District, Division 1, California.

Sept. 7, 1933.

Criminal law ⚷1182.

Conviction for murder was affirmed, where evidence contained in transcript was sufficient to sustain conviction and accused failed to show error in record (Code Civ. Proc. § 473).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Dominic Stanza was convicted of first degree murder, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

PER CURIAM.

The defendant was found guilty of murder in the first degree, and on October 24, 1932, in conformity with the recommendation of the jury, was sentenced to imprisonment for life in the penitentiary. Execution of sentence was stayed for one day. Written notice of appeal was given, and counsel representing the defendant up to that time thereupon withdrew from the case. Approximately three months later and on January 10, 1933, counsel now appearing for defendant presented a motion on behalf of the defendant, under section 473 of the Code of Civil Procedure, asking that defendant be relieved of his default in failing to comply with the legal requirement of demanding a transcript on appeal; and on January 25, 1933, said motion was granted. Thereafter the clerk's and reporter's transcripts consisting of more than 300 pages were prepared and certified, and later filed in this court. At the time the appeal was called for hearing in this court oral argument on behalf of defendant was waived, and permission was given to file a brief. However, no brief of any kind has been presented or filed. The evidence contained in the reporter's transcript is amply sufficient to sustain the verdict of the jury; and it follows, therefore, in the absence of any attempt whatever on the part of defendant's counsel to point out any error in the record, that the judgment of conviction and the order denying the motion for new trial should be, and they are hereby, affirmed.

134 Cal.App. 196

In re BROAD'S ESTATE.

Civ. 9139.

District Court of Appeal, First District, Division 2, California.

Sept. 15, 1933.

Rehearing Denied Oct. 14, 1933.

Hearing Denied by Supreme Court Nov. 13, 1933.

Executors and administrators ⚿194(2).

Probate court had jurisdiction to enter second order granting allowance to decedent's widow out of estate after filing of inventory and after first order ceased to operate (Probate Code, §§ 680, 681).

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Application by Louise M. Broad for allowance out of the estate of Alfred Fry Broad, deceased. From an order granting the allowance, the Wells Fargo Bank & Union Trust Company, executor, and Harriet Kemp, legatee, appeal.

Affirmed.

See, also, 19 P.(2d) 258.

Francis V. Keesling and Garton D. Keyston, both of San Francisco, for appellant Wells Fargo Bank & Union Trust Co.

Harry G. McKannay, of San Francisco, for appellant Kemp.

L. C. Pistolesi, of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal from an order granting an allowance to the respondent widow, Louise M. Broad, for her maintenance during the administration of the estate.

The deceased died in 1930. During that year an inventory and appraisement was filed, but it was signed only by the inheritance tax appraiser, while three appraisers had been appointed. Thereafter respondent petitioned for an allowance for her maintenance, and an order was made granting her the sum of $125 per month for the period of one year from and after the death of the deceased. No appeal was taken from said order. In 1931 another inventory and appraisement was filed, which document was signed by all three appraisers. In May, 1932, after the last-mentioned inventory had been filed and after the original allowance to the respondent had terminated, respondent petitioned for a further allowance of $150 per month. Appellants objected to the hearing of said petition, claiming that the trial court was without jurisdiction to make any further allowance. The trial court overruled the objection and proceeded with the hearing. The estate was not insolvent, and, although there had been a depreciation in values, there was still property of the value of approximately $7,600 in the hands of the executor. The trial court found that six months was the time reasonably necessary for settling the estate and made its order granting respondent an allowance of $25 per month for a period of six months. This appeal is taken from the last-mentioned order.

Appellants contend that the trial court "had no jurisdiction to entertain the petition of the widow for a second family allowance after the inventory was filed." Although the parties discuss in their briefs the effect of the filing of the first inventory, we do not believe that question need be discussed here in view of the conclusions which we have reached. If after filing a valid inventory a probate court can properly make an allowance for a limited period and, after the expiration of such limited period, make a further allowance for a second limited period, then the question of the validity of the first inventory herein is of no importance. As we view the record on the present appeal, the solution of this question is determinative of the controversy, as it is not contended that the trial court abused its discretion in making the second order in the event that it had the power to make said order after the termination of the first.

In support of the foregoing contention, appellants argue that it makes no difference whether the matter be considered in the light of section 680 of the Probate Code or of sections 1466 and 1467 of the Code of Civil Procedure, "but one allowance after the inventory is filed is contemplated by the said sections." No authority is cited in support of this argument, and we do not believe that the power of the trial court is thus limited by the terms of the sections mentioned. Said sections of the Code of Civil Procedure, which were in effect at the time of the death of the deceased, were replaced by various sections of the Probate Code, which were in effect at the time of the making of the order appealed from, but the earlier sections were substantially similar to the new sections. Section 680 of the Probate Code provides in part, "The widow and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters." The claim to such allowance is strongly favored in our law. Estate of Gould, 181 Cal. 11, 183 P. 146; Estate of Whitney, 171 Cal. 750, 154 P. 855; 11 Cal. Jur. 493. While section 681 of the Probate Code has been so worded as to avoid the necessity previously existing for making two orders based upon two separate petitions, one before the filing of the inventory and the other after the filing of the inventory, neither said section nor the earlier sections of the Code of Civil Procedure contain anything which in our opinion would prohibit the trial court from making more than one order after the filing of the inventory in order to give to the widow the allowance to which she might be entitled "during the progress of the settlement of the estate." It may be the general practice to make but one order for such allowance, subject to the power of the court to modify such order (Estate of Boselly, 179 Cal. 218, 176 P. 45), but we see no objection to the practice adopted here. The first order was limited to a period of one year after the death of the deceased, within which time it was possible to determine whether the estate was solvent, to determine how much time would be required to settle the estate, and to determine other matters which would be pertinent to the consideration of the propriety of making a further allowance. We believe the procedure adopted was entirely proper and that the trial court did not "exhaust its jurisdiction" by making the first order. The authorities appear to support this view. Roberts v. McKimmon, 67 Cal. 349, 7 P. 733; Estate of Bump, 152 Cal. 274, 278, 92 P. 643; 11 Cal. Jur. 495.

Appellants have called our attention to the language of the court in the Estate of Clark, 96 Cal. App. 243, 274 P. 76. There the trial court had exercised its discretion and discontinued the family allowance before the final settlement of the estate. We have no doubt that there are cases in which such action is fully warranted, but we find no facts in the record before us showing that the trial court abused its discretion in granting a further allowance pending final settlement of the estate.

The order is affirmed.

We concur: NOURSE, P. J.; DOOLING, Justice pro tem.

134 Cal.App. 206

PEOPLE v. VAN BUREN.

Cr. 2419.

District Court of Appeal, Second District, Division 1, California.

Sept. 18, 1933.

Hearing Denied by Supreme Court Oct. 16, 1933.

Criminal law 🔑**1014.**

Appeal from judgment refusing to vacate conviction, following appeals from judgment of conviction and previous denial of motion to vacate judgment, *held* dismissible.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Charles W. Van Buren was convicted of grand theft, his motion to vacate the judgment of conviction was denied, and he appeals. On motion to dismiss appeal.

Motion granted.

Charles W. Van Buren, in pro. per.

U. S. Webb, Atty. Gen., for the People.

HOUSER, Justice.

Briefly, the pertinent facts connected herewith are that heretofore under one count of an information filed against defendant he was convicted of the crime of grand theft, and, at the same time, under a separate count of the same information, he was acquitted of the offense of driving an automobile without the consent of the owner thereof. His appeal from the ensuing judgment resulted in an affirmance thereof. Some time thereafter, defendant presented a motion to the superior court to vacate the judgment which theretofore had been rendered against him; which motion was by said court denied. His appeal from that order was dismissed by order of this court; following which, defendant presented a second motion to the superior court to vacate the said judgment. That motion also having been denied, the defendant appealed from such order to this court; whereupon the respondent has moved for a dismissal of said last appeal.

An inspection of the opening brief by appellant reveals the fact that the point urged by him as a sufficient reason for an order by which the said judgment would be vacated is that, since the evidence showed that the two crimes of which he was separately charged arose out of the same transaction, and since on the trial of the action he was acquitted by the jury of the offense of driving an automobile without the consent of the owner thereof, necessarily the legal effect was that he could not have been guilty of theft of the automobile.

It is apparent that the merits of appellant's contention cannot be considered on the hearing of the instant motion. The point here at issue is whether, considering the facts hereinbefore set forth, appellant is entitled to have his contention considered by this court. Not only is it clear that on the original appeal from the judgment appellant might have presented for decision by this court the identical point which he now urges, but also (assuming, but not deciding, the propriety of his first motion to vacate the said judgment) that he might have done so on his appeal from the order by which his motion to vacate the said judgment was denied. In other words, appellant heretofore has had at least one opportunity, and possibly two separate opportunities, to have determined the very point which on his third appeal he now seeks to have decided. If such a course of procedure is in accordance with the law and the practice of the several interested courts, it is manifest that by presenting a single point on his appeal from the judgment against him, in the event that such judgment should be affirmed, the defendant thereafter by successive motions to vacate the judgment, each for a reason differing from either of the others, followed by an appeal from the order in each case by which his said motion was denied, would occupy the attention of the trial court and this tribunal indefinitely. In that regard the authorities of this state appear to be against the position assumed by appellant.

The case of People v. Brattingham, 91 Cal. App. 527, 267 P. 120, 121, was an appeal from an order denying a motion of the defendant therein for modification of the judgment which had been rendered against him; and, with reference to the matter here under consideration, it was there stated:

"Appellant contends that an appeal is authorized by subdivision 3 of section 1237 of the Penal Code, which provides that an appeal may be taken from an order after judgment affecting the substantial rights of the defendant. It is also said that the court has inherent power at any time to vacate a void judgment. Generally this is true, but the rule is well established that an order made after judgment is not appealable where the motion merely asks the court to repeat or overrule the former ruling on the same facts. As said in De la Montanya v. De la Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 P. 345, this is so because to permit such an appeal 'would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing contrary to the intent of the statute.' To the same effect are Kent v. Williams, 146 Cal. 3, 79 P. 527, Alpers v. Bliss, 145 Cal. 565, 79 P. 171, and other cases.

"A number of decisions cited by appellant hold that the trial court has jurisdiction to vacate or modify a void judgment, but they do not mention the question here presented; namely, Will an appellate court entertain an appeal from an order made after judgment, where the appeal from the judgment would present precisely the same question, and in every way afford protection to the rights of the defendant? The authorities sustain the contention of the people upon this issue.

"Applying the rule to the record before us, it is apparent that upon an appeal from the judgment alone the judgment roll would contain everything necessary to a determination of the contention of the appellant, and to consider the appeal from the order refusing to modify the judgment would have the effect of allowing the right to two appeals.

"It is ordered that the appeal be dismissed."

In 8 California Jurisprudence, page 495, the law is thus stated: "Ordinarily a party who has a right to appeal from a judgment or order is not allowed to move to set it aside and then appeal from an order denying his motion." Citing People v. Walker, 132 Cal. 137, 64 P. 133; People v. Mayne, 118 Cal. 516, 50 P. 654, 62 Am. St. Rep. 256.

It is ordered that the motion to dismiss the appeal be, and it is, granted.

We concur: CONREY, P. J.; YORK, J.

134 Cal.App. 201

TORIYAMA et al. v. PUTNAM et al.

Civ. 8806.

District Court of Appeal, First District, Division 2, California.

Sept. 18, 1933.

Hearing Denied by Supreme Court Nov. 16, 1933.

1. Automobiles ⚷245(15).

Whether driver was negligent because coming in contact with car he passed, forcing it off road into pole, killing its driver, *held* for jury.

2. Automobiles ⚷244(12).

Implied finding that driver was not negligent because coming in contact with car he passed, forcing it off road into pole, killing its driver, *held* supported by evidence.

3. New trial ⚷6.

Allowance or refusal of motion for new trial rests largely in trial court's discretion.

4. New trial ⚷21, 104(1).

New trial for newly discovered cumulative evidence and for misconduct of trial judge who questioned plaintiffs' witness on material point *held* properly refused (Code Civ. Proc. § 657, subd. 4).

Appeal from Superior Court, Contra Costa County; W. T. O'Donnell, Judge.

Action by Mieko J. Toriyama and others by Kumi Toriyama, their guardian ad litem, and Kumi Toriyama against George A. Putnam and another. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Russell W. Cantrell and Guy C. Calden, both of San Francisco, for appellants.

James F. Hoey, of Martinez, for respondents.

SPENCE, Justice.

Plaintiffs sued to recover damages resulting from the death of Heizo Toriyama, deceased. The jury returned a verdict in favor of defendants, and, from the judgment entered thereon, plaintiffs appeal.

At about 5 p. m. on the evening of November 18, 1931, the deceased, in company with another Japanese, was driving his automobile in a northerly direction on the road to Martinez just north of the town of Walnut Creek. Defendant George A. Putnam, hereinafter referred to either as defendant or respondent, was driving the automobile of defendant G. Blalock Putnam in the same direction and had followed the deceased through the town. Both cars were being operated at a moderate speed of between 25 and 30 miles per hour. At the point where the accident occurred the road had an asphalt surface about 22 feet in width with ragged edges or "chuck holes." On either side of the asphalt there was a shoulder of hard dirt and gravel; the shoulder on the easterly side of the road being quite wide. An engineer called by plaintiffs, testifying with respect to this shoulder, said, "It can be a roadway." There was a line of poles near the edge of this shoulder. The accident occurred when the car of the deceased ran off the asphalt and struck one of the poles on the easterly shoulder of the highway. Plaintiff appears to have proceeded to trial upon the theory that defendant, in attempting to pass the car of the deceased, had cut in too quickly and had come in contact with the car of the deceased, forcing it off the asphalt road. The Japanese passenger in the car of the deceased testified that he felt "contact with the wheel," but the uncontradicted testimony showed that there was no indication on either car of any contact between them. This witness had previously written to the widow of the deceased saying that he did not know anything about the details of the accident, and it appeared on his cross-examination that he had an action pending seeking to recover damages arising out of the same accident. No other witness testified to any contact between the cars. The defendant testified that there was no such contact and that he was six feet away from the car of the deceased as he passed it. He further testified that there were some bamboo plants on the left running board of the car of the deceased, which plants were in sacks; that the sacks had become loose, and that the plants, which were eight or nine feet tall, were projecting over the running board and were dragging on the ground; that as he drove up beside the car of the deceased he sounded his horn and called the attention of the deceased to the dragging plants by pointing to them; that the deceased looked down at the plants; that defendant then increased his speed but did not pull over to the right side of the road until he was 75 feet beyond the pole which was struck by the deceased; that he saw nothing of what occurred after passing the deceased's car until he heard the crash and stopped. There was evidence relating to another car approaching from the opposite direction, but the evidence as to the speed and the position of this car was highly conflicting. The evidence offered by the defense showed that this car was approaching at a great distance and that it did not pass defendant's car until after the accident had happened and after defendant's car had stopped.

[1, 2] Appellants contend "that the verdict is not supported by, but it is directly contrary to, the evidence introduced in this case." They argue that the evidence conclusively establishes that respondent was "guilty of

gross, if not criminal, negligence." An examination of the record shows that there is no merit in appellants' contention, for, while the evidence is conflicting in many particulars, the question of whether respondent was negligent was essentially a question of fact for the jury, and there was ample evidence to sustain an implied finding that the respondent was not negligent. The accident was an unusual one, but the jury could have concluded that the deceased may have lost control of his car by reason of looking down at the plants or by striking one of the "chuck holes," or that he intentionally pulled off the asphalt road to adjust the plants and did not notice the pole until too close to avoid striking it. In any event, if the jury believed the testimony of respondent, such testimony was sufficient to sustain the verdict. Apparently conceding that the evidence was conflicting, appellants take the position that this court should disregard the evidence of respondent because of its inherent improbability. It is a sufficient answer to state that we have examined the record and find no such inherent improbability in the testimony of respondent as would justify this court in disregarding it.

Appellants further contend that the trial court erred in denying their motion for a new trial. Appellants' brief contains two subheadings relating to this contention. The first is, "Prejudicial conduct of the trial judge," and the second is, "Newly discovered evidence." We are at a loss to understand appellants' charge of prejudicial conduct, as it was merely based on the fact that the trial judge asked several questions of one of appellants' witnesses with respect to the position of the bamboo plants on the automobile of the deceased. It is claimed that the trial judge thereby unduly developed a wholly immaterial point. The condition of the car of the deceased and its load was not an immaterial point, and testimony relating thereto was offered by both sides without objection. The trial judge merely endeavored to clear up some uncertainty on this subject in the testimony of one of appellants' witnesses and proceeded further when the witness said, "but that was the position it was tied on originally, I imagine." We have read the portions of the record referred to by appellants and find nothing whatever in the nature of misconduct.

[3,4] The alleged newly discovered evidence was contained in certain affidavits offered in support of the motion for a new trial. Appellants had produced three eyewitnesses to the accident at the trial of the cause. It appeared from the affidavits that there were other eyewitnesses who had not been called. We find no error in the trial court's action in denying the motion for new trial on the ground of newly discovered evidence. Assuming without deciding that the affidavits offered in support of the motion were sufficient to show that said evidence was "newly discovered evidence" which appellants could not with "reasonable diligence" have discovered and produced at the trial (Code Civ. Proc. § 657, subd. 4; 20 Cal. Jur., pp. 78 and 84), it nevertheless appears that said evidence was merely cumulative and the trial court no doubt determined that the result of the trial would have been the same even though said evidence had been produced. The determination of this question rests largely, if not wholly, in the sound discretion of the trial court. 20 Cal. Jur. 94, § 62. We find no abuse of discretion in the present case.

The judgment is affirmed.

We concur: **NOURSE, P. J.; DOOLING,** Justice pro tem.

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134 Cal.App. 184

PEOPLE v. GILYARD et al.

Cr. 2372.

District Court of Appeal, Second District, Division 2, California.

Sept. 14, 1933.

1. Arson 🔑37(1).

Evidence supported verdict that accused was guilty of arson and of burning insured property.

2. Arson 🔑33.
Criminal law 🔑358.

Mail box card containing names of both accused *held* properly admitted in conjunction with other evidence to disprove alibi and to show conspiracy to burn insured property.

3. Arson 🔑31.

Fire policy was properly admitted in prosecution for burning insured property.

4. Criminal law 🔑1169(2).

In arson prosecution, admission of teakettle in evidence was harmless, where other evidence showed that it contained lukewarm water at 6:30 a. m., though accused had testified they had left premises between 7:30 and 9 o'clock evening before.

5. Criminal law 🔑304(2).

Court judicially knows that even in Southern California temperature of water, which was 212 degrees Fahrenheit at 9 p. m., late in December, would be lower than 110 degrees at 6:30 next morning, though house was not ventilated.

6. Criminal law 🔑404(4).

In prosecution for arson and burning insured property, jar of earth taken from beneath partially burned house and smelling of kerosene *held* properly admitted.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Arthur Gilyard and another were convicted of arson and of burning insured property, and the named defendant appeals.

Affirmed.

M. H. Broyles and Gladys Towles Root, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WORKS, Presiding Justice.

Defendants were convicted under an information in two counts, one charging arson and the other charging the burning of insured property. Gilyard appeals from the judgment and from an order of the trial court denying his motion for a new trial.

Appellant's first contention is that the evidence was insufficient to support the verdict of the jury. Gilyard owned a certain frame dwelling in Los Angeles which was occupied by a tenant, a woman with three minor children. Gilyard himself occupied a garage in the rear of the dwelling together, at least sometimes, with defendant Siplin, to whom we shall refer hereafter as Evelyn. The charges related to the dwelling and not to the garage. Evelyn, between whom and Gilyard existed an illicit relationship, was with her inamorato in the garage during the day preceding the night on which the fire occurred. At a time after 7:30 and before 9 o'clock in the evening, it was testified that the pair left the garage and went to the home of Evelyn's mother, where, according to some of the direct testimony, they slept together all night.

The fire department responded to a call at about 3:20 in the morning and found the dwelling aflame. The fire was extinguished after but a small part of the building had been consumed. The "arson squad" of the fire department arrived on the scene at about 6:30 the same morning and proceeded to an investigation into the causes of the fire. The officers broke into the garage, which was locked. There they found a five-gallon can about one-fourth filled with kerosene. They also saw in the garage two clotheslines on which were hanging articles of men's and women's wearing apparel. In the part of the garage used for residential purposes they found furniture and a coal oil stove, with a teakettle sitting on it in place. In this kettle was water which was lukewarm at the time, with no fire under it. While the arson squad was at the scene of the fire, Evelyn appeared alone. She and Gilyard had left her mother's house together, so it was said, some time earlier, in Gilyard's car, but he had dropped her a block distant from the scene of the fire. There was a spot or hole in the sole of one of Evelyn's shoes which gave out the odor of kerosene when she was talked to by the officers.

At about 9 o'clock in the morning Gilyard came to the place, accompanied in his car by one Ford. When questioned by the officers, Gilyard said that he had been all night at the house of Ford, and the latter made a statement to the same effect. At the trial, however, Ford testified to the contrary. But to return to the scene of the fire. Not only did the officers question Gilyard on his arrival, but they examined his wearing apparel. Some fresh-looking spots on his shoes gave forth the odor of kerosene, and spots on one leg of his trousers emitted the same effluvium.

[1] Meanwhile the officers had made a search under the partially burned house. There they found some rags and women's silk stockings, all of which gave forth the odor of kerosene. After completing their investigation at the scene of the fire, the officers went to the home of Evelyn's mother, where also resided her sister. There they found many pairs of old silk stockings and a quantity of old clothes. There was evidence from which the jury could justly have inferred that one of the stockings found under the partially burned house was the mate to one found at Evelyn's home. We think, without the necessity for discussion, although we shall hereafter mention further evidence, that the verdict was amply supported. However, we shall later further refer to the count charging the burning of insured property.

[2] It is contended that the trial court erred in receiving in evidence a certain card which was on a mail box on the front porch of the partially burned dwelling. On this card the names of both Gilyard and Evelyn were inscribed. The card thus gave notice to postmen that mail addressed to both parties was to be deposited in the box. The card therefore tended to prove that Evelyn regularly lived with Gilyard on the premises, being cumulative of other evidence to the same effect. During the day preceding the fire, the two defendants were together in the garage throughout the period. Evelyn did a washing, and we have already recited that when the arson squad broke into the garage the next morning there was found in the structure a clothesline on which was strung a woman's wearing apparel. From all this evidence, the card included, and other evidence to be mentioned later, the jury was justified in finding that Gilyard and Evelyn left their usual place of abode in the evening and, ostensibly at least, if they did leave at all, went to the home of the woman's mother to spend the night together, with the purpose of establishing an alibi as a defense

whereby to loose them under the charge of having committed crimes already planned by them in concert. The card, together with all the evidence referred to above, strongly tended to show circumstantially a conspiracy between the two to burn the house; the state thus being entitled to claim the statements or acts of either, after the formation of the conspiracy, as evidence against the other. The card was therefore properly received in evidence also on this ground.

[3] A fire insurance policy on the dwelling, taken out by Gilyard, was admitted in evidence, and it is insisted that the admission was error. There is no merit in the point. Under a charge of burning insured property, one of the necessary elements of proof to be produced by the prosecution is that the property was insured.

[4, 5] The trial court received in evidence a teakettle which was sworn to have been the container of the lukewarm water found on the stove in the garage by the arson squad some time after the arrival of its members on the scene at about 6:30 in the morning. The offer of the teakettle was, of course, useless. It might better have been offered in rebuttal if the defense had produced evidence tending to prove that Gilyard and Evelyn kept no teakettle on their stove. Still, we cannot perceive that the offer of the kettle did harm to appellant. It was testified, without dispute, that a teakettle was on the stove when the officers broke into the garage, but the really material evidence was that the vessel then contained water, the temperature of which was shown to have been from 100 to 110 degrees Fahrenheit. The fire occurred on or about December 28. There was testimony that the morning was "cold." Evidence was introduced to show that, if the water in the kettle had stood at the boiling point when Gilyard and Evelyn left the garage on the evening preceding the fire, if they did, it must have stood lower than its temperature when the officers discovered it. Indeed, we think we may take judicial notice of the fact that on a night in late December, even in Southern California, under the circumstances presented here, water at 212 degrees Fahrenheit at 9 o'clock in the evening, or before, could not have been as warm as the officers found the water in the kettle after 6:30 the next morning, even if the garage was ventilated only by air coming through crevices around doors and windows. Counsel for appellant wonder what this evidence concerning the warm water tended to prove. There should be no doubt upon this point. It tended strongly to show that either Gilyard or Evelyn, or both, remained in the garage until shortly before the tenant of the dwelling gave the fire alarm, or that either or both, granting that both left the garage in the evening, returned to the place at a time not long before the alarm was given. This evidence alone, therefore, was in substantial conflict with the evidence offered in support of the defense of alibi. At any rate, whether the reception of the teakettle in evidence was proper under the law, or whether it was not, the admission of it stands in minimized insignificance when compared with the testimony concerning the receptacle and its contents. We have been at some pains in considering this question because some of the evidence referred to during the discussion adds materially to what we have said above as to the sufficiency of the evidence to support the verdict.

[6] A jar of earth, taken by the police from beneath the partially burned house and giving forth the odor of kerosene, was admitted in evidence. There was no error here, as this real evidence tended to prove that the fire was of incendiary origin.

Appellant contends that the evidence shows that he had no motive in burning the house under the count charging a burning of insured property. The place was under mortgage for $1,800, and the mortgagee, as is usual in such cases, had a first claim against the insurance for reimbursement in case the dwelling was burned. An expert witness testified that if the building had been burned completely the insurance company could have reproduced it at a cost of a little less than $1,300. On this theory it is argued that Gilyard could not possibly have profited by the fire, and that therefore motive on his part to burn insured property was not shown by the prosecution. But we are not bound to assume, nor was the jury which tried the case, that Gilyard possessed the knowledge conveyed by the testimony of the expert witness, or that he even believed it when he heard it. We must, however, find in the record some evidence upon which the jury could justly base an inference that Gilyard intended to defraud the insurer when he set fire to the house, and we think the evidence is there. When a man fires the property of another he is inspired to the act by a spirit of malicious mischief, by a desire for revenge, or perhaps because he is a victim of pyromania. When a man burns his own house, however, and the place is insured, there is in these very circumstances a temptation to others to perceive something in his act other than a mere desire to see flame and smoke rise into the air. This fire, too, might have entailed very serious consequences, and from that circumstance the jury might justly have inferred that some interested motive impelled Gilyard to incendiarism. A woman and her three minor children were domiciled in the dwelling, and Gilyard knew it. The fire was probably set not far from 2 o'clock in the morning, as the tenant testified that she was awakened by its crackling at about that hour and then sent in an alarm. It is quite likely that the blaze started long after 2, rather than before, as officers of the fire department testified that they arrived at the place at about 3:20, and as the house was so located that a city fire station could not have been greatly distant from it. At any rate, the house was fired at a time when it could have been inferred that the inmates were sleeping soundly. A quadruple homicide might easily have been the result of Gilyard's act. Another circumstance: The house was producing a rental of $20 to Gilyard monthly, and the jury must have inferred some motive on his part in committing an act which would deprive him of the income. As the house was insured for $3,000, and as the amount of the mortgage against it was only $1,800, Gilyard, perhaps not having the knowledge of the expert witness, might have believed that he could have profited out of the difference between the face of the mortgage and the face of the policy. Under all the circumstances we think this an inference which the jury could justly have drawn. As we have said above, the evidence was sufficient to support the charge of arson. This fact, taken together with what we have just said upon the question of intent, indicates clearly to our minds that the evidence amply supports the verdict on the other count.

Other points are made. Some are so plainly without merit as not to require discussion, while others are baldly stated without argument.

Judgment and order affirmed.

We concur: STEPHENS, J.; CRAIG, J.

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134 Cal.App. 137

EDERER v. SHANZER.

Civ. 8895.

District Court of Appeal, First District, Division 2, California.

Sept. 11, 1933.

Hearing Denied by Supreme Court Nov. 8, 1933.

1. Automobiles ⚷245(44).

Speed of motorist colliding at intersection with motorcyclist, completing left-hand turn, *held* for jury (St. 1923, p. 553, § 113, as amended).

2. Appeal and error ⚷1002.

Jury's determination on conflicting evidence may not be disturbed.

3. Automobiles ⚷245(82).

Whether motorcyclist making left-hand turn at street intersection, and struck by motorist coming from opposite direction, was contributorily negligent as violating statute regarding starting, turning, or stopping, *held* for jury (St. 1923, p. 558, § 130(a), as amended by St. 1925, p. 412, § 15a).

4. Automobiles ⚷213.

Motorcyclist signaling left-hand turn at intersection, and struck by motorist coming from opposite direction, *held* not contributorily negligent as failing to yield right of way, where motorcyclist entered intersection before motorist, and was entitled to make turn (St. 1923, p. 560, § 131(b), as amended).

5. Automobiles ⚷244(47).

Evidence in motorcyclist's action for intersection collision failed to establish that motorcyclist recklessly proceeded into path of motorist's car while looking backward.

6. Appeal and error ⚷930(4).

Where jury rendered verdict for motorcyclist suing for injuries, reviewing court must assume jury found motorcyclist acted in emergency and was not liable for error in judgment.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Benjamin Ederer against Harold M. Shanzer. From a judgment for plaintiff, defendant appeals.

Affirmed.

John Ralph Wilson, Carl E. Day, and Hugh K. McKevitt, all of San Francisco, for appellant.

Walter McGovern, of San Francisco, for respondent.

STURTEVANT, Justice.

In an action to recover for personal injuries sustained in an automobile accident the plaintiff was awarded a verdict, and from the judgment entered thereon the defendant has appealed.

Late in the afternoon, but before sunset, a collision occurred between the motorcycle operated by the plaintiff and a Ford automobile operated by the defendant. The collision occurred at the crossing of Sixth street and Mission street in San Francisco. On Mission street there is a double street car track running east and west. On Sixth street there is a double street car track running north and south and crossing Mission street at right angles. There is also at the crossing a crossover from the westerly track on Sixth street to the southerly track on Mission street. The plaintiff had come south on Sixth street to the northern property line of Mission street at a time when the automatic signals indicated "stop." He brought his motorcycle to a full stop at the property line. On the opposite side of the street a Chrysler automobile was stopped at the southern property line of Mission street and was standing on the rails of the eastern car track in Sixth street. It was the intention of the plaintiff to make a left-hand turn and go down Mission street. When the signals showed "go" he advanced on a curve on his right-hand side of the cross-over. The driver of the Chrysler in the meantime was advancing on a straight line to the north. When the Chrysler car reached the south rail on Mission street the driver signaled to the plaintiff to proceed. He did so and had crossed the Sixth street rails and was at a point about four feet from the eastern rail when he observed the defendant's car approaching from the south. At that time the defendant's car was about four or five feet south of the southern property line on Mission street. The plaintiff testified that the defendant's car advanced at a speed of twenty-five or thirty miles per hour and paused as though it was going to stop and give to the plaintiff the right of way. The plaintiff continued on his way. The Ford car did not stop and the collision occurred a few feet east of the most easterly rail on Sixth street.

[1, 2] The defendant contends that he was not negligent. The plaintiff contends to the contrary. He cites the statute (section 113, as amended) that the maximum speed allowed at the crossing was fifteen miles per hour, and he quotes his own testimony to the effect that the defendant was driving twenty-five or thirty miles per hour at the time of the impact. The defendant denies that fact and contends he was not traveling more than five miles per hour. He lays particular stress on certain physical facts which he claims support his testimony and refute the testimony of the plaintiff. These conflicts were clearly for the jury and may not be disturbed by a court of review.

[3-6] The defendant also contends that the plaintiff was guilty of contributory negligence. This contention rests on several different theories. The defendant quotes from the California Vehicle Act and contends that the plaintiff violated section 130 (a) of the Act (as amended by St. 1925, p. 412, § 15a) which, among other things, provides: "The driver of any vehicles upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety, and if it can not be made in safety, shall wait until it can be made in safety. * * * " From the facts recited above it does not appear as a matter of law that the plaintiff violated the statute. No additional fact is called to our attention showing that he did so. The fact that a collision occurred does not justify the court in holding that the plaintiff before starting forward did not first see that his movement could be made in safety. The subsequent events would indicate that he determined erroneously, but that is the most that can be said. In the next place the defendant contends that the plaintiff violated section 131 (b), as amended. That section provides: "The driver of a vehicle within an intersection intending to turn to the left shall yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard but said driver having so yielded and having given a signal when and as required by law may make such left turn and other vehicles approaching the intersection from said opposite direction shall yield to the driver making the left turn." From what we have said it will appear at once that when the plaintiff entered the intersection the defendant had not entered it and did not enter until some time later. When the plaintiff started forward he gave the signal indicating that he was going to make a left-hand turn. Under these facts "said driver (the plaintiff) having so yielded and having given a signal when and as required by law may make such left turn and other vehicles (the defendant) approaching the intersection from said opposite direction shall yield to the driver making the left turn." It is next contended that the plaintiff deliberately and recklessly proceeded into the path of defendant's car while looking backward and relying upon defendant to avoid the accident. There was testimony that the plaintiff looked back; however, from the entire context we think the language had a different meaning than as claimed by the defendant. The plaintiff testified that he looked from side to side. In doing that manifestly he looked to the right, then to the left and back to the right, or back to the left; but he flatly denied that he looked to the rear. It is again contended that the plaintiff recklessly proceeded into the path of danger. Unquestionably that point could be plausibly presented to the trier of the facts. However, it could also be contended that when the plaintiff first became aware of any approaching danger an emergency confronted him. In view of the verdict of the jury we must assume the jury adopted the latter theory and did not hold the plaintiff responsible for having erred in judgment when acting in an emergency. Again, it is contended that the plaintiff relied upon the defendant to avoid the accident. As we understand the record the defendant is addressing himself to the testimony of the plaintiff when the plaintiff was testifying regarding his actions at the time the emergency confronted him. If we are correct in assuming such to be the fact, it is settled law that the question of negligence or nonnegligence under such circumstances was peculiarly addressed to the jury and that the jury was justified in not hold-

ing the plaintiff to the same degree of discretion when acting in an emergency as when no emergency existed.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; OGDEN, Justice pro tem.

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134 Cal.App. 125

PEOPLE v. RALEIGH.

Cr. 1735.

District Court of Appeal, First District, Division 1, California.

Sept. 7, 1933.

Criminal law ⚷1182.

Where no oral argument or brief was presented on behalf of appellant, order appealed from was affirmed.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

William J. Raleigh was convicted of attempting to commit robbery of the first degree, judgment of conviction was affirmed, motion to suspend execution of the judgment was denied and defendant appeals.

Affirmed.

William J. Raleigh, in propria persona and Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

PER CURIAM.

The defendant was convicted of an attempt to commit robbery of the first degree and sentenced to imprisonment in the state prison. He appealed, and the judgment of conviction and order denying his motion for new trial were affirmed. People v. Raleigh (Cal. App.) 16 P.(2d) 752. Thereafter he applied for probation, and after a full hearing his motion therefor was denied. Two days later defendant's present counsel, who had been substituted shortly after the order was made denying the application for probation, appeared in defendant's behalf and moved said court "to suspend the execution of the judgment." The motion was denied; and thereupon he gave notice of appeal and demanded the preparation of a transcript, which was accordingly prepared, certified, and filed in conformity with all legal requirements. The appeal was called for hearing in this court, but no oral argument was presented on behalf of the defendant. Time was given to file a brief, but none has been presented or filed.

Therefore, since no grounds have been urged in support of the appeal, the order appealed from is affirmed.

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134 Cal.App. 155

PEOPLE v. ABDULLAH.

Cr. 2418.

District Court of Appeal, Second District, Division 2, California.

Sept. 12, 1933.

1. **Criminal law** ⚷678(½).

In rape prosecution, prosecutor had duty of naming, identifying, and proving specific act within statute of limitations for every count charged.

2. **Rape** ⚷51(1).

In rape prosecution, evidence identifying specific acts charged *held* insufficient to sustain conviction.

3. **Rape** ⚷38(1).

In rape prosecution, striking testimony of accused's wife that she was home part of day designated in information as time of one of specific acts charged and nothing occurred, on ground that witness was not present all of time, *held* error.

> Striking wife's testimony was error, since about only way accused could defend himself, aside from his denial, was to show the unlikeliness of the truth of the accusation by showing that others were present at the time alleged or that he was elsewhere, and while the testimony was not conclusive, the time could perhaps only be covered by piecing together the testimony of many.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Ahmed Abdullah was convicted of rape, and he appeals.

Reversed and remanded for retrial.

Paul Barksdale D'Orr, Thomas A. Reynolds, A. L. Abrahams, and Frank H. Love, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

STEPHENS, Justice.

Ahmed Abdullah was convicted by the court sitting without a jury of two charges of rape upon a minor female person. Thereafter his motion for a new trial was denied and judgment was pronounced. He appeals from the judgment and from the order denying said motion.

The girl's father, a widower, worked for appellant and lived with his daughter, a younger son, and a woman housekeeper in a house on appellant's premises, quite close to the latter's residence. Appellant operated a health farm or conditioning establishment on the outskirts of Los Angeles and lived on the place with his wife. At the trial an array of men and women of known probity and standing testified to their long acquaintance with appellant and to his good reputation. At the time of trial the complaining witness was enceinte. She testified with great diffidence, and a perusal of the transcript reveals the fact that her story was produced largely from leading questions to which answers in the negative or the affirmative were given. Many times her answers were simply, "I don't remember." The story briefly was that appellant came to the house in which the girl lived and, standing by the kitchen door, told her that he wanted her to be his sweetheart—that girls of her age could be married, or something to that effect. The housekeeper said she overheard this conversation, which was about if not quite all of the corroborating testimony in the case. Thereafter the girl went to appellant's house and the two had intercourse, which was repeated several times through the succeeding months, sometimes at appellant's home and sometimes at the girl's home.

While the prosecuting witness was being examined in chief appellant's counsel made the motion that the district attorney elect as to the specific acts, but the court denied the motion with the expression, "Any time within the three years. The specific date is not essential in this type of case." Later, however, the prosecutor elected to stand on two specific acts, in the following language: "We will elect as to these offenses, one in June and one in the fall; it is alleged September 25th, the date, and the court stated any time within three years, but if I understand counsel's position we have to elect as to the specific offense, so those will be the two specific offenses." The year is not mentioned, but the year 1932 must have been intended, for the immediately preceding questions referred to "last fall" and "last spring," and the date of questioning was April 28, 1933. This is made certain later on, when the district attorney specifically explained that counsel had mistaken his dates and that he referred to June, 1932. No doubt counsel was misled, because the information fixed the date as of June 1, 1931. The main point raised by appellant is that neither of these specific acts has been proved.

[1] The prosecutrix was fourteen years old on November 22, 1932, and testified that the illicit relations began when she was twelve, or after November 22, 1930, her twelfth birthday. The information was filed February 9, 1933. It is clear that the three years' statute of limitations to which the court evidently referred in his ruling had not run. But the prosecutor had a greater duty than to produce general evidence of a series of acts extending over a period running into years. People v. Elgar, 36 Cal. App. 114, 171 P. 697; People v. Castro, 133 Cal. 11, 65 P. 13; People v. Currie, 16 Cal. App. 731, 117 P. 941. He had the duty of naming, identifying, and proving a specific act within the statute of limitations for every count charged. The reason for this, as definitely held in numerous authorities by which we are bound, is well expressed in appellant's brief: "The policy of the law in these dangerous cases, so easy to charge and so difficult to meet, is sternly opposed to general statements, * * * and it is only where the acts are moored to some date or circumstance that the defendant can be expected to meet them. * * * A man charged with such a serious crime is entitled to an opportunity to defend and not merely to deny." As above stated, the evidence of the prosecuting witness in this case is to the effect that the illicit relations extended over a period beginning either in the fall of 1930 or the spring of 1931, and continuing into the fall of 1932. She does not remember how many acts there were, and although testifying upon the specific question that there were more than one, more than two, more than three, a reading of the testimony conveys the idea that there had been many. Parenthetically we may remark that the continued relation for so long a time without discovery between this mature man and this ignorant child just budding into puberty would be very remarkable; the more remarkable too when it is considered that several people lived in appellant's home and many visited the place daily, and more remarkable when we consider that the relation was begun, if we may believe the housekeeper, following certain suggestive remarks by appellant to the girl—a plain warning.

[2] We shall proceed to examine the testimony as to the identification of the acts upon which the district attorney requested judgment of guilt. In all of the prosecutrix' testimony up to the request by appellant's counsel for an election of acts there is not a word as to a specific act; it is all general. Immediately afterwards her attention was drawn to the beginning of school in the fall of 1932. She answered "September." Every school child remembers the starting of school. She was not then asked if she remembered anything that happened about that time, but the specific, all-including question was put to

her: "Now, about the time you started back to school did you have an act of sexual intercourse with Mr. Abdullah?" Her answer was, "Yes, ma'am."

"Q. Where did that take place? A. I don't remember.

"Q. Well, did it take place at any other place than in Mr. Abdullah's house or in your house? A. No, ma'am."

Then came the same sort of questioning regarding the closing of school in the spring, a circumstance also well remembered by any child. The answer was "June," followed by the same question containing the same suggestion, to which the same affirmative answer was given and the same lack of memory shown as to place. It may be said that appellant's counsel should have objected to this method of examination. The answer is that he did object at the beginning of the examination and his objection was overruled. It is evident that the court and counsel were saving the child from further anguish, but in doing so a substantial right of the defendant was being neglected.

We think the evidence as to these specific acts was so unsubstantial as to amount practically to no evidence at all. No circumstance is mentioned that designates any one particular act. It is almost definite proof that the prosecutrix was not indicating one specific remembered act, when she could not remember whether it happened at her house or appellant's house. There is not a circumstance surrounding or concerning the act related that indicates a memory of any identical act near or at the period designated by the district attorney.

[3] This is a sad case. The little girl was obviously imposed upon by some one. The court's remarks at the conclusion of the trial are significant: "I think there was sufficient foundation, plenty of opportunity. The witnesses who testified were general in their remarks as to time and place. The child was scared. I have heard many of these cases and we have to come as near as we can. They saw them at about the time the act took place." These remarks strongly indicate that the court recognized the indefiniteness of the evidence, but that it still regarded the proof sufficient without identification of the specific acts if the proof of a series of acts fell within the period of statutory limitation. If there was opportunity for the act with appellant, the evidence indicates that ample opportunity was open to others, who could with equal definiteness have been accused. The remarks indicate an abiding doubt in the court's mind—"We have to come as near as we can." This is not the equivalent of proof beyond a reasonable doubt. The only support for the last statement of the court, "They saw them at about the time the act took place," is the housekeeper's testimony that she saw appellant and the prosecutrix together at the kitchen door and heard him ask her to be his sweetheart. This was before the first act and could not have related to either of the alleged acts specified by the district attorney. Gladys Abdullah, wife of appellant, testified that she was home a part of one of the days designated in the information and that nothing of the kind testified to by the prosecutrix occurred. The court struck this testimony out, saying that the witness was not present all of the time and consequently that it developed nothing. This was error. About the only way defendant could defend himself beyond his own denial was to show the unlikeliness of the truth of the accusation by showing that others were present at the time alleged or that he was elsewhere. The evidence was not conclusive, but the time could perhaps only be covered by piecing together the testimony of many.

We are impressed with the idea that the court was affected by the extreme pitifulness of the child's plight and in the emotion of the situation unwittingly overlooked substantial rights of the accused.

The judgment and order on both counts are reversed and the cause remanded for retrial.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

134 Cal.App. 123

PEOPLE v. NORMANDIE et al.

Cr. 1722.

District Court of Appeal, First District, Division 1, California.

Sept. 7, 1933.

Criminal law ⚷1182.

Conviction of burglary in second degree must be affirmed, where sustained by evidence and accused's counsel had not called attention to any error.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Oliver Normandie and William Cayhill were convicted of burglary in the second degree, and they appeal.

Affirmed.

Raine Ewell, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

PER CURIAM.

Defendants were charged with burglary. Pleas of not guilty were entered, and upon trial before a jury they were found guilty of burglary in the second degree. Counsel now appearing for defendants was thereupon substituted for the attorneys who had represented the defendants during the trial, and on behalf of the defendants he presented two motions, one for a new trial, and the other for probation, both of which were denied. Defendants were then sentenced to imprisonment in the state prison. Notice of appeal was given and request made for a transcript; and in pursuance thereof a record on appeal was prepared and certified and filed in this court. Since then counsel for defendants has done nothing in furtherance of the appeal. Oral argument was waived, and, although time was granted to file a brief, none has been filed. The transcript discloses evidence legally sufficient to sustain the judgment of conviction, and therefore, since counsel for defendant has not called attention to any error in the record, the judgment of conviction and the order denying the motion for new trial are affirmed.

134 Cal.App. 193

GENTRY et ux. v. MAXWELL.

Civ. 589.

District Court of Appeal, Fourth District, California.

Sept. 14, 1933.

Appeal and error 🔑**773(2).**

Appeal was dismissed where no briefs were filed nor appearance made on order to show cause why appeal should not be dismissed.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by I. H. Gentry and Elizabeth B. Gentry, husband and wife, against James B. Maxwell. From the judgment, plaintiffs appeal.

Appeal dismissed.

Harry W. Horton, of El Centro, for appellants.

Best & Best, of Riverside, for respondent.

BARNARD, Presiding Justice.

A printed transcript was filed on August 31, 1931. No brief having been filed by either party, this court, on its own motion, noticed an order to show cause why the appeal should not be dismissed for September 12, 1933.

No cause being shown and no appearance having been made, the appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

GREGG v. MANUFACTURERS' BLDG. CORPORATION.*

Civ. 8847.

District Court of Appeal, First District, Division 2, California.

Sept. 12, 1933.

Rehearing Denied Oct. 11, 1933.

Hearing Denied by Supreme Court Nov. 8, 1933.

1. Divorce 🔑**156.**

Reconciliation of parties to divorce suit after entry of interlocutory decree embodying property settlement agreement restores their mutual obligations without court proceedings to set aside settlement.

2. Divorce 🔑**156.**

Evidence in widow's action for her husband's death *held* to sustain trial court's findings that plaintiff and deceased became reconciled after entry of interlocutory divorce decree embodying property settlement agreement.

3. Appeal and error 🔑**1050(1).**

Erroneous admission of plaintiff's testimony in action for her husband's death that they considered property settlement agreement, embodied in interlocutory divorce decree, void after their reconciliation, *held* not prejudicial to defendant, in view of other evidence.

4. Appeal and error 🔑**1010(1).**

Trial court's fact finding, supported by sufficient evidence, will not be disturbed on appeal.

5. Appeal and error 🔑**1010(1).**

Defendant's contention that it was not liable for death of one falling down elevator shaft because of trial court's finding that it used ordinary care required in operation of freight elevator *held* not available on appeal, where trial court found on sufficient evidence that elevator was for passengers.

6. Appeal and error 🔑**1010(1).**

Absence of evidence in action for death of one falling down elevator shaft that burr was on doorlatch before accident *held* not to warrant reversal of judgment for plaintiff on ground that such defect was not discoverable on careful examination, in view of evidence of other defects.

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*Rehearing denied and opinion modified 25 P.2d 1014.

7. Death 🔑58(1).

It will be presumed in death action that decedent used due care for his own safety and was not contributorily negligent, in absence of direct evidence on such question.

8. Landlord and tenant 🔑169(4).

Res ipsa loquitur doctrine *held* applicable in action against building owner for death of tenant's employee by fall down elevator shaft because of failure to keep elevator in repair, in absence of claim that others than defendant and its agents exercised control over elevator, changed apparatus, or put it to unintended use.

9. Negligence 🔑121(3).

Inference of negligence, created by res ipsa loquitur doctrine in action for death of one falling down elevator shaft, *held* not overcome by positive testimony, in view of evidence that elevator door was out of repair and locks inefficient.

10. Landlord and tenant 🔑169(6).

Building owner *held* liable for death of tenants' employee, falling down elevator shaft, though not insurer required to exercise such care as would absolutely prevent accident, in view of evidence that elevator door was not in proper repair.

11. Negligence 🔑121(3).

Plaintiff properly relying on res ipsa loquitur rule to recover for death of one falling down elevator shaft was not bound to prove defendant's knowledge of facts sufficient to put it on notice that elevator door was out of repair.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Anna M. Gregg against the Manufacturers' Building Corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

W. N. Mullen, of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal from a judgment for the plaintiff in an action for damages for personal injuries.

On the 7th day of February, 1931, Oliver T. Gregg was employed by the Standard Plating Works, a corporation, at 288 First street, San Francisco. He had been employed by that company for about four years in the lacquer spraying room on the fourth floor of the annex to the building. On the morning mentioned he died as the result of injuries received at about 8 o'clock when he fell into the elevator shaft. The deceased had been accustomed to take the elevator to and from his place of employment. He was a married man, and left him surviving Anna M. Gregg, his wife. The husband was at the time of his death about forty years of age and the plaintiff forty-one years of age. They were married on the 1st day of June, 1927. There were no children of the marriage.

At the time of the death of the deceased, the defendant, the Manufacturers' Building Corporation, was the owner of the building which contained the elevator shaft in which the accident happened. There were in the building two elevator shafts. One was in the front part of the building, and in that shaft an elevator was operated for passengers only. In the rear of the building was another elevator shaft which was equipped with automatic devices, and at times was used for freight, and at other times four of the employees of the Standard Plating Works used that elevator for the purpose of going to and coming from their work. The Manufacturers' Building Corporation had a contract with Spencer Elevator Company under which the latter serviced and maintained the elevator last mentioned. That elevator was used by the three tenants and their employees. Jesse Seward, an employee of one of the tenants, was authorized to act as safety man. If the lights in the elevator went out, he replaced them; if other repairs became necessary, he notified the Spencer Elevator Company, and it attended to such repairs. On the morning of the accident, and shortly prior thereto, the deceased was seen on the first floor passing toward the door of the elevator. Shortly afterwards one of the witnesses saw two hands extended and going down the elevator shaft. Those were the hands of the deceased. The elevator in question was so constructed that the elevator door would not open if the apparatus was in proper working condition when the elevator was not at that floor. When the elevator left any floor going up or coming down, the elevator was so constructed that the doors automatically closed. If the closing was effective, the doors could not be opened until the elevator was again brought to that floor. The elevator was equipped with lights, and, when it was opposite a certain floor, the light was visible through the translucent pane of glass located in the outer door. There was also an inner door constructed of lattice work, but it did not greatly obstruct the rays of light. At the time of the accident, the elevator was at the fourth floor. One desiring to use it could do so from the first floor only by manipulating a rope which extended up and down to the left of the elevator door. About sixteen hours before the accident the representative of the Spencer Elevator Company inspected the elevator. After the accident had happened, W. J. Cove, the deputy state inspector, and certain other experts, soon went to the building to make another inspection. Immediately after the accident, and when the elevator was examined, the lights were burning. When the experts were making their examination, they examined the apparatus for the purpose of seeing whether the doors locked at the first floor when the elevator was moved. On some tests the doors locked and on some tests they did not. On one occasion they forced the lock to open. Thereafter in making a careful examination they found a burr on the latch tongue of the lock. As to when that burr was created the evidence did not accurately disclose. When the burr was removed, the locking device operated properly.

The plaintiff brought this action as the surviving widow of the deceased. It was tried before the court sitting without a jury, and it made findings against the defendant and fixed the damages in the sum of $14,000. The defendant made a motion for a new trial, which was denied, and thereupon it appealed from the judgment.

[1-3] The first point made by the defendant is that the judgment was excessive. In this connection it calls to our attention that the plaintiff and deceased were unhappily married; that the plaintiff's husband was cruel to her; that he was not affectionate toward her; that he stated he did not love her; and that for several weeks in the year 1930 he did not live with her. Continuing, the defendant states that the plaintiff commenced an action for a divorce and an interlocutory decree was entered on September 13, 1930. Prior to the entry of the decree the parties entered into a property settlement agreement. The decree was based on the grounds of extreme cruelty, and by the terms of the decree the property settlement agreement was approved and made a part of the decree. Prior to the date of the accident no proceeding had been brought in court to set aside the interlocutory decree, but there was testimony that the parties had been reconciled and were living together as man and wife on the day of the accident. The plaintiff testified over the objection of the defendant that the parties had considered the property settlement as null and void. In reply, the plaintiff calls to our attention that during the trial she took the stand as a witness in her own behalf and gave evidence which, if the trial court believed it, clearly sustained the findings made by the court. In this connection she testified that for several weeks immediately preceding the accident she and the deceased were living together as man and wife. In corroboration of her testimony, she also produced the evidence of some of her neighbors who testified to facts tending to corroborate her testimony. In making this point, the defendant lays much stress on the property settlement and the fact that no court proceeding had been brought to set it aside. No doubt a court proceeding is one proper method, but it has been held that, if the parties become reconciled, their mutual obligations are, for the time being at least, restored. Gould v. Superior Court, 47 Cal. App. 197, 200, 201, 191 P. 56; Estate of Boeson, 201 Cal. 36, 42, 43, 255 P. 800. In short, the evidence on the point was such that the trial court might have found the fact either way; but it may not be said the finding that the plaintiff and deceased had become reconciled is not sustained by the evidence. As a part of this point, the defendant also complains of one ruling on the admission of evidence. It asserts that the plaintiff should not have been allowed to testify that the husband and wife after the reconciliation considered the property settlement agreement as null and void. That contention is not without merit. However, if we take into consideration all of the other evidence which was properly admitted, it is perfectly clear the error complained of is not shown to be prejudicial.

[4] It is next contended that the trial court erred in making a finding that the elevator was a passenger elevator. It is claimed that it was a freight elevator. As presented in this case, the point was solely a question of fact which the trial court found against the defendant on an abundance of evidence tending to support the finding. Wilmarth v. Pacific Mut. Life Ins. Co., 168 Cal. 536, 143 P. 780, Ann. Cas. 1915B, 1120; 10 Cal. Jur. 211.

[5] Still contending that the instrumentality was a freight elevator, the defendant asserts that it was bound to exercise only ordinary care, that the trial court found it used ordinary care, and therefore the defendant was not liable. However, as we have just shown, the finding is that it was a passenger elevator, and the last assertion need not be further considered.

[6] Calling attention to the burr hereinabove mentioned, the defendant asserts that the defect was not discoverable upon careful examination. If the presence or nonpresence of the burr was the determining feature of the case, the point would require further consideration, because, as we have shown above, there was no evidence that the burr was on the latch before the accident happened. But there was other evidence of other defects. Instead of the burr being the cause of the accident, there was evidence that the doors had sagged, and that the sagging of the doors interfered with the latching of the lock. There was also evidence that the lock on the door was not the safest device; but that there is an improved type of lock by the use of which the contact is broken unless the door locks and the elevator cannot be operated at all.

[7] The next point made by the defendant is that the decedent was guilty of contributory negligence as a matter of law. That is

an affirmative defense. As shown above, no witness saw anything except two hands going down the shaft. There was not therefore any direct evidence that the decedent was or was not guilty of contributory negligence. If we resort to indirect evidence, then it must be conceded at once that it will be presumed the decedent used due care for his own safety, and, secondly, it will be presumed that he was not guilty of contributory negligence. In the case of Jacobi v. Builders' Realty Co., 174 Cal. 708, at page 710, 164 P. 394, 395, L. R. A. 1917E, 696, speaking of a self-locking automatic elevator, the court said: "Specifically, as to this elevator, there was no attendant, nor even any sign to warn a passenger of this defect either in its construction or operation, or both. No person using it was informed that a door which was presumed to be tightly locked unless the cage was at its floor could be opened when it was not there. Ignorant of this, persons intending to use the elevator came to rely, and to a certain extent were entitled to rely, upon the fact that if they could open the door at all it would be because the cage was there." And thereafter the court stated as follows: "Under its second proposition appellant contends that the negligence of the deceased is established by virtue of the fact that if on opening the door she had used her eyesight, as she was in duty bound to do, she would have perceived that the cage was not there, and that it was therefore contributory negligence upon her part to have made the fatal step. We have hereinbefore sufficiently outlined the course of conduct which the deceased doubtless pursued, and also the conditions which prompted her to that course of conduct. It has thus been made to appear, and indeed the positive evidence is to that effect, that people, using such an elevator and finding that in general practice when such an elevator was operating properly a door could not be opened unless the cage was at that floor, had come to rely, in determining the presence or absence of the cage, upon their ability or inability to open the door. The deceased unquestionably opened this door or found it open. In either case (there being no attendant to warn or any other kind of warning given) it was not at least unnatural that she should have placed reliance upon the conditions which she found. Whether under these circumstances she should also have looked, or be convicted of negligence, presents a question of reasonable argument before a jury, but one which cannot be resolved against plaintiffs as matter of law. The language of the Supreme Court of New York is here appropriate: 'An elevator for the carriage of persons is not, like a railroad crossing at a highway, supposed to be a place of danger to be approached with great caution; but, on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen, or make a special examination.' Tousey v. Roberts, 114 N. Y. 312, 11 Am. St. Rep. 656, 21 N. E. 399." A similar ruling was made as to an elevator having an inside door as well as an outside door and a light within the elevator. McKeon v. Lissner, 193 Cal. 297, 304, 223 P. 965; and, see, Chambers v. Slattery, 147 Wash. 538, 266 P. 185, 57 A. L. R. 959, and notes.

[8-11] In its closing brief the defendant states that there is no evidence to support the finding that defendant did not use the utmost care and diligence of very cautious persons. This point is broken into several. (a) It claims that the doctrine of res ipsa loquitur does not apply in this case because the elevator was used indiscriminately by the employees of all three tenants. However, it is not asserted that any one excepting the defendant and its duly authorized agents attempted to exercise any control excepting to push the buttons, pull the rope, and ride in the elevator. These things the tenants and their employees were invited to do. Moohr v. Victoria Inv. Co., 144 Wash. 387, 258 P. 43; Moohr v. Victoria Inv. Co., 146 Wash. 251, 262 P. 643; Johnson v. Hopkins, 213 Ala. 492, 105 So. 663. If any one of such persons changed, or attempted to change, the apparatus in any respect, or to put it to a use for which it was not intended, the claim now made has authority to support it. Scellars v. Universal Service, 68 Cal. App. 252, 256, 228 P. 879; White v. Spreckels, 10 Cal. App. 287, 101 P. 920. However, there is no evidence in this case of any such interference. The plaintiff's complaint was based solely on the fact that the elevator was not kept in repair. Under that theory the doctrine of res ipsa loquitur was applicable. McKeon v. Lissner, 193 Cal. 297, 223 P. 965; Id., 87 Cal. App. 371, 262 P. 459. (b) It is next asserted that, even if the doctrine of res ipsa loquitur did apply, the inference created by the doctrine was overcome by positive testimony, and therefore, there was no evidence upon which to base the finding in question. The defendant cites and relies on Stott v. Southern Sierras Power Co., 47 Cal. App. 242, 190 P. 478. In that case the court was at pains to point out that the evidence introduced showed that the defendant had installed the very best equipment that money could buy, and that it had carefully inspected. Whereas, in this case, as indicated above, there was evidence that the door was out of repair and in a sagging condition and that the locks were not efficient. (c) The next assertion is closely akin to the last one. It is to the effect that the defendant was not an insurer. It is not claimed to the contrary. If the evidence had shown without conflict that the elevator was in proper repair, was properly equipped, and also had been properly inspected, then the contention now made would have found support under the authority of Stott v. Southern

Sierras Power Co., supra. (d) It is then asserted that it was not the duty of the defendant to exercise such a degree of care as would absolutely prevent accidents. That statement is but another manner of making the claim that the defendant was not an insurer. (e) Finally it is claimed that, unless it is held that the mere happening of the accident is sufficient to sustain the finding, then it was incumbent upon plaintiff to prove that defendant had knowledge of facts sufficient to put it upon notice. The plaintiff relies, and we think properly, on the rule of res ipsa loquitur. O'Connor v. Mennie, 169 Cal. 217, 227, 146 P. 674.

It is next asserted that the manner of inspecting and servicing an elevator is a matter for expert testimony. We do not understand that the plaintiff contends to the contrary. The record discloses no ruling by the trial court conflicting with the defendant's assertion.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; OGDEN, Justice pro tem.

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134 Cal.App. 111

WOODS LEASING CO. v. FUNCHEON et ux.

FUNCHEON et ux. v. WOODS LEASING CO. et al.

Civ. 1057.

District Court of Appeal, Fourth District, California.

Sept. 6, 1933.

1. Evidence ⚷383(7).

Recital in order for reconveyance signed by mortgagee that mortgage note was fully paid *held* not conclusive.

2. Chattel mortgages ⚷162.

Where owner placed deed to chattel mortgagee in escrow making return of deed dependent on owner's performance of certain conditions, upon owner's violation of such conditions, chattel mortgagee could take possession of mortgaged property under mortgage default clause notwithstanding escrow period had not expired, as against assignee of owner's right in property who received no assignment of owner's rights under escrow agreement.

3. Chattel mortgages ⚷169.

Mortgagee's delay in selling chattels seized or foreclosing mortgage *held* not conversion rendering mortgagees' original taking of possession unlawful.

4. Chattel mortgages ⚷235.

Evidence *held* not to support finding that chattel mortgage note was paid, so as to make mortgagee's seizure of chattels a conversion.

5. Chattel mortgages ⚷219.

Chattel mortgagees, who were orally informed of sale of mortgaged chattels and recognized purchasers and accepted payments from them, could not question legality of sale for lack of written notice (Pen. Code, § 538).

Appeal from Superior Court, San Diego County; A. C. Finney, Judge.

Action by the Woods Leasing Company against Glen Funcheon and wife, wherein defendants filed a cross-complaint against plaintiff and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Herbert C. Kelly, of San Diego, for appellants.

Stearns, Luce & Forward and Fred Kunzel, all of San Diego, for respondent.

MARKS, Acting Presiding Justice.

In January, 1931, the plaintiff, Woods Leasing Company, instituted its action against Glen and Mary E. Funcheon to recover possession of the furniture and furnishings of the Aztec Court in the city of San Diego, or their value, together with damages for their detention. The action was founded upon its alleged ownership and right of possession of the personal property. The answer of the defendants denies the ownership and right of possession of the plaintiff and alleges right of possession in themselves under the terms of a chattel mortgage. They filed a cross-complaint seeking to foreclose the chattel mortgage, alleging an unpaid balance of $34,634.79 due upon a promissory note secured by this chattel mortgage. The trial court gave judgment for the plaintiff for the possession of the personal property, or, in case possession could not be had, its value in the sum of $1,500, together with $1,500 damages for its wrongful detention.

As we view the case, it will finally turn upon the question of whether a finding of the trial court that the promissory note described in the cross-complaint had been fully paid, satisfied, and discharged, is supported by the evidence. The facts presented by the record are so involved that they require more detailed recitation than in the ordinary case.

In June, 1927, the defendants built and furnished the Aztec Court on property which they owned in the city of San Diego. The total cost of the furnishings, purchased new, at that time was $6,013.83. They borrowed the sum of $17,500, which was secured by a first mortgage on the real estate. A year and a half later, in December, 1928, they sold the real and personal property to Neal D. and Edna R. Wagar, subject to the prior incumbrance, and as a part of the purchase price received a promissory note in the sum of $36,353.58, which was secured by a deed of trust on the realty, and a chattel mortgage on the furnishings. The chattel mortgage recited that it was given as "further security" for the payment of the note. Mr. and Mrs. Wagar entered into possession of the apartment court and seven months later, in July, 1929, sold the real and personal property to J. H. and Abbie R. Logeman. In the deed and bill of sale it was recited that the sale was subject to the incumbrances which we have mentioned, as well as certain other liens such as taxes and local improvement assessments. Mr. and Mrs. Logeman and their successors did not assume or agree to pay any of the incumbrances. The note, secured by the deed of trust and chattel mortgage, was by its terms made payable in installments. These installments were to be applied, first, on the accrued interest, and, second, the balance on the principal. The last installment was paid in October, 1929. In December, 1929, there were delinquent installments on the promissory note secured by the deed of trust and chattel mortgage, interest on the promissory note secured by the first mortgage, taxes, local improvement assessments, and bills for water and electric light. The holder of the first incumbrance was pressing for payment of the delinquent interest, and the water and electric lights were about to be shut off because of the delinquency in these bills. Glen and Mary Funcheon and A. D. Logeman, son and attorney in fact for J. H. and Abbie R. Logeman, had various conferences concerning the situation in December, 1929, which resulted in their entering into an escrow agreement whereby Mr. and Mrs. Logeman deposited a deed to the property to Glen and Mary Funcheon and agreed to pay all unpaid installments of interest, principal, taxes, local improvement assessments, and other bills within sixty days and apply all income from the property on these items of indebtedness. If all such were paid, it was agreed in the escrow instructions that the deed would be returned to Mr. and Mrs. Logeman, otherwise it would be delivered to the defendants. Mr. and Mrs. Logeman collected the rents from the premises and retained them. They made no payments on any of the items mentioned. The defendants were compelled to pay $900 interest on the promissory note for $17,500, and to make other payments in an amount not disclosed for water, electric lights, and taxes. About the middle of January, 1930, the Logemans entered into negotiations with George W. Wood, the president and manager of the Woods Leasing Company, for a sale of the property. This resulted in Mr. and Mrs. Logeman executing a deed to the real estate to Lewin A. Wood, and a bill of sale to the personal property to George W. Wood, who also received a lease on the Aztec Court executed by Mr. and Mrs. Logeman, for both of which they received $500. George W. Wood and Lewin A. Wood, who were brothers, immediately conveyed to the Woods Leasing Company, which took possession of the Aztec Court. The defendants, Glen and Mary Funcheon, learned that A. D. Logeman, who was operating the property for his parents, had vacated it, and they took possession of the court and the personal property here in question. Thereupon the Woods Leasing Company served a notice upon the defendants that it had acquired title to the real estate and the personal property and demanded that possession be delivered to it. This was refused.

On February 9, 1930, the deed from Mr. and Mrs. Logeman was delivered by the escrow holder to Glen and Mary Funcheon and recorded. This was subsequent to the recordation of the deed from Mr. and Mrs. Logeman to George W. Wood and his deed to the plaintiff. All of the conveyances and bills of sale from Mr. and Mrs. Wagar to Mr. and Mrs. Logeman, Mr. and Mrs. Logeman to George W. Wood and Lewin A. Wood, and from George W. Wood and Lewin A. Wood to the Woods Leasing Company, recited that they were made subject to the mortgage, deed of trust, and chattel mortgage which we have mentioned.

It appears that at a date not disclosed some one, probably either Mr. and Mrs. Wagar or Mr. and Mrs. Logeman, had placed a third incumbrance in the form of a deed of trust on the property to secure a promissory note in the sum of $1,000. This incumbrance was foreclosed and the property conveyed to Helen Clemmons by trustee's deed on May 26, 1930. Helen Clemmons deeded the property to Glen and Mary Funcheon on August 15, 1930. On the same date the defendants signed an "order for full reconveyance" directed to the Union Trust Company of San Diego, the trustee named in their deed of trust, requesting a reconveyance of the property to the party or parties entitled thereto. In this instrument it was recited "that said note, together with all other sums and indebtedness secured by said deed of trust has been fully paid and satisfied." The note was delivered to the trustee and marked "canceled."

The chattel mortgage contained the following proviso: "It is also agreed, that if the mortgagors shall fail to make any payment as in the said promissory note provided, then the mortgagees may take possession of the said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount in said note specified, and all costs of sale, including counsel fees not exceeding ——— per cent, upon the amount due, paying the overplus to the said mortgagors; all of said costs, including said counsel fees, being hereby secured."

Uncontradicted evidence shows that no money was paid to the defendants other than the sum of $3,591.10, which was paid in installments on the principal and interest on the note to Glen and Mary Funcheon in 1929. Plaintiff contends that the recital in the order for reconveyance, signed by the defendants, to the effect that the note and indebtedness secured by the deed of trust had been paid and the conveyance by Mr. and Mrs. Logeman of the real property to the defendants, must be construed as a full payment of the principal and interest on the note, and that these facts and the inferences to be drawn from them support the finding of the trial court that the indebtedness secured by the chattel mortgage had been fully paid.

The only evidence offered by plaintiff, other than the written instructions, of the intent of Mr. and Mrs. Logeman and the defendants in entering into the escrow agreement of December, 1929, concerning the deed which was delivered to the defendants in February, 1930, is found in the following testimony of A. D. Logeman:

"Q. Now, will you state the circumstances under which you placed this deed—executed these escrow instructions and placed the deed in escrow? A. Well, we was back on the payments to the court somewhat, and Mr. Funcheon threatened to foreclose, and also threatened to tie up other property we had here.

"Q. That who had here? A. My father and mother.

"Q. Yes. A. And I thought it best to deposit the deed. He agreed to release me from all obligations if I would deposit the deed.

"Q. Now, who do you mean by 'we'? A. My father and mother and myself.

"Q. All right. He agreed to release your father and mother from all obligations if you deposited the deed? A. Yes, sir.

"Q. And that is why you deposited it? A. That is why I deposited it."

In this connection it should be observed that the Logemans had assumed no obligation to pay the $17,500 first incumbrance or the $36,353.58 second incumbrance on the real property.

In the cross-complaint it was alleged that the only payments made upon the promissory note of Mr. and Mrs. Wagar were in the sum of $3,591.10, and it was sought to foreclose the chattel mortgage for a balance of $34,634.79. No credit was given for the value of the equity in the real property acquired by the defendants, Glen and Mary Funcheon, under the deed from Mr. and Mrs. Logeman, and of course credit should be given for the clear market value of this property thus conveyed. The only evidence of this value is contained in the testimony of Glen Funcheon. Placing a construction upon this most favorable to the Woods Leasing Company, it would leave the clear market value of the property so conveyed in the sum of about $29,000, which would leave a balance of about $5,000 unpaid on the principal and interest then accrued on the promissory note secured by the chattel mortgage. This chattel mortgage was never released.

We have studied the record carefully, and have concluded that the net result of the judgment rendered in this case is to deprive Glen and Mary Funcheon of personal property for which they had not been paid and which originally cost them $6,013.83, besides mulcting them of $1,500 for its use from the time they took possession in January, 1930, until the trial of the action.

The evidence clearly fails to support the finding of the trial court that the note for $36,353.58 has been paid unless the recital in the request for reconveyance signed by defendants on August 15, 1930, that it had been fully paid precluded them from proving the actual fact of partial and not complete payment.

[1] It has been repeatedly held that the marking of a promissory note "paid" is not conclusive evidence of payment, nor is a receipt in full conclusive that an account has been actually paid. The parties may prove the true facts. Gnarini v. Swiss American Bank, 162 Cal. 181, 121 P. 726; Barling v. Weeks, 4 Cal. App. 455, 88 P. 502; Breslauer v. McCormick-Saeltzer Co., 31 Cal. App. 284, 160 P. 251. We cannot see why the same rule should not apply to the facts of this case, especially since the statement in the request for reconveyance, that the note had been paid, was made to the trustee merely for the purpose of securing a reconveyance of the property described in the deed of trust and clearing its title. Certainly the plaintiff and its predecessors in interest were not injured by this statement upon which they could not have relied, as it was made long after their rights to or in the real and personal property, if any, had become fixed. Glen and Mary Funcheon should have the right to explain the true nature of the transaction.

[2] Plaintiff urges that, because of the extension of the sixty days given by the escrow instructions of December, 1929, to Mr. and Mrs. Logeman within which to pay the delinquent portions of their obligations, there was no default under the terms of the note and chattel mortgage, modified by this agreement, when defendants took possession of the personal property, and that such taking was therefore a conversion. The Logemans assumed certain obligations under the terms of this extension, if such it can be called, none of which they performed. One was to pay all the rents collected on the delinquent items of indebtedness. This they did not do. They col-

lected the rents and kept them. For a small consideration they conveyed all their interest in the real and personal property to third parties who had notice of all incumbrances, and vacated the premises, thereby evidencing an intention to repudiate and not to perform their part of the obligations. Mr. and Mrs. Logeman are not now attempting to assert any rights under the so-called extension agreement. They sold their interest in the real estate and furnishings, but did not assign their rights under this agreement. Plaintiff is now attempting to take advantage of its terms without an assignment of the benefits or assumption of the obligations of this agreement to which it was not a party. There was no privity of contract between the Woods Leasing Company and Glen and Mary Funcheon, who did not take possession of the personal property from Mr. and Mrs. Logeman, but from a stranger to the agreement, the benefits of which the stranger now claims. The notice served by the Woods Leasing Company was merely a demand for possession and contained no offer on its part to perform the obligations of Mr. and Mrs. Logeman.

Under the facts of this case we cannot conclude that the defendants were required to wait the expiration of the sixty days before protecting their rights and taking possession of the mortgaged personal property under the default clause of the chattel mortgage.

[3] Plaintiff next urges that, assuming the chattel mortgage to be in default at the time the defendants took possession, it only gave them the right to take possession so that they could immediately exhaust the security by a sale of the mortgaged property. From this it is argued that the delay in selling the chattels or foreclosing the mortgage amounted to a conversion and rendered their original taking of possession unlawful. Plaintiff relies principally upon the cases of Blodgett v. Rheinschild, 56 Cal. App. 728, 206 P. 674, Peet v. People's Trust & Savings Bank, 56 Cal. App. 46, 204 P. 413, and Peet v. People's Trust & Savings Bank, 90 Cal. App. 436, 266 P. 300, to support its theory.

The Blodgett Case was an action for the possession of an automobile and damages for its detention. The defendant was the owner of the automobile and borrowed $400 from the plaintiff at an usurious rate of interest, giving what the parties termed a "lease" on the car to secure the loan. The court held this instrument in effect a chattel mortgage. The plaintiff secured possession of the car and sold it to a third party without first acquiring title, which amounted to a conversion by him. The trial court found that the automobile was wrongfully taken from the possession of the defendant; that the plaintiff expended $138.12 in necessary repairs on the car while in his possession; that the value of the car was $550, and of its use $210; that the loan of $400 had not been repaid. Judgment was rendered giving defendant possession of the car upon his paying plaintiff the $400 loan, or, if possession could not be had, the value of the car, $550, less the $400 loan and $210 for its detention less $138.12 expended by the plaintiff in repairs. This judgment was very properly affirmed on appeal as the original taking by the plaintiff was without right and his sale of the automobile before he acquired title was wrongful. It should be borne in mind that the trial court carefully balanced the accounts of the parties so that the plaintiff was given credit for the full amount of his loan, which was not done by the trial court in the instant case. We can find nothing in the Blodgett Case necessary to its decision which supports the theory which the plaintiff is urging here.

The two opinions in Peet v. People's Trust & Savings Bank, supra, were in successive appeals in the same case. Peet was the owner of a band of cattle upon which the People's Trust & Savings Bank held a chattel mortgage securing a promissory note which became due on January 1, 1918. The bank took possession of the cattle on April 20, 1918, and, after feeding at least some of them in California for a short time, removed the herd to Arizona, where they were turned out to graze. On October 7, 1918, the indebtedness to the bank was fully paid and thereafter it tendered part of the herd to Peet, some of the cattle having died, which tender was refused. Some time later the cattle were sold for $1,600 by the bank or its successor. On February 4, 1919. Peet instituted his action for conversion of the cattle and finally recovered judgment for $3,000, which was affirmed. 90 Cal. App. 436, 266 P. 300.

There is some discussion in the first opinion (56 Cal. App. 46, 204 P. 413) of the effect of the failure of the bank to foreclose its lien for five and one-half months after it took possession of the mortgaged property and a statement that the mortgagee should foreclose its lien within a reasonable time. This is unnecessary to the decision, as it is clear that the bank's lien and right to possession terminated on October 7, 1918, with the payment of the indebtedness. There could be no possible justification for its subsequent sale of the cattle. However, we are not prepared to disagree with the rule that the mortgagee should proceed with the sale under one of the two methods provided by our law (Ely v. Williams, 6 Cal. App. 455, 92 P. 393) within a reasonable time after taking possession of the mortgaged property, as it would seem unjust to permit him to hold possession of the mortgaged property for an indefinite period, as such action might cause prejudice to the mortgagor or his successor in interest. What is a reasonable time cannot be generally defined and must depend on the circumstances of each case. Where there was no prejudice to the mortgagor caused by the delay, a period within the statute of limitations might not be held unreasonable. In the absence of authority so holding, we do not care to declare the extreme rule that mere delay, without proof of injury, to the mortgagor or his successors, for a time within the statute of limitations, would work a forfeiture of the mortgage lien and amount to a conversion of the property. A fairer rule would permit the mortgagor or his successors to prove any damage caused by an unreasonable delay and offset it against the debt, rendering judgment for the overplus should there be one.

[4] The judgment must be reversed because the finding that the note secured by the chattel mortgage is paid is not supported by any evidence, but is contrary to the meager evidence on this subject in the record. On a retrial of the cause the court should determine the clear market value of the interest in the real estate conveyed by Mr. and Mrs. Logeman to the defendants and credit the amount of this value on the chattel mortgage note. The other questions presented should be determined upon the evidence taken in accordance with the views here expressed.

[5] We cannot agree with the contention of defendants that the sale of the mortgaged property from Mr. and Mrs. Wagar to Mr. and Mrs. Logeman was rendered void by the failure to give the written notice required by section 538 of the Penal Code. The defendants were orally informed of the sale shortly after it occurred and recognized Mr. and Mrs. Logeman as purchasers and accepted payments from them for several months. Assuming, but not holding, that the sale might have been void because of the lack of the written notice, the defendants knew of the sale, treated it as valid, accepted money from the vendees, and should not now be heard to question its legality.

Judgment reversed.

I concur: JENNINGS, J.

Mr. Presiding Justice BARNARD, being absent, does not participate herein.

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134 Cal.App. 141

WEHRLE v. MARKS.

Civ. 8928.

District Court of Appeal, First District, Division 2, California.

Sept. 11, 1933.

1. Chattel mortgages 🔑6, 63, 196.

Where debtor, to secure loan, executed conditional sales contract without delivering property, contract *held*, in effect, mortgage as between parties, which was ineffective as to debtor execution creditor, where contract was not acknowledged or accompanied by affidavit and was not recorded (Civ. Code, § 2957).

2. Chattel mortgages 🔑187.

Debtor's transfer of automobile title to creditor to secure loan, without change of possession, *held* void as to rights of third party, debtor's execution creditor (Civ. Code, § 3440).

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action by Herman Wehrle against G. M. Marks, in which plaintiff obtained a judgment against defendant and in which execution issued. From a judgment denying the third party claim of the Field Finance Corporation to the property levied on, third party claimant appeals.

Affirmed.

James E. Waddell, of Oakland, for appellant.

Lynn W. Culp, Sr., and Crozier C. Culp, both of Oakland, for respondent.

STURTEVANT, Justice.

On June 16, 1922, the plaintiff obtained judgment against the defendant G. M. Marks in the superior court of Alameda county for the sum of $1,326.05. Execution issued upon said judgment on August 13, 1931, at the instance of plaintiff, and pursuant to order of court under section 685 of the Code of Civil Procedure. On August 17, 1931, the sheriff of Alameda county levied execution upon a 1928 Dodge sedan automobile, taking the same from the possession of the defendant G. M. Marks. After the said sheriff had levied and seized the said automobile, and before sale thereof, Field Finance Corporation, a corporation and third party claimant herein, on August 20, 1931, made and served on said sheriff its verified third party claim to said automobile, in which it set forth that said automobile so levied upon and held by said sheriff was the property of Field Finance Corporation, and demanding that said sheriff release to it said automobile. Thereupon plaintiff made and filed an affidavit and a bond as required by law, and delivered said bond and affidavit to said sheriff, and demanded that said sheriff proceed to sell said motorcar in accordance with law in satisfaction of said judgment. Code Civ. Proc. § 689. The sheriff thereupon sold the said automobile, and plaintiff thereupon filed its petition to try title thereto in this action. Notice of the hearing was duly given, and a hearing was had before the trial court sitting without a jury. After the evidence was in, the trial court expressed its opinion orally.

Treating that opinion as a judgment against it, the third party claimant has appealed. Both parties have briefed the case as though the trial court rendered a judgment, and that such judgment was appealable. Conceding solely for the purpose of this appeal that counsel are right in their assumption, but expressing no opinion whatever thereon, we will proceed to take up the points made by the third party claimant.

[1, 2] It is the claimant's contention the finding that the said automobile was at all times the community property of the defendant G. M. Marks and Venna B. Marks, his wife, was against the law and the evidence. No findings were made, but the point is only a different manner of saying that the trial court's ruling was not sustained by the evidence. That contention we think is not well founded. In 1925 Gus M. Marks and Venna B. Marks were husband and wife. They were then living together and the record shows that they have since continued to live together. Mr. Marks was engaged in the real estate business. He deposited his moneys in a joint account in a branch of the Bank of America. On that account both husband and wife drew checks for their living expenses, etc., and Mr. Marks drew checks on it for business expenses. Mrs. Marks owned an old automobile. In May, 1928, a new Dodge sedan was bought. The old car was turned in and the vendor accepted it as payment of the first installment, but in what sum does not appear. Other payments were made out of the joint bank account. A contract regarding the other payments was executed to the Pacific Finance Corporation, but the record does not disclose the terms of that contract. On July 2, 1930, Mr. Marks was in need of money. The claimant agreed to make the loan. Mrs. Marks at that time indorsed the pink certificate and the registration was so changed that the new certificate showed Mr. Marks to be the registered owner and Field Finance Corporation to be the legal owner. At the same time Mr. Marks and that corporation executed a conditional sales contract under which the vendee undertook to pay the vendor $330 in installments of $33.60 on September 12, 1930, and monthly thereafter; ten installments in all. At that time the Field Finance Corporation paid Mr. Marks $330 in the form of a check. The check was indorsed by him, and he delivered it to Mrs. Marks, who deposited it in the joint account. Such payments were made that on August 3, 1931, all payments excepting one had been made. However, at that time Mr. Marks needed more money. He called on the Field Finance Corporation and asked for another loan. It consented to make the loan and on that date Mr. Marks and Field Finance Corporation executed another conditional sales contract. By the terms of the latter instrument Mr. Marks undertook to pay $185 in installments of $19.97 on September 3, 1931, and monthly thereafter; ten installments in all. Thereupon $145 was paid to Mr. Marks in the form of a check. He indorsed that check and delivered it to Mrs. Marks, who deposited it in their joint bank account. Both of the conditional sales contracts were printed blanks identical in form. The blanks were filled in on a typewriter and varied only as to those insertions. Neither contract was acknowledged by either party, and no affidavit of any kind was attached to either. Mr. Marks did not part with possession of the automobile at any time, and the Field Finance Corporation never had possession of it. Furthermore, there was no evidence that the Field Finance Corporation contracts were recorded. Conceding that as between the Field Finance Corporation and Mr. Marks an attempt was made to secure the payment of the loan made by the former to the latter, such attempt was ineffective as to the rights of the plaintiff Herman Wehrle. The Field Finance Corporation did not stand in the position of a mortgagee in possession. It did not conform to the statute, and therefore did not hold a statutory chattel mortgage. Civ. Code, § 2957. Furthermore, as there was no change of possession the transfer from Mr. Marks to Field Finance Corporation, as to the rights of the execution creditor, was void. Civ. Code, § 3440. Considered as conditional sales contracts the instruments were such in form only, but in legal effect they constituted nothing but a mortgage as between Mr. Marks and the Field Finance Corporation. Commercial S. Corp. Cons. v. Lindsay Mercantile Co., 92 Cal. App. 91, 267 P. 766.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; OGDEN, Justice pro tem.

BURLINGAME v. JUSTICE'S COURT OF CITY OF BERKELEY et al.*

Civ. 9034.

District Court of Appeal, First District, Division 2, California.

Sept. 14, 1933.

Rehearing Denied Oct. 13, 1933.

Hearing Granted by Supreme Court Nov. 13, 1933.

1. Justices of the peace ⚷194(1).

One entitled to appeal from appealable order of justice's court cannot bring certiorari to annul it (Code Civ. Proc. § 1068).

2. Appeal and error ⚷138.

One who becomes party to record may appeal though not party to action.

3. Justices of the peace ⚷149(1).

One substituted as judgment debtor for one against whom default judgment was entered by justice's court became party to record and hence entitled to appeal from order granting motion for substitution though not party to action (Code Civ. Proc. §§ 982a, 983).

4. Certiorari ⚷37.

Certiorari will not issue at instance of applicant not party to action, proceedings in which are sought to be reviewed thereby.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Proceeding in certiorari by R. A. Burlingame against the Justice's Court of the City of Berkeley, County of Alameda, Oliver Youngs, Justice, to review an order granting the motion of Charles Kaufman to amend a default judgment against O. A. Burlingame by substituting petitioner as judgment debtor. From a judgment annulling the order, respondent appeals.

Reversed.

Nathan G. Gray, of Berkeley, for appellant.

John F. O'Sullivan, of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal from a judgment of the superior court in a proceeding in certiorari.

We shall refer to the parties as appellant and respondent. An action to recover rent was brought in the appellant justice's court against O. A. Burlingame and Mrs. O. A. Burlingame, his wife. The complaint and summons was served on respondent R. A. Burlingame. A return was made showing service on O. A. Burlingame and a default judgment was entered against O. A. Burlingame. The plaintiff in said action thereafter served upon respondent R. A. Burlingame a notice of motion to amend the judgment by substituting the name of R. A. Burlingame as the judgment debtor in the place and stead of the name of O. A. Burlingame. Said motion was heard and granted by the appellant justice's court, and respondent thereafter commenced this proceeding in certiorari in the superior court. By way of return to the writ, appellant interposed a demurrer to the petition. The demurrer was overruled, and the trial court entered its judgment annulling the above-mentioned order.

[1] Appellant contends that the facts alleged in the petition were insufficient to state a cause for the issuance of the writ or to sustain the judgment. In our opinion this contention must be sustained. We need not discuss the question of whether the appellant justice's court exceeded its jurisdiction in making the order, for, if said order was appealable and respondent had a right of appeal therefrom, then certiorari does not lie. Code Civ. Proc. § 1068; 4 Cal. Jur. 1052; Hildebrand v. Superior Court, 173 Cal. 86, 159 P. 147; Anglo-California Bank v. Superior Court, 153 Cal. 753, 96 P. 803; Elliott v. Superior Court, 144 Cal. 506, 77 P. 1109, 103 Am. St. Rep. 102; Stoddard v. Superior Court, 108 Cal. 303, 41 P. 278; Helbush v. Superior Court, 99 Cal. App. 501, 278 P. 1062; Postal, etc., Company v. Superior Court, 2 Cal. App. 770, 136 P. 538; Mayer v. Superior Court, 84 Cal. App. 265, 257 P. 893; Candeias v. Superior Court, 51 Cal. App. 128, 196 P. 86.

[2, 3] Respondent does not claim that said order was not an appealable order. His petition showed that the appellant justice's court was one in a township having a population of 30,000 or more, and therefore said order was appealable as a "special order made after final judgment." Code Civ. Proc. §§ 982a, 983; 4 Cal. Jur. 1059; Snyder v. Plummer, 174 Cal. 204, 162 P. 1040; Elledge v. Superior Court, 131 Cal. 279, 63 P. 360; Hilliker v. Board of Trustees, 91 Cal. App. 521, 267 P. 367; Martin v. Miller, 65 Cal. App. 581, 224 P. 783. Nor does respondent claim that he was not "aggrieved" by said order within the meaning of section 938 of the Code of Civil Procedure. His contention is that he was not a "party aggrieved" within the meaning of that section as he was not a "party to the action." This contention is based upon the allegations of his petition to the effect that the action was commenced against O. A. Burlingame, the father of respondent, and that respondent was not a party thereto.

We may assume that respondent was not a party to said action, but respondent's contention rests upon the assumption that only a party to the action may appeal. This assumption is erroneous, for it is well settled that an appeal may be taken by one who becomes a "party to the record" even though he is not a "party to the action" in the full sense of that term. 2 Cal. Jur. 209; 3 Cor. Jur. 616, § 466; Tattenham v. Superior Court, 155 Cal. 205, 100 P. 248; Anglo-California Bank v. Superior Court, supra; Cline v. Superior Court, 35 Cal. App. 150, 169 P. 453; Elliott v. Superior Court, 14 Cal. 509, 77 P. 1109, 103 Am. St. Rep. 102; Postal, etc., Company v. Superior Court, supra. See, also, Luckenbach v. Laer, 190 Cal. 395, 398, 212 P. 918. In the present case the appellant justice's court, after notice to respondent, granted a motion substituting respondent as the judgment debtor in the place and stead of O. A. Burlingame. We are of the opinion that respondent thereby became a "party to the record" and had a right of appeal from the order granting said motion. There is no doubt that, if respondent had taken an appeal from said order, his right to appeal therefrom could not have been successfully challenged.

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*For subsequent opinion see 33 P.2d 669.

[4] The difficulty which has confronted respondent in attempting to invoke the extraordinary remedy of certiorari is found in the fact that, if he was not entitled to appeal from the order of the appellant justice's court by reason of not being a party to the action as he claims, he was not entitled to proceed in certiorari for the same reason. Whitney v. Superior Court, 199 Cal. 569, 250 P. 666; Elliott v. Superior Court, supra; Tattenham v. Superior Court, supra. As was said in Whitney v. Superior Court, 199 Cal. 569, at page 577, 250 P. 666, 668 of the opinion: "A writ of certiorari will not issue at the instance of applicants therefor who are not parties to the action the proceedings in which are sought to be reviewed thereby."

The judgment is reversed.

We concur: NOURSE, P. J.; DOOLING, Justice pro tem.

On Petition for Rehearing.

PER CURIAM.

In the petition for rehearing, respondent has called attention to our reference to section 938 of the Code of Civil Procedure in the fourth paragraph of the opinion heretofore filed. Section 983 and not section 938 of said Code was the section applicable to appeals from the respondent court at the time in question. Section 982a, Code of Civil Procedure. Said section 938 was applicable only to appeals from the superior court. Section 959, Code of Civil Procedure. The reference to said section 938 was inadvertently made, but, for the purposes under discussion, the language used in that section is substantially the same as the language used in section 983. We are of the opinion that respondent had a right of appeal under the provisions of the last-mentioned section.

The petition for a rehearing is denied.

219 Cal. 82

SIERRA LAND & WATER CO. v. CAIN IRR. CO. et al.

Sac. 4768.

Supreme Court of California.

Sept. 27, 1933.

Rehearing Denied Oct. 26, 1933.

1. Waters and water courses ⚷152(5).

Complaint in action to establish priority to appropriative right to water, showing lack of due diligence by plaintiff in submitting to temporary injunction against use of diversion works for over 18 years without complaint, *held* not to state cause of action (Civ. Code, § 1410 et seq.).

2. Waters and water courses ⚷135.

Diligence is of essence of priority under water right statute (Civ. Code, § 1410 et seq.).

3. Waters and water courses ⚷135.

Lack of diligence of water company seeking to acquire water rights at certain place, in allowing temporary injunction against use of diversion works to stand over 18 years without complaint, was not excused by diligence in seeking rights elsewhere (Civ. Code, § 1410 et seq.).

4. Waters and water courses ⚷152(5).

Complaint in action to establish priority to appropriative water right alleging that plaintiff is lawful owner of prior usufructuary right to waters of certain stream to extent of 75,000 miner's inches *held* insufficient to state cause of action (Civ. Code, § 1410 et seq.).

5. Waters and water courses ⚷130.

Water right cannot exist without imposing servitude at some fixed point on riparian land.

In Bank.

Appeal from Superior Court, Mono County; Pat R. Parker, Judge.

Action by the Sierra Land & Water Company against the Cain Irrigation Company and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Wm. B. Ogden and Ogden, Steelman & Crocker, all of Los Angeles, and Arthur A. Weber, of Santa Monica, for appellant.

Henry W. Coil, Newman Jones, Harold M. Hammack, and D. L. King, all of Riverside, for respondents Cain Irr. Co., Nevada-California Power Co., L. S. Amiot, Fee Foster, Young Charlie, and Joe McLaughlin.

Erwin P. Werner, W. B. Mathews, and Kenneth K. Scott, all of Los Angeles, for respondents City of Los Angeles and the Board of Water and Power Commissioners.

PRESTON, Justice.

Plaintiff, a public utility corporation, by an original, an amended, and an amendment to the amended, complaint, essays to put in issue as against the claims of defendants, its priority to an appropriative right in 75,000 miner's inches of the waters of Rush creek in Mono county. The complaint is in two counts. The first is an attempt to show a compliance with section 1410 et seq. of the Civil Code, by setting forth in detail the facts upon which it relies; the second is an attempt to plead the ultimate fact of ownership of such prior right.

The court below, having sustained demurrers to said complaint as amended, without leave to amend, gave judgment for defendants. Plaintiff has appealed, supporting its appeal by the judgment roll and a bill of exceptions. The effort of plaintiff in its first count is to come within the rule announced in the cases of Inyo Cons. Water Co. v. Jess, 161 Cal. 516, 119 P. 934; Merritt v. City of Los Angeles, 162 Cal. 47, 120 P. 1064.

[1] We have carefully considered the record and the voluminous briefs on file. We agree with the court below that plaintiff has not stated a cause of action, and that insurmountable difficulties bar the right of relief. The fact is that plaintiff as a matter of law has been guilty of inexcusable neglect and lack of diligence, as will be demonstrated by the following statement of the cause:

Plaintiff initiated its claim to these waters by a notice of appropriation posted and filed April 6, 1914. The point of intended diversion on the east bank of the stream was named. The complaint alleges that this point was at the headgate of the Rush Creek Mutual Ditch Company, and that plaintiff, within sixty days after posting said notice, made a contract with the ditch company to use its headgate, ditch, and rights of way as a part of its plan to divert said water and convey it to the place of intended use.

The complaint then alleges that certain predecessors in interest of defendants began a suit in Mono county and secured a temporary injunction enjoining plaintiff, and said ditch company as well, from using these diversion works; that, following this, the defendant Cain Irrigation Company destroyed said headgate, built obstructions across the ditch, and ousted plaintiff from its possession of the diversion works. The date of this injunction is not given, but presumably it followed on the heels of said notice of appropriation. It is further alleged that the injunction is still in force. In other words, for some eighteen years or more the injunction has remained, and still remains, precluding plaintiff from use of the stream. It is nowhere alleged that the injunction is invalid or that efforts have been made or will be made to remove it or that the ditch company had any right of access to the stream or that, if it had such right, the right still obtains. The action of plaintiff with respect to this injunction shows conclusively that due diligence on its part is now, and for years has been, lacking. In deed, its conduct with respect to the present action confirms this view. The complaint herein was filed in April, 1924; summons did not issue until March, 1927; and judgment of dismissal was entered on July 1, 1931.

[2, 3] Diligence is of the essence of priority under the above-mentioned sections of the Code. This lack of diligence is not excused by the fact that plaintiff lodged, in 1921, an application under the State Water Commission Act (St. 1913, p. 1012 as amended) for permission to divert water at a point some four miles up stream from the point here in question and to store same in aid of its purpose to procure water for sale and distribution as a public utility, and that such application is still pending, or that, in further aid of this latter application, a right of way is being sought over the national forest reserve, which application is likewise pending. Neither is this lack of diligence overcome by the proffered amendment to the complaint to the effect that continuously since the injunction above mentioned plaintiff has elsewhere been diligently engaged in constructing ditches which could be used as a part of the diversion system it seeks to establish by the present action. In other words, no amount of diligence elsewhere will overcome the submission, without complaint, to said injunction for a period of now nearly twenty years. A suit after the lifting of the injunction, alleging continuous and unrelenting efforts to get it dissolved, would come with better grace than this action.

[4, 5] The second cause of action is likewise without substance, and is of itself some evidence of the nebulous character of plaintiff's claim. It merely alleges the right of plaintiff as follows: "That plaintiff is the lawful owner of the prior usufructuary right to the waters of that certain stream and its branches and tributaries situate, lying and being in the county of Mono, state of California, and more particularly known and described as Rush Creek, to the extent of 75,000 miner's inches measured under a four-inch pressure, save and except that as alleged in paragraph VIII of plaintiff's first cause of action, which said paragraph is herčby repeated by reference."

A water right cannot exist without imposing a servitude at some fixed point upon riparian land. An undefined floating water right could not be made the subject of a binding decree of court. Moreover, the right here attempted to be stated is evidently the same as that attempted in detail in the first cause of action.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

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134 Cal.App. 268

CITY OF LOS ANGELES et al. v. LOS ANGELES-INYO FARMS CO. et al.

Civ. 802.

District Court of Appeal, Fourth District, California.

Sept. 22, 1933.

1. Appeal and error 🔑1052(5).

Overruling of city's objection to property owners' hypothetical question to expert witnesses as to reasonable attorney's fees for preparing for trial of condemnation suit did not prejudice city, where answer was $25,000 as reasonable value and $20,000 as minimum fee and court granted only $13,200.

2. Eminent domain 🔑265(3).

Fees and expenses of expert witnesses employed by landowner to testify at trial of condemnation proceeding *held* not taxable as costs, where proceeding was abandoned before trial (Code Civ. Proc. § 1255a).

3. Appeal and error 🔑984(5).

Trial court's award of attorney's fees will not be disturbed unless palpable abuse of discretion is manifest.

4. Attorney and client 🔑140.

Trial court, in awarding attorney's fees, has power to appraise services and determine reasonable value independent of expert testimony.

5. Appeal and error 🔑1008(1).

Trial court's determination of value of attorney's services after full inquiry into pertinent facts constitutes some evidence of value of services.

6. Eminent domain 🔑262(1).

That trial court's award of attorney's fees for preparation for trial of condemnation proceeding was larger than reviewing court would have allowed *held* not to justify reversal.

7. Attorney and client 🔑140.

In determining reasonable compensation for attorney's services, court must consider nature and difficulty of litigation; amount involved; skill required and employed; attention given, success or failure; attorney's skill, learning, and experience.

8. Attorney and client 🔑141.

Award of $13,200 attorney fees for preparing to defend suit to condemn land, worth at least $323,000, dismissed before trial, *held* not excessive, where considerable time was consumed by skilled counsel in preparation and evidence as to value of services was widely divergent.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Condemnation proceeding by the City of Los Angeles, Department of Water and Power of the City of Los Angeles, against the Los Angeles-Inyo Farms Company and others. Judgment dismissing proceeding was entered on defendants' motion, and from an order taxing defendants' costs, plaintiffs appeal.

Modified and affirmed.

See, also, 126 Cal. App. 61, 14 P.(2d) 339.

Erwin P. Werner, City Atty., Mark L. Herron, Asst. City Atty., F. M. Bottorff and Carl A. Davis, Deputy City Attys., and T. B. Cosgrove, Special Counsel, all of Los Angeles, for appellants.

Chase, Barnes & Chase, of Los Angeles, Swallow & Richards, of Bishop, and H. B. McClure, of Visalia, for respondents.

JENNINGS, Justice.

The appeal herein has been taken from an order taxing costs in a proceeding instituted by the city of Los Angeles for the condemnation of certain lands and appurtenant water rights.

On February 17, 1930, the defendant Los Angeles-Inyo Farms Company and certain other owners of ranch lands in Owens Valley commenced an action in the superior court of Inyo county, whereby they sought to enjoin the city of Los Angeles from operating pumps located upon land which was owned by said municipality in Owens Valley and from withdrawing water from the underground basin of said valley. On April 28, 1930, the city filed an answer and a cross-complaint in this action. By the answer, in addition to other defenses, the city proceeded as in reverse condemnation. By the cross-complaint the city sought to condemn the property of the plaintiff in said action, Los Angeles-Inyo Farms Company, which overlay the underground water basin. On May 10, 1930, the cross-defendant in said action, Los Angeles-Inyo Farms Company, filed an answer to the city's cross-complaint, in which it was alleged that the value of the land sought to be condemned was $1,419,000. Upon stipulation this action was transferred to San Bernardino county for trial. Thereafter the plaintiff in said action, Los Angeles-Inyo Farms Company, proceeded to have the action set for trial and demanded a jury trial. The date set for the trial was October 7, 1930. The action did not, however, proceed to trial on the date appointed but was continued from time to time. On motion of the aforesaid plaintiff the action was finally set for trial for March 24, 1931, and a jury trial was again demanded by the Los Angeles-Inyo Farms Company. On January 19, 1931, Los Angeles-Inyo Farms Company served and filed notice of motion to strike from the files the cross-complaint of the city. On February 24, 1931, the court entered its order granting the motion. From the order thus entered the city prosecuted an appeal to the Supreme Court of California. On March 24, 1931, while the above-mentioned appeal was pending, the city of Los Angeles instituted in the superior court of Inyo county a proceeding to condemn the same land of the Los Angeles-Inyo Farms Company, which had been described in the complaint in the injunction suit and in the city's cross-complaint in said action. On October 30, 1931, the Supreme Court rendered its decision upon the appeal taken by the city of Los Angeles from the order striking the city's cross-complaint from the files of the injunction proceeding. This decision held that the order from which the appeal had been taken was not an appealable order and that the appeal therefrom was therefore premature and should be dismissed. Yandell v. City of Los Angeles, 214 Cal. 234, 4 P.(2d) 947. In the meantime, on May 12, 1931, the condemnation action was transferred to the superior court of Tulare county for trial. It was set for trial for November 10, 1931. On November 5, 1931, the city of Los Angeles filed with the superior court of Tulare county a written notice of abandonment of the condemnation proceedings. This notice was dated November 3, 1931, and was served on counsel for the defendants in said action on the same date. Thereupon, the defendants in said condemnation action gave written notice that on November 23, 1931, they would move the court for entry of a judgment dismissing the condemnation proceeding and awarding to said defendants their costs and disbursements therein including necessary expenses incurred in preparing for the trial of the action and reasonable attorney's fees. The judgment of dismissal was signed by the court and filed on December 7, 1931. On December 9, 1931, a memorandum of costs and disbursements, which had been served on plaintiffs in the condemnation suit, was filed. This memorandum showed costs incurred in the action by defendants in the total amount of $19,580.72, of which amount the sum of $16,000 was remanded as reasonable attorney's fees for services rendered in preparing for trial. Plaintiffs then filed notice of motion to tax costs. Hearing of the motion was continued by stipulation to January 25, 1932, at which time the motion came on regularly to be heard. Upon the hearing of the motion evidence consisting of affidavits and the testimony of witnesses was presented to the court. On February 19, 1932, the court made an order taxing costs in the total amount of $16,765.60, of which amount the sum of $13,200 was allowed as attorney's fees for preparing for the trial of the action.

Three alleged errors of the court are specified by counsel for plaintiffs on this appeal from the aforesaid order taxing costs. These are: First, that the court improperly overruled an objection interposed by counsel for plaintiffs to a hypothetical question propounded to an expert witness of the defendants by defendants' counsel during the hearing of the motion; second, that the sum of $3,142.39 allowed by the court for the fees of four expert witnesses who were to be produced by defendants to testify during the trial of the action was not a necessary or proper item of expense; third, that the award by the court of the sum of $13,200 for attorney's fees constituted an abuse of discretion by the court in that such a fee is excessive and unreasonable. These three alleged errors will be treated seriatim.

[1] Consideration of the first of the three above-mentioned objections is rendered unnecessary by reason of the concession of counsel for appellants that, assuming that the court erred in overruling the objection to the hypothetical question, nevertheless appellants may not have been prejudiced thereby because it is apparent that the court disregarded the answer of the witness to the question in arriving at its conclusion as to the proper amount to be allowed for attorney's fees. The concession is justified. The effect of the question propounded was to call for the opinion of the witness as to what sum would represent a reasonable attorney's fee for preparing for the trial of the action. Upon the objection to the question being overruled by the court the witness replied that his opinion was that a reasonable attorney's fee for the services rendered would be $25,000 and a minimum fee $20,000. Since the court, as above noted, allowed the sum of $13,200 for such fee, it is reasonable to conclude that the court disregarded the estimate of the witness. No prejudice therefore resulted to appellants because of the error claimed to have been committed.

[2] With reference to the second of the aforesaid objections, viz., that the court erred in allowing as costs the sum of $3,142.39 for fees and traveling expenses of four persons who were retained by respondents to make certain investigations preliminary to their being called to testify as expert witnesses for respondents during the trial of the case, the following observations are proper to be made: At the time the opening brief and reply brief of appellants were filed with this court, no objection was raised to the allowance by the court of the sum of $1,519.75 representing fees and traveling expenses of two of such witnesses. It was apparently conceded by counsel for appellants that the witnesses for whose services and expenses the aforesaid sum of $1,519.75 was allowed were proper and necessary witnesses and the amount allowed for their fees and expenses was properly chargeable as an item of costs. On October 11, 1932, counsel for appellants filed with this court a supplementary brief in which for the first time appellants object to the allowance of any part of the aforesaid sum of $3,142.39. The reason for appellants' failure to have objected earlier to the allowance of the sum of $1,519.75 is that they were of the opinion that section 1255a of the Code of Civil Procedure permitted an allowance as an item of costs for the fees and expenses of experts whose services were reasonably necessary for the preparation for trial and that the services of the two experts whose fees and expenses amounted to said sum of $1,519.75 were reasonably necessary for the preparation for trial and that not until September 28, 1932, was it decided by an appellate court that the fees and expenses of expert witnesses employed by defendants in condemnation proceedings are not properly taxable as costs in such proceedings following abandonment by the condemnor, under the provisions of section 1255a. The decision to which reference is made is City of Los Angeles v. Clay, 126 Cal. App. 465, 14 P.(2d) 926, in which it is held that a defendant in condemnation proceedings is not entitled, under section 1255a of the Code of Civil Procedure, upon a dismissal of the proceedings after trial, to an allowance of fees for expert witnesses who were not appointed by the court but were employed by such defendant. The decision is squarely in point upon the problem here presented and is conclusive of it. The contention of appellants in this regard must therefore be sustained.

The principal contention advanced by appellants relates to the award by the court of the sum of $13,200 as reasonable attorney's fees for preparing for the trial of the condemnation proceedings. It is urged that such an award, under the circumstances here presented, is excessive, unreasonable, and unjust, and that the allowance of such an amount constituted a clear abuse of discretion on the part of the court.

In giving consideration to this contention it is to be observed that the award was made after presentation to the court of a mass of irreconcilably conflicting evidence regarding the subject. The conflict related principally to the time which was reasonably required to prepare properly for the trial of the action.

On behalf of respondents, affidavits were produced which showed that a total of 80 days was consumed in preparing for the trial of the case. On the other hand, evidence was submitted by appellants which tended to show that proper preparation for trial could not reasonably have required more than 10 days. The estimates of expert witnesses who testified regarding the value of the services rendered by counsel for respondents ranged from an amount in excess of $16,000 on the part of respondents to the sum of $1,000 on behalf of appellants.

[3] The rule is established that, in fixing the fees of attorneys, the court is vested with a wide discretion and the court's award of an amount for such fees will be disturbed only when it is manifest that there has been a palpable abuse of such discretion. Pennie v. Roach, 94 Cal. 515, 29 P. 956, 30 P. 106; Watson v. Sutro, 103 Cal. 169, 37 P. 201; Freese v. Pennie, 110 Cal. 467, 42 P. 978; Estate of Duffill, 188 Cal. 536, 206 P. 42; Libby v. Kipp, 87 Cal. App. 538, 262 P. 68.

[4, 5] It is also established that, in making an award for attorney's fees, the court has the unquestioned power to make an appraisal of the services rendered and to arrive at a determination of the reasonable value of such services independent of expert testimony. Estate of Dorland, 63 Cal. 281; Estate of Straus, 144 Cal. 553, 77 P. 1122; Zimmer v. Kilborn, 165 Cal. 523, 132 P. 1026, Ann. Cas. 1914D, 368; Kirk v. Culley, 202 Cal. 501, 261 P. 994; Elconin v. Yalen, 208 Cal. 546, 282 P. 791; Moore v. Maryland Casualty Co., 100 Cal. App. 658, 280 P. 1008; Lady v. Ruppe, 113 Cal. App. 606, 298 P. 859; Theisen v. Keough, 115 Cal. App. 353, 1 P.(2d) 1015; Mills v. Friedman, 119 Cal. App. 74, 5 P.(2d) 901. It may further properly be observed that the court's determination of the value of the services made after full inquiry into the facts of the case which were pertinent to the matter under consideration constitutes some evidence of the value of such services. Theisen v. Keough, supra.

The correctness of these well-established principles is not questioned by appellants. It is, however, strenuously insisted that careful examination of the record herein will show that the court's award of the aforementioned amount for attorney's fees is entirely unwarranted and constituted a clear abuse of discretion.

In this connection, it is urged that the single issue in the condemnation proceedings which called for preparation by respondents was the issue of value of the property sought to be condemned; that this issue had been raised in the injunction suit through the city's cross-complaint seeking condemnation of the identical land described in the complaint in the condemnation action; that respondents had twice announced their readiness to proceed with the trial of the injunction suit and had twice demanded a trial by jury, all of which indicated that respondents had made ample preparation to try the issue of value; that in an affidavit made by the chief counsel for respondents it was stated that affiant and his associates were able to bring to the matter in controversy a familiarity with local conditions in Owens Valley and a knowledge of the law with respect to water rights and were able to give to respondents and their cause the benefits of this familiarity and knowledge and of long and successful trial experience in general practice and of their particular experience in condemnation proceedings; that this statement respecting the qualifications was not denied; that, in view of the admitted experience and skill of respondents' counsel with respect to condemnation proceedings and their familiarity with local conditions prevailing in Owens Valley, the statement that these experienced counsel had expended 80 days in preparing to try the single issue of value, particularly when this issue had been raised in the injunction suit and preparation to meet it had been made, was obviously extravagant and preposterous; that it was established by the expert witnesses produced by appellants that ample preparation for the trial of the condemnation proceedings could have been made in a period of approximately 6 to 10 days and a fair fee for such services would not exceed the sum of $1,500.

[6] The contention of appellants in this regard is not lacking in merit. Assuming the correctness of respondents' claim that the issue of necessity was an important issue in the proceedings, requiring careful preparation, it must be conceded that the condemnation suit was not a complicated action. At first blush, therefore, the court's award appears excessive. It is, however, not sufficient for us to say that the award for attorney's fees was in an amount larger than we should have allowed in order to justify a reversal of the court's order. Estate of Duffill, supra. We are not at liberty to convert this appeal into a trial de novo. Libby v. Kipp, supra. It must clearly appear that the trial court abused the very wide discretion reposed in it to warrant a cancellation of the award. Freese v. Pennie, supra; In re Estate of Adams, 131 Cal. 415, 63 P. 838: In re Estate of Parker, 186 Cal. 668, 200 P. 619.

[7] A number of factors are to be taken into consideration by a court in an endeavor to solve the not too simple problem of determining what constitutes a reasonable compensation for an attorney who has rendered services in connection with a legal proceeding. Among these factors the following are to be noted: The nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the atten-

tion given, the success or failure of the attorney's efforts, the attorney's skill and learning, including his age and experience in the particular type of work demanded. 3 Cal. Jur. p. 698; Grass v. Rindge Co., 84 Cal. App. 750, 258 P. 673; Deberry v. Cavalier, 113 Cal. App. 30, 297 P. 611. We understand that appellants concede that counsel for respondents possessed ample skill and learning to enable them to perform in an entirely satisfactory manner the task of preparing for the trial of the action. It is also conceded, we understand, that counsel were not lacking in experience in condemnation proceedings. It can hardly be maintained that counsel did not give careful attention to the task nor that the litigation did not receive skillful handling. It is undisputed that the amount involved in the controversy was considerable. In the affidavit of Lucius K. Chase it is stated that the minimum valuation which would have been placed upon the land sought to be condemned was approximately $800,000 and that, if the action had proceeded to trial, some testimony would have been produced which would have indicated a valuation of more than $1,500,000, the sum demanded by the answer filed by respondents. In their reply brief appellants point to the fact that approximately nine months after the abandonment of the condemnation proceedings all of the property and appurtenant water rights sought to be condemned, together with an additional parcel of land of comparatively less value, was contracted to be sold to the city of Los Angeles for the sum of $333,000. No information as to the value of "the additional parcel of land," which was included with the land sought to be condemned in the contract whereby the city purchased the property, is available to us. In the supplemental brief filed by respondents it is said that a fair allowance for this additional parcel of land would be $10,000. If this last statement is correct, it is apparent that the city considered that the property whose taking it sought to accomplish by the proceedings in condemnation had a value of at least $323,000. Nor is this conclusive of the true market value of the property. It is, however, tangible evidence pointing unmistakably to the fact that there was involved in the controversy an amount of very considerable magnitude and that the responsibility of counsel for respondents was thereby materially increased. No standard for the exact appraisal of such an element as increased responsibility has been devised. It is, however, an important factor entitled to consideration. Boyles v. Leonardo, 65 Cal. App. 315, 224 P. 115.

[8] Having in mind that the trial court made the allowance for attorney's fees following the presentation of widely divergent evidence regarding the value of the services rendered by counsel and that the court had the power to disregard entirely the testimony of the expert witnesses who gave their estimates of the value of these services and to appraise them from his own experience, and having in mind also that a very considerable period of time was consumed in preparing for the trial of an action wherein the amount involved was large and to which experienced counsel, skilled in the handling of such cases, gave careful and skillful attention, we conclude that the trial court may not fairly be convicted of the charge of "vicarious generosity" mentioned by the Supreme Court of the United States in the case of In re Gilbert, 276 U. S. 294, 48 S. Ct. 309, 72 L. Ed. 580.

The order from which this appeal has been taken is therefore modified by striking therefrom the sum of $3,142.39 allowed by the court for the fees and traveling expenses of the witnesses W. R. McCarthy, Hyde Forbes, Thomas H. Means, and Noah Adair and by deducting from the total amount of $16,765.60 allowed by the court as necessary costs and disbursements, the aforesaid sum of $3,142.39, leaving a balance of $13,623.21. As thus modified, the court's order taxing costs in the action is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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134 Cal.App. 264

DELIJIAN v. ROSENBURG et al.

Civ. 8997.

District Court of Appeal, First District,
Division 2, California.
Sept. 22, 1933.

1. Stipulations ⚷3.

Stipulation of parties after judgment that minutes of court reciting waivers of written findings of fact and conclusions of law were in fact not waived *held* not binding upon trial court.

2. Appeal and error ⚷904.

Reviewing court will assume that record reciting waiver of written findings was correct.

3. Sales ⚷87(3).

In action by buyer of cigar stand for damages and rescission of contract on ground seller did not secure landlord's signature to lease, evidence sustained finding that contract was consummated at time buyer took possession.

Evidence disclosed that buyer went into immediate possession and continued in possession for seventeen months, that he voluntarily quit and subsequently sued for damages; that during those seventeen months he paid rent directly to lessor who did not object.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by P. M. Delijian against Barnett Rosenburg and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Y. B. Arsen, of Los Angeles, for appellant.

Nathan O. Freedman and A. Wm. Christlieb, both of Los Angeles, for respondents.

OGDEN, Justice pro tem.

This is an appeal from a judgment in favor of the defendants rendered after trial by the court sitting without a jury.

[1, 2] Appellant first complains of the failure of the trial court to make and file written findings of fact and conclusions of law. The minutes of the court recite that the same were waived. Appellant seeks to overcome the effect of such recital by reference to a stipulation, signed by counsel for both parties and filed in the trial court after the entry of judgment, to the effect that written findings were in fact not waived and that the minutes of the court are erroneous. The record discloses no motion for the correction of the minute entry or order made to that effect. The stipulation was not binding upon the trial court. It was for the court, not counsel, to determine whether its record was erroneous. Upon this appeal we must assume the record to be correct and that written findings were duly waived. The sole question left for us to determine is, therefore, whether the judgment can be sustained by the evidence.

[3] The defendants were the proprietors of a cigar stand situated in the lobby of an office building; the floor space thereof being occupied under written lease from the owners of the building. This lease contained a clause providing in the usual form that it could not be assigned or the premises subleased without the written consent of the lessor, and that any such attempted assignment or sublease would be cause for cancellation of the lease at the option of the lessor. On September 20, 1929, plaintiff purchased from defendants the stock, fixtures, and good will of the cigar stand for the sum of $3,500, which was paid in full. On the same day the parties entered into a written agreement subleasing the premises to plaintiff for the balance of the term and upon the same conditions of tenancy as contained in the original lease. Plaintiff thereupon took immediate possession and commenced the operation of the stand. At the conclusion of the agreement of sublease was typed a provision for the consent thereto of the owners of the building. This, however, was never signed; the defendants being unable to secure the written consent of their lessor to either the sublease or to an assignment of the lease, due to the fear of the latter that they might thereby become involved in a possible dispute between plaintiff and defendants with reference to a deposit of $2,000 held as security for the faithful performance of the terms of the lease and to be applied on the last month's rental. Because of the failure by defendants to secure such written consent, plaintiff bases his claim for damages and the right to rescind.

Plaintiff contended at the trial that, although he took immediate possession of the cigar stand, it was understood that the entire transaction was to be dependent upon the securing of the written consent of defendants' lessor to the sublease, and that the purchase was not to be considered consummated until such consent was secured. There was, however, ample evidence to warrant the contrary conclusion that the purchase of the stand was fully consummated.

Although we find nothing in the agreement of sublease to support defendants' contention that they were not obligated to secure the consent of their lessor thereto until plaintiff reimbursed them in full for the advanced deposit of $2,000, we are satisfied with the correctness of the conclusion reached by the trial court. Plaintiff remained in possession and operated the stand until the month of February, 1931, a period of seventeen months, at which time he voluntarily quit the premises. He made payments of rent directly to the owners of the building, who at no time indicated or made any objection to his occupancy. The sole reason given for their refusal to sign the consent was, as before stated, to avoid any dispute with reference to the $2,000 deposit. If, as the trial court might well have concluded, the owners of the building consented in fact to the sublease and waived the provision requiring that such consent be in writing, plaintiff was not injured and had no cause for complaint.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

134 Cal.App. 312

Ex parte HAYES.

Cr. 253.

District Court of Appeal, Fourth District, California.

Sept. 25, 1933.

Hearing Denied by Supreme Court Oct. 23, 1933.

1. Statutes 🔑205, 211.

Scope and meaning of act must be gathered from title and body thereof.

2. Food 🔑15.

Statute punishing mislabeling *held* intended to refer to mislabeling used in marketing, not to cases where fruit is privately consumed without deceiving others (St. 1931, p. 1463, § 11).

3. Food 🔑1.

Statute denouncing mislabeling of fruits, nuts, or vegetables, construed as applying only to mislabeling used in marketing, *held* not unconstitutional as arbitrary or unreasonable (St. 1931, p. 1463, § 11).

4. Food 🔑15.

Marking word "Coachella" on grapefruit grown in San Bernardino county, not Coachella Valley, *held* "mislabeling," not equivalent to mere statement that fruit was of certain quality (St. 1931, p. 1463, § 11).

5. Food 🔑15.

Offense of mislabeling is not dependent on whether fruit, marked with name of region in which it was not grown is of same quality as fruit imitated (St. 1931, p. 1463, § 11).

Proceeding by Bartlett H. Hayes for a writ of habeas corpus prayed to be directed to the sheriff of Riverside county.

Writ discharged, and petitioner remanded.

Albert H. Ford, of Riverside, for petitioner.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

Upon application of the petitioner, a writ of habeas corpus was issued by the Supreme Court and made returnable before this court.

It appears that petitioner was arrested and is being detained under a warrant based upon a complaint filed in the justice court of Riverside township, county of Riverside, in which he is charged in four separate counts with violations of section 11 of the California Fruit, Nut and Vegetable Standardization Act of 1931 (St. 1931, pp. 1459, 1463). In two counts he is charged with mislabeling certain grapefruit by marking the wrappers thereof with the word "Coachella" and by stamping the word "Coachella" upon each individual grapefruit and thereafter offering the same for sale, thereby representing the same to be grapefruit that had been grown and raised in the Coachella Valley when in truth and fact said grapefruit had been grown in San Bernardino county. In the other two counts he is charged with mislabeling certain containers of grapefruit by the repeated use of containers which were labeled, "Pure Gold Coachella Valley Grape Fruit—Sweet Seedless—Grown and packed by Coachella Valley Citrus Association—Thermal, Riverside County, California," without completely removing, erasing, or obliterating said markings; it being further charged that he then and there offered for sale grapefruit in such mislabeled containers, well knowing that said markings did not properly or accurately apply to the fruit repacked therein, in that the said fruit was grown in San Bernardino county and not in the Coachella Valley and that the same was not packed by the Coachella Valley Citrus Association.

The pertinent portion of section 11 of this act, under which petitioner is charged, reads as follows: "Sec. 11. It is unlawful to prepare, deliver for shipment, load, ship, transport, offer for sale or sell a deceptive pack, bulk lot, bulk load, load, arrangement or display of fresh or dried fruits, nuts or vegetables, or to mislabel any container of fresh or dried fruits, nuts or vegetables, or the label or lining of any such container, or the wrapper of any fruit, nut or vegetable, or any fruit, nut or vegetable, or any placard used in connection therewith having reference to such fresh or dried fruits, nuts or vegetables. This provision shall be construed to prohibit the repeated use of any container or subcontainer of fruits, nuts or vegetables, bearing any markings, or any designations of brand, quality or grade, unless all such markings which do not properly and accurately apply to the products repacked or replaced therein shall first be completely removed, erased or obliterated. * * *"

The first point raised by petitioner is that section 11 of this act is unconstitutional and void as being arbitrary and unreasonable. This argument is based upon the contention that the mislabeling provisions of that section are not thereby limited in their application to such fruit as is offered for sale or sold or marketed, that the same are made applicable to all fruit without regard to its actual or intended use or disposition, and that the same apply equally to fruit intended for sale and to fruit intended and destined for the private use of the one doing the labeling. It is urged that the act in this respect is too broad, in that it forbids such mislabeling and such misleading statements without regard to whether the same are intended or used for the purpose of deceiving others.

The petitioner relies upon Ex parte Hayden, 147 Cal. 649, 82 P. 315, 317, 1 L. R. A. (N. S.) 184, 109 Am. St. Rep. 183; In re Fujii, 189 Cal. 55, 207 P. 537, 539; Mattei v. Hecke, 99 Cal. App. 747, 279 P. 470, and In re Mefferd, 110 Cal. App. 1, 292 P. 988, 6 P.(2d) 71. None of these cases is decisive of the question now before us. In the last-named case, the provisions of the Fruit, Nut and Vegetable Act as amended in 1929, with the violation of which the petitioner there was charged, were held unconstitutional. While the charges in that case included one of mislabeling under section 10 of that act, the opinion is based largely upon the proposition that no natural or reasonable basis existed for a discrimination said to be contained in section 20 of that act, relating to the matter of proper maturity of grapefruit offered for sale. A hearing was granted in the Supreme Court and an opinion filed, which was later set aside for another reason, in which the Supreme Court upheld the constitutionality of section 10 of the act as amended in 1929, the opinion observing that the Legislature had precisely followed the court's suggestion in the case of Ex parte Hayden, supra, in which case the court said: "If it were a question merely of deception in the label, the direct and efficacious method would be for the Legislature to prohibit false labeling."

The essence of petitioner's claim is that, under section 11 of the act now under consideration, the provisions against mislabeling are not confined in their application to fruit offered for sale or placed upon the market. While section 11 of the present act is more comprehensive than the similar section 10 of the prior act (St. 1927, p. 1849) as amended in 1929 (St. 1929, p. 105) in the respect now under consideration, the language used in the former section 10 was not more favorable to the petitioner than is the language of the present section 11.

[1] As was said in Ex parte Hayden, supra: "The scope, the meaning, and intent of an act must be gathered from its title and from its body." The title of the present act is as follows: "An act to prevent fraud and deception and to protect the general welfare by establishing standards and standard containers for certain fruits, nuts and vegetables; and to that end regulating the sale, offer for sale, shipment, transportation, loading, packing, marking and disposal of fruits, nuts and vegetables; and repealing certain acts therein named."

Section 7 of this act, enumerating what fruit shall conform to the act, makes the same applicable to all fruits that are packed or delivered for shipment or shipped or offered for sale or sold in bulk or otherwise. The plain meaning of the first part of section 11 is that it is unlawful to prepare for market, offer for sale, or sell a deceptive parcel of fruit, following which, in the same sentence, it is made unlawful to mislabel any fruit, its label or container. The latter provision is then construed to prohibit the repeated use of containers in such a manner as to constitute mislabeling. In our opinion, the fact that the matter of shipping, offering for sale or selling is not repeated in that portion of the sentence relating to mislabeling is not fatal to the act in the respect here claimed. Not only the entire sentence but the entire section must be read together, and so read the highly technical construction contended for seems neither necessary nor proper. As was said in In re Fujii, supra: "With the policy of the law we have not to deal, but it may be said that acts of this character, having for their purpose the protection of the purchasing public by the elimination of deceptive methods in the marketing of products, are beneficial in a high degree, and that such acts are to be liberally construed so as to give effect to their salutary regulations."

[2] The word "deceptive" in the fore part of the section relates to some half dozen of the usual methods of selling or offering for sale fruit in varying quantities; the word "mislabel" carries with it the idea of an intent to deceive; a similar intent and intention is involved in the provisions forbidding the repeated use of containers containing markings not properly applying to the products repacked therein; and all of these provisions are related to the usual and ordinary steps of preparing fruit for market. In common experience fruit is labeled only for the purpose of sale and disposal, and mislabeling of the same can, in a practical sense, relate only to its preparation for sale and the deception of others. It abundantly appears from the title and body of the act that the sole purpose of this section is to protect the purchasing public by the elimination of certain deceptive methods in the marketing of those products covered thereby. The language of the act is sufficient to inform the ordinary man that the mislabeling prohibited is that used in the marketing of the products named, and it seems obvious that the section was not intended to apply to cases where fruit is privately consumed without deceiving others. As the court said in People v. Earl, 19 Cal. App. 69, 124 P. 887, 888:

"The function of the courts in construing statutes is not restricted to a view which shall give literal effect to every word and phrase appearing by the letter of the law. In that analysis reason must have its just proportion, and the intent of the lawmakers is to be ascertained by taking into account several considerations, as the history of the legislation upon the subject treated, and concurrent legislation affecting the same or closely kindred subjects. The fact that the enforcement of a statute according to its literal import will have the effect of prohibiting otherwise necessary and useful acts may also furnish an entirely sufficient reason for concluding that the intent of its framers was not that it should so operate. Our Supreme Court, in Ex parte Lorenzen, 128 Cal. 431, 79 Am. St. Rep. 47, 50 L. R. A. 55, 61 P. 68, has declared the rule thus: 'But for the more substantial objection that the ordinance by its terms would oppress and lead to the conviction of persons guilty of no fraudulent act, it is to be remembered that the letter of a penal statute is not of controlling force, and that the courts, in construing such statutes, from very ancient times have sought for the essence and spirit of the law and decided in accordance with them, even against express language; and in so doing they have not found it necessary to overthrow the law, but have made it applicable to the class of persons or the kind of acts clearly contemplated within its scope.' As an illustration, the old Bologna law, which provided in literal terms for the punishment of a person who should let blood in the streets and which was held not to apply to a barber performing the office of a surgeon, is given, among others. This expression of Mr. Justice Field, used in United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278, is also quoted: 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence. It will always be presumed that the Legislature intended exceptions to its language which would avoid results of this character.'"

[3] In our opinion, the provisions of section 11 of this act are neither arbitrary nor unreasonable. The only requirement is that such articles as are covered, if labeled at all, shall not be so labeled as to mislead and deceive the public. In the case of In re Bear, 216 Cal. 536, 15 P.(2d) 489, 490, 83 A. L. R. 1402, the court quoted with approval from Parrott v. Benson, 114 Wash. 117, 194 P. 986: "We cannot hold anything to be unjust discrimination or unreasonable restriction which requires merchandise to be sold for just what it is, and prevents its sale as something other than it is."

[4, 5] The only other point presented is that the use of the word "Coachella" as alleged, was not a false representation but was only a statement as to the quality of the fruit. It is argued that the Legislature itself, in section 18 of this act, in districting a part of the state, has associated the Coachella Valley with grapefruit having 6 per cent. juice when 25 per cent. colored, and that the Legislature has thereby made the word "Coachella" synonymous with grapefruit meeting the 6 per cent. test when 25 per cent. colored. It is therefore argued that it is permissible for any grower to mark his grapefruit "Coachella" when the same contains 6 per cent. juice when 25 per cent. colored. Not only is the language used in section 18 of the act not susceptible of this construction, but the matter of mislabeling is not dependent on whether the article so marked is of the same or equal quality with the article imitated. It is entirely a question of deception and the buyer has the right to know what he is purchasing (U. S. v. 100 Cases of Tepee Apples (D. C.) 179 F. 985; In re Bear, supra). It can hardly be questioned in the present case that the use of the word "Coachella" was designed to and would naturally tend to mislead any purchaser of the fruit thus packed. In any event, if we are correct in our holding upon the first point raised, a holding in favor of the petitioner upon this point would not entitle him to a discharge.

For the reasons given, the writ is discharged, and the petitioner remanded.

We concur: MARKS, J.; JENNINGS, J.

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134 Cal.App. 181

PEOPLE v. BISBEE.

Cr. 2370.

District Court of Appeal, Second District, Division 2, California.

Sept. 14, 1933.

Rehearing Denied Sept. 29, 1933.

Hearing Denied by Supreme Court Oct. 13, 1933.

Bigamy 🔑11.

In bigamy prosecution, evidence *held* to show that accused was not legally married when he married woman claimed in information to be his legal wife (Civ. Code, § 61).

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William Bisbee was convicted of bigamy, and he appeals.

Affirmed.

Ralph Edgington, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

STEPHENS, Justice.

Defendant appeals from a judgment following a conviction of bigamy and from the denial of his motion for a new trial. The case was tried by the court without a jury.

The point upon which appellant asks us to reverse the judgment is that he was already legally married when he married the woman claimed in the information to be his legal wife, and that the evidence upon this point is conclusive.

There is some indirect evidence in the case to the effect that appellant had been married five times, but only three marriages were proved. He married Marie Shay in 1923, Viola Kelly in 1930, and Pauline Gallagher in 1932; the last named being the marriage upon which the information herein is based. The arresting officer testified that appellant told him that he had been married twice before the marriage to Viola Kelly, and that there had been an annulment as to one and a divorce as to the other. In appellant's direct testimony it is claimed that no divorce or annulment, so far as his knowledge goes, had ever affected his marriage to Marie Shay. On cross-examination, however, he testified:

"Q. Now isn't it true that after your arrest in San Bernardino Lieutenant Ryan inquired of you about former marriages and asked you if you had ever been married to anyone before the time you were married to Viola Kelly, and that you told Lieutenant Ryan that you had been married twice before that, and that one of the marriages had been annulled and the other had been dissolved by divorce, or words to that effect? A. I did.

"Q. That is true? A. Yes."

If this is true he was free to marry Viola Kelly.

There is much inconsistency to be found in appellant's testimony, but it would seem useless to notice it here specifically.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

On Petition for Rehearing.

STEPHENS, Justice.

We appreciate the fact, as set out in the petition for rehearing, that the arresting officer's testimony is not wholly in accord with the facts related in the question quoted in the opinion. This, however, does not change the situation, as appellant not only answered the question put to him, but followed with an affirmance of the facts upon which the question was based.

But there are other reasons why the judgment must be affirmed. A careful analysis of the testimony shows that there is no substantial evidence that appellant was ever married to any others than Marie Shay, Viola Kelly, and Pauline Gallagher. The trial court may have believed either that a divorce or annulment had been secured by the first one mentioned or that appellant was the legal spouse of the second one mentioned under the provisions of section 61, California Civil Code. Appellant testified positively that he had been absent from, had not seen nor heard of or from, Marie Shay for about six years before he married Viola Kelly and that he did not know whether she was dead or alive. Under this testimony the second marriage was "valid until its nullity is adjudged by a competent tribunal." Section 61, Civ. Code.

The testimony demonstrates that, of the three marriages proved, he contracted the third one without any dissolution of the second one. In these circumstances neither the trial court nor an appellate court will indulge in strained inferences from inconsistent, indefinite, and improbable testimony that perhaps, after all, appellant was married to some one else when he married the second wife, therefore he should be acquitted of legal wrong in taking the third wife under representation that he was an unmarried man.

Rehearing denied.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

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134 Cal.App. 252

VOGEL v. WHITE.

Civ. 8920.

District Court of Appeal, First District, Division 1, California.

Sept. 21, 1933.

1. States 🔑63.

Draftsman in engineering department of state harbor commission, employed at stipulated salary and thereafter transferred to architectural department, where he continued to accept such salary, could not subsequently recover additional compensation for services rendered in architectural department on ground salary was inadequate.

2. Officers 🔑100(1).

Officer who accepts office at fixed salary or compensation, though inadequate, cannot legally claim additional compensation, even if proper authority increases duties by addition of others germane to office.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by E. J. Vogel against Frank D. White. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

E. J. Vogel, in pro. per.

Winston C. Black and Cullinan, Hickey & Sweigert, all of San Francisco, for respondent.

TYLER, Presiding Justice.

Appeal from a judgment entered upon an order sustaining a demurrer of respondent to an amended complaint without leave to further amend.

The complaint in substance alleged defendant to be the chief engineer of the state harbor commission, and that he is the appointing power of persons under his control, and is authorized to pay compensation for the actual value of any service rendered under his appointment or employment. It then alleges that defendant employed plaintiff as engineering draftsman in the engineering department of the state harbor commission at the stipulated salary of $135 per month; that subsequently plaintiff was transferred to the architectural department, where he continued to receive and accept the salary above mentioned as compensation for his services; that plaintiff continued in his new employment for a period of eleven months, at which time he concluded that the work he had been performing entitled him to be classified as a senior architectural draftsman, and that as such he was entitled to be paid more than $135 per month during the eleven months' period; that he was kept in ignorance of the fact that his services were worth more than he was being paid; that the reasonable value of such services rendered during the eleven months' period was $300 per month, a difference of $1.815 over and above the amount received, for which sum judgment was prayed.

The grounds of the demurrer were that the only contract set forth in plaintiff's complaint was for employment at the rate of $135 per month, which salary had been paid, and that no other comtract, express or implied, is alleged; that an employee whose compensation has been fixed by express contract may not, where the contract has been fully performed, sue for an alleged reasonable value of the services in excess of the stipulated amount; that the complaint on its face shows that the contract of employment at $135 per month was made by defendant not on his own behalf or individually, but on behalf of the state harbor commissioners, officially as the board's representative; and there is, therefore, no allegation in the complaint upon which to base any personal liability on the part of defendant.

[1, 2] We are of the opinion that the complaint fails to state a cause of action and that the demurrer thereto was properly sustained.

It is expressly alleged in the complaint that defendant offered to plaintiff and plaintiff accepted appointment and employment as engineering draftsman at a salary of $135 per month, and that this amount was paid. An officer who accepts an office at a fixed salary or compensation is deemed to undertake to perform the duties thereof for such stipulated salary, though it be inadequate; and if the proper authority increases his duties by the addition of others germane to the office the officer must perform them without extra compensation (Kilroy v. Whitmore, 115 Cal. App. 43, 300 P. 851). He cannot legally claim additional compensation for the discharge of those duties, even though the salary may be a very inadequate remuneration for the new work required of him. Whenever he considers the compensation inadequate he is at liberty to resign. Mechem on Public Officers, § 862. This being so, the question as to who was the proper appointing power becomes unimportant, as the complaint states no cause of action, and the demurrer thereto was properly sustained.

Judgment affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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134 Cal.App. 195

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 1029.

District Court of Appeal, Fourth District, California.

Sept. 14, 1933.

Appeal and error ⚷1218.

Appellate court has jurisdiction to recall remittitur and order issuance of new one nunc pro tunc providing for recovery of costs by respondents who prevailed on appeal, where Supreme Court denied petition for hearing (Code Civ. Proc. § 1027).

Petition for writ of review by the Security-First National Bank of Los Angeles to annul an order of the Superior Court of San Diego County, C. N. Andrews and another, judges thereof, granting a motion for a new trial. On respondents' motion to recall remittitur and to direct issuance of another, nunc pro tunc. Motion granted. Prior opinion, 23 P. (2d) 1055.

Hamilton, Lindley & Higgins, of San Diego, and William M. Hiatt, of Los Angeles, for petitioner.

Stearns, Luce & Forward, Albert J. Lee, and Fred Kunzel, all of San Diego, for respondents.

MARKS, Justice.

A decision was filed in this case on June 20, 1933, on a petition for a writ of review, affirming an order of the superior court of San Diego county granting a motion for new trial. 23 P.(2d) 1055. A petition for hearing by the Supreme Court was denied on August 17, 1933. Thereafter a remittitur was issued containing no provision that the respondents recover costs. They have moved for an order recalling the remittitur and directing the issuance of another, nunc pro tunc, which shall include the recovery of costs by them.

Under the provisions of section 1027 of the Code of Civil Procedure (St. 1933, c. 744), formerly section 1032 of that Code, respondents should recover their costs. We have the undoubted right to recall the remittitur and order the issuance of a new one nunc pro tunc providing for the recovery of costs. Estate of Prager, 167 Cal. 737, 141 P. 369; Estate of Johnson, 200 Cal. 307, 252 P. 1052; Horan v. Varian, 207 Cal. 7, 276 P. 1002; Morgrage v. National Bank of California, 25 Cal. App. 133, 142 P. 1124.

It is ordered that the remittitur heretofore issued be recalled; that the clerk of this court issue in lieu thereof a new remittitur, nunc pro tunc as of the date of the former remittitur, inserting therein a provision that respondents recover their costs.

We concur: BARNARD, P. J.; JENNINGS, J.

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134 Cal.App. 227

PEOPLE v. SANTOS.

Cr. 1749.

District Court of Appeal, First District, Division 2, California.

Sept. 20, 1933.

1. Criminal law 🔑1084.

Exercise of inherent power in District Court of Appeal to grant accused stay of execution pending determination of appeal is discretionary (Pen. Code, § 1243, as amended by St. 1927, p. 1062).

2. Criminal law 🔑1084.

Defendant confined in state prison for second-degree murder *held* not entitled to stay of execution pending determination of appeal within brief period (Pen. Code, § 1243, as amended by St. 1927, p. 1062).

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Nick Santos was convicted of murder of the second degree and appeals. On petition for stay of execution pending the determination of the appeal from the judgment of conviction.

Petition denied.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Appellant was convicted of murder of the second degree and was sentenced to confinement at the state prison at San Quentin. He gave notice of appeal and applied to the trial court for a stay of execution, which application was denied. He was delivered to the warden of the state prison at San Quentin on June 15, 1933. He subsequently petitioned this court for a stay of execution, and said petition, together with the cause on the merits, was regularly on the calendar for hearing on August 14, 1933. Appellant had filed no brief prior to said hearing, although the transcript had been on file since June 30, 1933. At that time counsel for appellant requested a continuance of the hearing on the merits and of the hearing of his petition until the September calendar. His request was granted. The cause was again regularly on the calendar on September 18, 1933, at which time counsel for appellant argued the cause on the merits. Appellant's brief was not filed until the time of said hearing, and at the conclusion of the hearing respondent was granted 15 days within which to file a brief in reply. The petition for a stay of execution was argued at the same hearing and submitted for decision.

[1, 2] Claiming that his appeal presents debatable questions and is not frivolous, appellant contends that this court should grant him a stay of execution pending the determination of the appeal. He cites authorities holding that this court had inherent power to make such order despite the amendment of 1927 to section 1243 of the Penal Code (St. 1927, p. 1062), which provides that, "The granting or refusal of such order shall rest in the sole discretion of the trial court." In re Albori, 95 Cal. App. 42, 272 P. 321; People v. Biescar, 95 Cal. App. 70, 272 P. 328; In re Brahm, 98 Cal. App. 731, 277 P. 895. We are of the opinion that while these authorities indicate that such inherent power exists and should be freely exercised in proper cases, this court is not deprived of discretion in the exercise of such power. In the present case the hearing of the petition

was continued until September 18, 1933, at the request of appellant. At that time he had been confined in the state prison for over three months. It will be but a brief period before the appeal is determined on the merits. Under these circumstances we do not believe that appellant's place of confinement should be changed by order of this court pending the determination of the appeal.

The conclusion which we have reached makes it unnecessary for us to determine whether a sentence imposed upon a conviction of murder of the second degree is a sentence to "life imprisonment" within the meaning of the last sentence of said section 1243 of the Penal Code.

The petition is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

In re BYERS. *

HELMORE et al. v. BRAMBLE.

Civ. 8915.

District Court of Appeal, First District, Division 2, California.

Sept. 20, 1933.

Hearing Granted by Supreme Court Nov. 16, 1933.

1. Newspapers ⚿3(3).

"Newspaper of general circulation" must be printed, published, and issued from same city, town, county, or place where notice of publication or official advertising is to be made (Pol. Code, §§ 4460, 4462, 4463, 4465).

[Ed. Note.—For other definitions of "Newspaper of General Circulation," see Words & Phrases.]

2. Newspapers ⚿3(3).

Newspaper, decreed to be newspaper of general circulation before adoption of statute requiring such newspaper to be printed where published, *held* not exempt from such requirements (Pol. Code, §§ 4460, 4462, 4463, 4465).

> Pol. Code, § 4463, provides, in substance, that newspaper of general circulation within meaning of section 4460, must be printed, that is, the mechanical work of producing it must be performed, at same place where it is published. Section 4465 provides, in part, that statute should not be construed to alter standing of any newspaper which, prior to passage of act, was established newspaper of general circulation, irrespective of whether it has been printed in the place where it is published for a period of one year as required by section 4460.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Proceedings between Edith Harriet Elizabeth Helmore and others and E. E. Bramble, wherein Glenn Byers made an application for the establishment of the Peninsula News, as a newspaper of general circulation. From an order denying the motion of E. E. Bramble to vacate a judgment theretofore entered decreeing the Peninsula News to be a newspaper of general circulation, the movant appeals.

Judgment reversed, with directions.

J. W. Coleberd, of South San Francisco, for appellant.

Kirkbride, Wilson & Brooks, of San Mateo (John D. Willard, of San Francisco, of counsel), for respondents.

OGDEN, Justice pro tem.

This is an appeal from an order of the trial court denying motion of appellant, made under the provisions of section 4462 of the Political Code, to vacate its judgment theretofore entered decreeing the Peninsula News to be a newspaper of general circulation.

The Peninsula News, now published under the title of "San Bruno Herald and Peninsula News," was decreed to be a newspaper of general circulation on December 30, 1915. At that time and continuously thereafter until May 20, 1932, a date after the filing of the motion and after the commencement of the hearing thereon, the mechanical work of producing the newspaper was not performed in the city of San Bruno, the place where it was published.

In 1923 the Legislature adopted section 4463 of the Political Code, requiring that a newspaper of general circulation, within the meaning of section 4460 of the Political Code, must be printed, that is, the mechanical work of producing it must be performed, at the same place where it is published. Respondent contends, however, that, by virtue of the provisions of section 4465 of the Political Code, adopted at the same time and contained in the same act as was section 4463, a newspaper theretofore established as a newspaper of general circulation was excepted from the effect of the amendment and not required to comply therewith. Section 4465 of the Political Code reads as follows: "Nothing in this title shall be construed to alter the standing of any newspaper which, prior to the passage of this act, was an established newspaper of general circulation, irrespective of whether it has been printed in the place where it is published for a period of one year

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 27 P.2d 641.

as required by section four thousand four hundred sixty."

Whether, as contended by appellant, this section is unconstitutional because of defective title of the act by which it was adopted is not necessary for us to decide, as we do not construe the section as intending or effecting the result as contended by respondent.

[1] Section 4463 was apparently deliberately adopted by the Legislature for the express purpose of overcoming the effect of the decisions of In re McDonald, 187 Cal. 158, 201 P. 110, and Stanwood v. Carson, 169 Cal. 640, 147 P. 562, holding that under the then existing Code sections the printing and publishing need not be performed at the same place. By its adoption it was very clearly the legislative intention to require that a newspaper of general circulation be printed, published, and issued from one and the same city, town, county, or place where the notice of publication or official advertising is to be made. In re Monrovia Evening Post, 199 Cal. 263, 248 P. 1017.

[2] To say, however, that the Legislature intended to prescribe for all times one set of requirements for newspapers theretofore established and a different set for newspapers to be established in the future would be to give to the amendment such a construction that the reasonableness thereof would become a serious question. By the adoption of section 4463 without limitation as to its effect, many established newspapers otherwise qualified could not have regained their standing as such until the expiration of one year after compliance with the additional requirement as to the place of printing. It is apparent that the Legislature only intended by section 4465 to permit such newspapers otherwise meeting all of the requirements, but which had not met the additional requirement for the required period, to maintain their standing in the interim and the section can be given no broader effect.

The San Bruno Herald and Peninsula News, not meeting the additional requirement of a newspaper of general circulation imposed by section 4463, ceased to be a newspaper of general circulation when that section became operative, and the trial court had no alternative but to vacate its judgment theretofore rendered in the proceeding.

The fact, if it be such, that since May 16, 1932, respondent's newspaper has been both printed and published in the city of San Bruno, does not necessarily render this proceeding moot. If, however, the newspaper has for the required period of one year met all of the qualifications prescribed by the Political Code, respondents are not by this proceeding barred from having its standing judicially ascertained and established anew.

The judgment is reversed, with direction to the trial court to set aside and vacate the judgment heretofore rendered decreeing the San Bruno Herald and Peninsula News to be a newspaper of general circulation.

We concur: NOURSE, P. J.; STURTEVANT, J.

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134 Cal.App. 219

PEOPLE v. MELLUS.

Cr. 1284.

District Court of Appeal, Third District, California.

Sept. 19, 1933.

1. Criminal law ⚷1186(4).

Error in admitting accused's confession *held* not to require reversal of conviction for theft of chickens as to one count which was amply supported by evidence (Const. art. 6, § 4½).

2. Criminal law ⚷522(1).

In larceny prosecution, admitting confession by accused *held* error where confession was obtained after officer's threat to lock up accused's mother if accused did not speak.

3. Criminal law ⚷531(1).

Confession must be shown by prosecution to be voluntary and made without previous inducement, intimidation, or threat to be admissible.

4. Criminal law ⚷532(2).

Admissibility of confession is discretionary with trial court.

5. Criminal law ⚷522(1).

That accused was told that he need not talk unless he desired did not render his confession voluntary in face of officer's threat that accused's mother would be locked up if accused did not speak.

6. Criminal law ⚷1169(12).

Error in admitting confession *held* to require reversal of conviction for theft of chickens as to one count, where without confession evidence was insufficient to sustain conviction (Const. art. 6, § 4½).

Appeal from Superior Court, Sonoma County; W. D. L. Held, Judge.

Loyd Mellus was convicted of grand theft under information charging grand theft in two counts and prior conviction in foreign state, and he appeals.

Affirmed in part, and reversed in part.

J. N. De Meo and S. K. McMullin, both of Santa Rosa, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an appeal by the defendant from a judgment of conviction based upon an information filed in the superior court of the county of Sonoma, by the district attorney, on the 24th day of March, 1933, and from the order of the court denying his motion for a new trial. Two sentences were imposed upon the appellant, running consecutively. The information is in two counts, to wit: Count 1 charges that the defendant, on or about the 19th day of February, 1933, in the county of Sonoma, willfully and feloniously stole certain chickens belonging to one Fred Martin. Count 2 charges that the defendant on or about the 19th day of February, 1933, in the county of Sonoma, willfully and feloniously stole certain chickens belonging to one F. W. Collings. The information also charged that the defendant had suffered a prior conviction for the crime of burglary committed in the state of Nevada, and had served a term of imprisonment therefor in the penitentiary of said state. The defendant pleaded guilty to the prior conviction, and not guilty to the two counts set forth in the complaint.

Upon this appeal no contention is made that the testimony is not sufficient to support the verdict of the jury as to count 1. The specifications of error present two questions: The alleged error of the court in admitting the confession of the appellant where the prosecution had failed to establish the corpus delicti as to the second count; and alleged error of the court in holding that the confession of the appellant was free and voluntary.

The alleged error of the court as to the admission of the confession of the appellant is directed to the first count, without any discussion or reference to the testimony showing commission of the offense charged in said count, or questioning the sufficiency thereof, as we have said, to support the verdict of the jury. Nor is there any argument presented that the alleged error of the court in admitting the confession of the appellant resulted in a miscarriage of justice in so far as the verdict based upon the first count of the information is concerned.

[1] A reading of the testimony convinces us that any error of the court in admitting the confession of the appellant could not have, and did not result in any miscarriage of justice in finding the defendant guilty as charged in the first count. The testimony shows that on the 19th day of February, 1933, some one with an automobile visited the premises of Fred Martin, and took therefrom a number of chickens. Automobile marks were made by the conveyance in which the chickens were transported from the premises just named, leading toward a certain building in which a man by the name of John Belluomini conducted a business of buying chickens. At about 9:30 the same night a coop containing the chickens was placed by the defendant on the rear platform of the building just referred to. A witness who lived in the vicinity of the building where Belluomini conducted his business was attracted to the scene, and then and there saw the defendant place the coop of chickens on the platform just mentioned. This witness stated that he had a good look at the defendant who, in the course of his operations, stepped immediately in front of the lights burning on his automobile. An examination of the chickens revealed that aluminum bands had been placed upon the legs of some of the chickens and stamped with the numbers used by Mr. Martin to identify his poultry. The witness Martin identified the chickens as belonging to him, and which were taken on the night of February 19th. On the morning of February 20th the appellant went to the premises where Belluomini conducted his business, sold the chickens to Belluomini, and received payment therefor. No explanation whatever was offered by the defendant, other than the confession to which we will hereinafter refer, as to the possession of the chickens, how he obtained possession thereof, or why he was making sale of the same. These facts show beyond any reasonable doubt, and practically beyond any possibility of question, the guilt of the appellant, and under the provisions of section 4½ of article 6 of the Constitution, it must be held that conviction properly followed the testimony introduced in support of the first count, irrespective of any alleged error of the court in the admission of the defendant's confession, and consequently there has been no miscarriage of justice.

The second count of the complaint charges, as stated, the stealing of chickens belonging to one F. W. Collings. The testimony in support of this count is to the effect that about 8:30 on the evening of February 19, 1933, F. W. Collings heard a buzzer ring which he had attached to the gate through which entrance is made to his chicken houses. That on the 18th day of February he had counted his chickens, and at that time had either 122 or 123. On the morning of the 20th of February his chickens were again counted and he was able to count only 98 or 99. There were some foot tracks in the vicinity of the gate leading to his chicken houses. No testimony has been called to our attention, however, that these tracks corresponded in size to the shoes worn by the appellant. F. W. Collings stated on the witness stand that he could not identify any of the chickens sold by the appellant to Belluomini, as chickens belonging to him. The chickens bore no identifying marks.

The testimony as to the second count may be summarized in the following statement: F. W. Collings lost some 25 chickens on the night of February 19, 1933. On February 19th the appellant was seen leaving a chicken coop on the rear platform of the premises belonging to Belluomini, and on the morning of February 20th sold a coop of chickens to Belluomini and received payment therefor. Whether the chickens sold by the appellant to Belluomini were chickens taken from or belonging to F. W. Collings is left wholly unanswered.

Basing his argument on the testimony to which we have referred, the appellant contends that the corpus delicti of the alleged offense is not established. While a strong probability is raised that some of the chickens sold by the appellant to Belluomini were chickens belonging to F. W. Collings, there is not sufficient proof to establish such fact, without recourse to the confession of the appellant. However, by reason of what we are about to state it is not necessary to base our decision upon the insufficiency of the testimony to establish the corpus delicti of the offense charged.

[2] The record shows that during the course of the trial the confession of the appellant was presented in testimony. The contention made here is that the confession was not freely and voluntarily made by the appellant, but was superinduced by coercion and threats, and that the court erred in admitting the confession. This contention of the appellant appears to be well taken. We quote from the record as follows (beginning with the statement of the district attorney), to wit:

"Q. I thought I would come in and talk to you, something about the chicken business in Petaluma, and your delivery of them to the Commonwealth Company. Of course anything you say now may be used against you later, and all statements made by you are free and voluntary on your part. You understand that, of course? A. Yes, sir." (There were also present at the same time the sheriff and a shorthand reporter.)

"Q. You called at the house and went out and went down and delivered the chickens to the Commonwealth Company; took them out and put them in the coops? A. Yes, right.

"Q. Where did you get those chickens from? A. You told me not to answer any questions if I didn't want to, didn't you?

"Q. Is that the postion you want to take? A. Not necessarily, no.

"Q. Do you want to tell the sheriff the truth about it—because we know anyway. If you want to come clean on it, that is one thing; if you don't, that is all right. Your mother has told us practically everything. In fact, we have implicated her in it. The question is, do you want to come clean on it yourself and exonerate her, or are we going to hold both of you? A. What have you got to hold her on?

"Q. She was with you on the two occasions, and about two or three weeks ago you delivered some chickens there in the morning between 10 and 12 o'clock, didn't you?

"By the sheriff: Q. The thing is this, Loyd: Here we find the chickens there; find your mother delivering them; and we have got your mother here. A. What have you got her for?

"Q. She delivered those chickens; she was with you, was she not, when you got them? That is the thing we want to know. We are entitled to the truth about it here to see whether we shall hold her or not. A. Certainly.

"Q. She was with you when you delivered them last night; with you when you got the money today; with you a couple of weeks ago when you delivered chickens out there; and we naturally presume she was with you when you got the chickens? A. What made you think she was with me when we got the chickens?

"Q. Because I find the imprints of a lady's shoes, either hers or some other woman's. The presumption is that she goes with you when the chickens were delivered, on the occasion when they were delivered; she was the one that was with you when you took them out of the house, and we are going to hold her until we find out differently."

The testimony of the sheriff relative to what took place before the defendant made his confession is as follows:

"Q. At that time did Mr. Mellus deny the commission of the particular offense? A. Yes, he did.

"Q. Thereafter, after the defendant had denied the offense, did he say, 'I have nothing to say?' A. He may have said that; I am not so sure about that.

"Q. And thereafter, when he said, 'I have nothing to say,' did you say, 'then as long as you have nothing to say we will have to lock your mother up.' Did you state that? A. Yes, I might have said, 'if you don't tell just what happened, I will have to hold your mother, because your mother was with you when you delivered these chickens.

"Q. You stated that to him? A. Yes; I may have said that; I believe I did say that.

"Q. Now, thereafter did the defendant admit the perpetration of the offense charged? A. Yes, he did.

"Q. And he did not admit it prior to making the statement that you would lock his mother up? A. No, I don't believe he did."

As stated in 8 California Jurisprudence, p. 111: "It is established law that a confession is not rendered involuntary or inadmissible in evidence merely because it was made to a police officer while the accused was under arrest, or because the defendant was not at the time in full possession of his faculties, or was under a state of great excitement, or because he made it to free another from suspicion or guilt." The following is also set forth as a rule of law: "However, the slightest pressure, whether by way of inducement to confess, or threat if confession is withheld, is sufficient to require the exclusion of the confession." And further: "Upon the other hand a confession is not rendered involuntary because it is preceded by a statement that a confession would relieve the defendant's mind, or by an admission to tell the truth, or by a statement of an officer that he has sufficient evidence to convict the defendant, and the latter ought to tell the truth when there is nothing to indicate in any way that it was coupled with a threat, or that it was to be, or was regarded as a promise." Here, there can be little question but that the sheriff threatened the defendant that he would lock his mother up, and the promise to let the mother go free if he made a confession is certainly to be implied from the testimony quoted.

[3, 4] The following taken from the opinion in the case of People v. Siemsen, 153 Cal. 387, 394, 95 P. 863, 866, we think applicable to this case: "'Before any confession of a defendant can be offered in evidence, it must be shown by the prosecution that it was voluntary, and made without any previous inducement or by reason of any intimidation or threat.' The slightest pressure, whether by way of inducement to confess, or threat if confession is withheld, is sufficient to require the exclusion of the confession. Thus the confession is not admissible, if made in response to a statement by one in authority to the prisoner that 'it will be better for him' to make a full disclosure." (Citing a number of cases.) "But whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it (People v. Miller [135 Cal. 69, 67 P. 12], supra), and a considerable measure of discretion must be allowed that court in determining it. 'The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion.'"

[5] Much consideration must be given to the determination of the trial court, from the attendant circumstances, that the confession is voluntary, yet on the other hand if it satisfactorily appears, as it does in this case, that the sheriff had stated that if the defendant did not tell all about what took place, he would have to lock up the mother of the defendant, so clearly and convincingly appears from the record that we cannot escape the conclusion that the court erred in the admission of the confession of the appellant. We cannot overlook the natural ties of affection which would induce almost anyone to shoulder all the burden attendant upon the commission of any offense in order to relieve his mother from being confined in a prisoner's cell on a charge of theft. The threat in this case is plain and explicit. That the prisoner was told that he need not talk unless he so desired becomes immaterial in the face of the threat made by the officer preceding the appellant's confession.

Disregarding the appellant's confession there is not sufficient testimony in the record to support a verdict of guilty of the offense charged in the second count in the information. Under these circumstances, do the provisions of section 4½ of article 6 of the Constitution apply? We think not. In this instance it is not a question of whether the defendant is or is not guilty of the offense charged in the second count contained in the information. The phrase "miscarriage of justice," as said in substance in the case of People v. Wilson, 23 Cal. App. 513, 138 P. 971, 975, "does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.'"

[6] In the instant case, without the confession of the appellant, the testimony did not warrant a conviction of the appellant on the charge contained in the second count. If the confession were erroneously admitted, it follows that a conviction has been had upon testimony that should not have been admitted for consideration by the jury. This constitutes a miscarriage of justice, because unless an offense is legally proven against the defendant, the people cannot justly demand conviction. An illegal conviction or a conviction based upon inadmissible testimony is in law a miscarriage of justice.

It follows from what we have stated that the order and judgment of the trial court, in so far as the second count in the information is concerned, must be and the same are hereby reversed. It likewise follows that the judgment and order of the trial court as to the first count contained in the complaint must be, and the same are hereby, affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

134 Cal.App. 325

FIELD v. HUGHES et al.

Civ. 4772.

District Court of Appeal, Third District, California.

Sept. 26, 1933.

1. Appeal and error ⚿439.

Trial court had no jurisdiction to vacate judgment against minor for minor's disaffirmance, where appeal from such judgment was pending in reviewing court at time motion to vacate was made.

2. Appeal and error ⚿439.

Trial court cannot modify, correct, vacate, or set aside its judgments pending appeal therefrom to reviewing court.

3. Evidence ⚿43(1).

District Court of Appeal will take judicial notice that appeal from original judgment against minor was pending before such court when motion to vacate judgment was made.

Appeal from Superior Court, Sacramento County; J. P. Hughes, Judge.

Action by Ralph H. Field against Eugene P. Hughes and Wayne Smythe. From an order refusing to vacate and set aside a judgment rendered against him, Wayne Smythe appeals.

Affirmed.

See, also (Cal. App.) 16 P.(2d) 160.

Humphrey, Searls, Doyle & MacMillan, of San Francisco, and Thomas B. Leeper, of Sacramento, for appellant.

A. B. Reynolds, George E. McCutchen, and Ralph H. Lewis, all of Sacramento, for respondent.

C. A. Russell, of Sacramento, for defendant Hughes.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant Smythe has appealed from an order refusing to vacate and set aside a judgment which was rendered against him in a suit for damages for injuries sustained by the plaintiff in an automobile casualty. Smythe is a minor. The judgment was secured against him without the appointment of a guardian ad litem. The minor subsequently gave notice disaffirming the judgment. He then moved the trial court to vacate the judgment against him on the ground that it had been disaffirmed. The trial court denied the motion. From this order an appeal was perfected.

This cause was previously before this court on a motion to dismiss the appeal. The facts are more elaborately stated in our opinion denying that motion. Field v. Hughes (Cal. App.) 20 P.(2d) 990. The appellant Smythe loaned his automobile to the defendant Hughes. While Hughes was operating the car, in the absence of Smythe, a collision occurred with a machine which was being driven by the plaintiff Field, who sustained serious injuries as a result of the accident. A suit for damages was instituted in the superior court of Sacramento county against both the owner and operator of the Smythe car. Smythe was then but twenty years of age. The suit for damages was concluded without the appointment of a guardian to represent the minor. Judgment for the sum of $3,100 was rendered August 18, 1931, against the defendants jointly. Smythe was made a party defendant under the provisions of section 1714¼ of the Civil Code on the theory that the car was being operated with his consent at the time of the accident. From this judgment the defendants appealed to the Third District Court of Appeal on September 24, 1931. Their notice of appeal was served and filed on that date. That appeal was still pending in this court at the time Smythe's motion was made in the trial court to dismiss the judgment as above related.

[1] Subsequent to the entry of judgment a guardian ad litem was appointed for Smythe and he thereupon gave notice of disaffirmance thereof. A motion supported by affidavits was made to the trial court to vacate the judgment as to the defendant Smythe on the ground that it had been disaffirmed. This motion was formally denied by the trial court on May 12, 1932. The cause was then pending in the Third District Court of Appeal. The records of this court show that the appeal above referred to was not dismissed until May 23, 1932. The trial court was therefore without jurisdiction or authority to grant the motion to vacate the judgment.

[2] A trial court has no authority to modify, correct, vacate, or set aside its judgments pending an appeal therefrom to a reviewing court. The appeal has the effect of removing from the jurisdiction of the trial court

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

the matters affected by the judgment, together with the validity thereof. Kinard v. Jordan, 175 Cal. 13, 164 P. 894; 2 Cal. Jur. 416, § 179. The trial court therefore had no authority or jurisdiction to set aside the judgment in the present case, for the reason that the cause was not pending before that court at the time the motion was made.

[3] This court will take judicial notice of the fact that the appeal from the original judgment was pending before the Third District Court of Appeal on May 12, 1932, when the motion to vacate the judgment on the ground of disaffirmance thereof was made by the defendant Smythe. Jones, Evidence in Civil Cases (3d Ed.) p. 162, § 124; 23 C. J. p. 109, § 1917. In the authority last cited it is said: "Courts take judicial notice of their own records."

For the reason that the trial court was without jurisdiction to modify or vacate its judgment at the time the motion was made, the order of May 12, 1932, from which this appeal was taken, was properly denied.

The order is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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134 Cal.App. 217

PEOPLE v. BLOCK (two cases).

Cr. 2377, 2384.

District Court of Appeal, Second District,
Division 2, California.
Sept. 19, 1933.

1. Criminal law ⚷1023(3).

Orders, made before judgment, denying defendant's application for probation and motions for leave to change plea and continuance are not appealable, and portions of appellant's brief applicable to appeals therefrom must be disregarded (Pen. Code, § 1237).

2. Criminal law ⚷997.

Application after judgment for writ of error coram nobis may be heard on affidavits without taking evidence on issues presented thereby.

Appeals from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Criminal proceedings by the People of the state of California against A. B. Block. From orders denying defendant's application for probation, motion for leave to change his plea, motion for continuance, and application for writ of error coram nobis, he appeals.

Appeals from orders denying application for probation and motions for leave to change plea and continuance dismissed, and order denying application for writ of error coram nobis affirmed.

John S. Cooper, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WORKS, Presiding Justice.

[1] In Cr. 2377, above entitled, defendant appeals from an order denying an application for probation, from an order denying his motion for leave to change his plea, and from an order denying his motion for a continuance. In his opening brief appellant concedes that, "as these orders were made before judgment and no appeal was taken from the judgment, we do not believe that they are appealable." This concession is properly made. Pen. Code, § 1237. Notwithstanding this situation, considerable portions of appellant's briefs apply only to the appeals above mentioned, and these parts of the briefs will naturally be disregarded. These appeals must be dismissed.

[2] In Cr. 2384 defendant appeals, in the same case from which Cr. 2377 arises, from an order made after judgment and denying his application for the writ of error coram nobis. This application was made in the form of a petition, accompanied by affidavits of appellant and of his former counsel, which affidavits contain substantially the same matters alleged in the petition. These matters consist of averments to the effect that a deputy district attorney and an investigator in the district attorney's office made to appellant certain statements and promises, and certain threats amounting to duress, whereby appellant, although innocent, as he alleges, was induced to plead guilty to certain criminal charges pending against him. The investigator, by affidavit, interposed a general denial to all the averments contained in the two affidavits which had been presented by appellant. The deputy district attorney, also by affidavit, traversed and specifically denied all the statements contained in the two affidavits. The trial court found that the allegations of the affidavits presented by appellant were untrue and therefore made its order denying the application for the writ.

It is contended by appellant that the various affidavits above mentioned had the effect merely, pro and con, of pleadings, as in a civil action, and that the trial court erred in making its order without taking evidence under the issues claimed to have been presented by them. We are referred, however, to no authority announcing such a doctrine. On the contrary, the opinion in People v. Perez, 9 Cal. App. 265, 98 P. 870, plainly shows that it is proper to hear such an application on affidavits. Indeed, appellant says in his opening brief that the case cited is to the effect that "the proper procedure was upon affidavits, oral evidence or both." In the proceeding considered in People v. Silver, 154 Cal. 556, 98 P. 543, the hearing was by both affidavits and oral evidence.

The appeals in Cr. 2377 are dismissed. Order affirmed in Cr. 2384.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

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134 Cal.App. 246

Ex parte LEUSCHEN.

Cr. 254.

District Court of Appeal, Fourth District, California.

Sept. 20, 1933.

1. False pretenses ⚷5.

Gist of offense of "fraudulently issuing check" is the fraudulent intent which must exist together with drawer's present knowledge that he has neither funds in nor credit with drawee bank to meet check when presented (Pen. Code § 476a).

[Ed. Note.—For other definitions of "Fraudulently Issuing Check," see Words & Phrases.]

2. Habeas corpus ⚷85(1).

Evidence *held* insufficient to establish that drawer intended to defraud and knew that he had neither funds in nor credit with drawee banks to meet his checks when presented, warranting his discharge on habeas corpus from commitment to answer for fraudulently issuing checks (Pen. Code § 476a).

Application of Fred R. Leuschen for a writ of habeas corpus.

Writ granted.

Swing & Swing, of San Bernardino, and Franklin G. West, of Santa Ana, for petitioner.

S. B. Kaufman, Dist. Atty., and Harold A. McCabe, Deputy Dist. Atty., both of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an application for a writ of habeas corpus. The petitioner was charged, in a complaint filed in the justice's court of Fullerton, Orange county, with violating section 476a of the Penal Code by issuing and passing six certain checks with the knowledge that he did not have sufficient funds in nor credit with the banks upon which they were drawn to meet the same in full. After a preliminary hearing a commitment was issued holding him to answer.

[1] This petition is based upon the contention that no reasonable or probable cause was shown, since the evidence is entirely insufficient to show any intent to defraud. It is well settled that the gist of the offense here charged is the fraudulent intent and there must be both an intent to defraud and a present knowledge upon the part of the one issuing such a check that he has neither funds in nor credit with the bank upon which it is drawn to meet the same when presented. Pen. Code, § 476a; In re Scott, 85 Cal. App. 170, 259 P. 101; People v. Owens, 57 Cal. App. 84, 206 P. 473; People v. Frey, 165 Cal. 140, 131 P. 127; People v. Routh, 182 Cal. 561, 189 P. 436.

Two of the six checks involved herein were drawn on the First Bank of Highland under date of June 13, 1932, each check being for $1,250. From the transcript of the evidence before us it appears that these checks were on that day at Highland, in San Bernardino county, delivered to some one whose identity does not appear. The person to whom they were made payable testified that they were handed to him in Orange county by a truck driver. There is an entire absence of any evidence to indicate that the person to whom they were handed in Highland was not an agent of the payee and, so far as the record shows, the jurisdiction of any offense in connection therewith was in San Bernardino county.

[2] It further appears that the petitioner was and had long been in the business of shipping oranges; that for more than a year prior to this transaction he had been doing his banking business with the First Bank of Highland; that his average monthly deposits and withdrawals through that bank were approximately $250,000; that during the first sixteen days of June, 1932, his deposits in that bank amounted to $75,000; that it was his custom to wire to parties in the east to whom cars of oranges had been started and that these parties would then wire funds to the Highland Bank sufficient to pay the growers for the oranges in the cars then rolling; that it had long been the custom for the cashier of the Highland Bank at the close of a business day to call the petitioner on the telephone and tell him the amount needed to cover any checks presented, whereupon the petitioner would wire to his dealers and have the amounts covered; that these amounts had always been so covered the next day and no checks were ever returned by the

bank or payment thereon refused prior to the two here in question; that $12,700 on June 13, 1932, $10,455 on June 15, 1932, and $3,400 on June 16, 1932, was so wired and placed to his credit; that on June 15, 1932, the petitioner wired one of his dealers in Chicago asking that $3,000 be sent; that a wire was received from this dealer saying that the request had come after the banks had closed for that day; that the checks here in question were presented to the bank on June 16; that the cashier of the bank did not get in touch with the petitioner on that day, but did communicate with his bookkeeper; that the cashier of the bank was disturbed because of certain banking troubles then pending in the city of San Bernardino and returned these two checks without paying the same on the night of June 16; that this bank failed to open for business on the next morning and was taken over by the state banking department; and that on that day the $3,000 for which the petitioner had wired came to the bank, but was not accepted owing to the fact that the bank was closed.

Aside from the matter of jurisdiction, we think this evidence is insufficient to establish an intent to defraud and that it fails to show knowledge on the part of the petitioner that he had neither funds in nor credit with this bank to meet the checks when presented.

The other four checks involved were drawn on the California Bank at Los Angeles. One was for $1,201.20 dated July 25, 1932; one for $1,978.50 dated July 26, 1932; one for $1,044.70 dated July 27, 1932; and one for $1,304.17 dated August 2, 1932. It appears that during the month of July, 1932, the petitioner was buying oranges in Orange county and shipping the same to a man named Andrews in Los Angeles. Andrews opened an account for petitioner in petitioner's name in this bank and from July 8, 1932, to July 29, 1932, a total of $31,933.59 was deposited therein. A signature card was sent by the bank to the petitioner at San Bernardino, who signed and returned the same and thereafter drew checks upon the account. Andrews testified that he opened this account for the petitioner; that he asked the manager of that bank to notify him whenever there was an overdraft and told him that he (Andrews) would make up the overdrafts every day upon being told the amount; that this arrangement continued "the main part of July"; that he covered the overdrafts whenever there was a shortage; and that "practically the end of July" the manager of the bank notified him that the arrangement was at an end. The manager of this bank testified that Andrews told him "that it was likely and probable that Mr. Leuschen would have to overdraw his account," and at the same time told him that if he would permit this account to be overdrawn and would call him in that event, he would make good the overdrafts; that in pursuance of that conversation he permitted a number of overdrafts; that there were overdrafts on July 20, July 21, and July 23 which were covered the same day; that there was an overdraft on July 25 of $2.100 which was not covered until the next day; that there was an overdraft on July 26 and on July 27 which were not covered until the next day; that when these last overdrafts were not covered on the same day he became dissatisfied with the arrangement and on July 27 told Andrews he would allow no further overdrafts; that within a day or two prior to July 27, he had paid overdrafts for this account in excess of $1,000 in pursuance of his agreement with Andrews; that he did not see petitioner during this period and did not notify him either personally or by letter that this credit was stopped; and that $1,600 was deposited in this account on July 27 and $400 on July 29.

This credit arrangement was not ended even by notice to Andrews until July 27 and the evidence shows without dispute that three of these four checks were drawn and delivered prior to that time. Incidentally, one of those three checks was postdated and it is not disputed that the payee was told the money would not be there until "next week." It further appears from the banker's testimony that he returned at least two checks at a time when petitioner's account was sufficient to cover them, his explanation being that while the bank had credited this account with certain items the same had not yet been collected. While the fourth check is dated August 2, 1932, petitioner's bookkeeper testified that he wrote the same either on July 27, 28, or 29 and postdated it August 2, and that he was not in the employ of the petitioner after August 1. There is no evidence in the record in any way justifying the inference that the check dated August 2, or any of the other checks, was issued or delivered after the petitioner was informed that the credit arrangement referred to had been terminated.

The respondent argues that at most the evidence discloses that the petitioner *thought* that he had a sufficient credit arrangement, but that this credit was with Andrews and not with the bank. It is difficult to see any merit in this contention. While the credit was arranged for by Andrews, it was extended by the bank, it was to be used by the petitioner, he was informed of its existence, and he used the same over a considerable period. The evidence discloses not only that the petitioner thought he had sufficient credit with this bank, but that he was justified in so thinking, and it is therefore entirely insufficient to show the criminal intent necessary under this statute or to show a present knowledge that he had not then sufficient credit with the bank to meet the checks in question.

While not properly a part of this case, it may be observed that the evidence shows that a large part of the amounts represented by these checks was paid in cash shortly after they were issued, and that security was given for the remainder. Under these circumstances, it is not without significance that these criminal charges were not brought until nearly a year had elapsed.

It appearing that the petitioner has been committed and held to answer without reasonable or probable cause, it follows that he should be discharged, and it is so ordered.

We concur: MARKS, J.; JENNINGS, J.

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134 Cal.App. 209

PEOPLE v. TEMPOMGKO et al.

Cr. 2390.

District Court of Appeal, Second District, Division 2, California.

Sept. 18, 1933.

1. Criminal law ⚷427(2).

In burglary prosecution, defendant *held* not bound by declarations and acts of other defendants; there being no evidence of conspiracy.

2. Burglary ⚷42(3).

Evidence that witnesses' home was burglarized, that some stolen articles were recovered from home of defendant and codefendants, that defendant's story conflicted with that of codefendants, and that defendant openly gave stolen article to acquaintance, *held* not to support burglary conviction.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Vincent Tempomgko was convicted of burglary, with prior convictions of felony, and he appeals.

Reversed.

Bob Wheeler, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIG, Acting Presiding Justice.

By two counts of an information the appellant and two other men were charged with burglary and receiving stolen property, and the appellant was also charged with a violation of section 146 of the California Vehicle Act (as amended by St. 1931, p. 2133, § 60) and with having twice previously been convicted of felonies. Upon a trial without a jury his codefendants pleaded guilty, the appellant admitted the prior convictions, and was found guilty upon the charge of burglary. He appeals upon the sole ground of alleged insufficiency of the evidence to support the judgment.

[1, 2] The evidence showed that the home of four witnesses was entered between 8 and 11 o'clock in the evening during their absence therefrom. They testified that many articles of wearing apparel and other personal property were missing upon their return. When next seen by either of these witnesses their property was at the police station. Officers testified that they recovered a porton of the same from the home of the defendants in another part of the city, and that the latter repeatedly stated when questioned that another, whom they named, had left the property with them. Friends of the defendants, from whom certain articles were recovered, testified that the latter had given the same to them. The only remaining evidence by which it is attempted to sustain the judgment consists of the testimony of officers that the defendants "told conflicting stories; one trying to blame the other." Association of either with the scene of the crime or with the taking is absent. No evidence is pointed out and we find none tending to show conspiracy of appellant with other defendants; hence their declarations and acts are of no value as binding him. It is not claimed that appellant told stories conflicting with each other, but only in conflict with those of other defendants. Such contradictions have never been held so indicative of guilty participation in burglary as to uphold a conviction where the only other substantial evidence was possession of the stolen property. Certainly it does not show conspiracy, with the other defendants, whose statements appellant contradicted. It appears that soon after the theft the appellant gave one of the stolen articles, a fur, to a woman acquaintance. This act was done openly and adds little if anything to the fact of possession. Circumstances here present in addition to possession of stolen property are not of sufficient force to warrant a conviction upon a charge of burglary, according to settled principles as announced in the following authorities: People v. Nichols, 39 Cal. App. 29, 177 P. 861; People v. O'Keefe, 54 Cal. App. 649, 202 P. 476; People v. Murphy, 91 Cal. App. 53, 266 P. 374.

The judgment and order denying a new trial are reversed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

134 Cal.App. 300

JENNINGS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9128.

District Court of Appeal, Second District, Division 1, California.

Sept. 25, 1933.

Hearing Denied by Supreme Court Nov. 23, 1933.

1. New trial ⟹165.

Trial court, making and entering conditional order granting or denying motion for new trial has no power thereafter to change or modify order except for inadvertence or mistake in entry thereof.

2. New trial ⟹161(4).

Unless party upon whom condition is imposed in conditional order granting or denying new trial complies with condition within time limited, alternative portion of order becomes operative.

3. New trial ⟹162(5).

Conditional order directing acceptance of modified judgment by plaintiffs in suit for rescission and cancellation of deed or granting new trial *held* to grant new trial, where plaintiffs failed to accept modified judgment even though order was in future tense.

Application of E. T. Jennings, also known as Earl Jennings, for writ of prohibition to restrain the Superior Court of the State of California in and for the County of Los Angeles, Honorable B. Rey Schauer, Judge, from proceeding with new trial.

Writ denied.

Francis D. Adams and Robert Clifton, both of Hollywood, for petitioner.

Haskell & Martin, of Long Beach, for respondents.

YORK, Justice.

The case of Jennings v. Carter et al. was tried in the superior court of Los Angeles county on or about the 16th day of February, 1932, before the Honorable H. D. Gregory, judge thereof; said action being one for rescission and cancellation of a deed to a parcel of land alleged to be worth the sum of $30,000, which plaintiff, then an incompetent, was induced to sign through the fraudulent representations of the defendants Carter and Mitchell. The complaint alleged that on or about the 24th day of April, 1929, plaintiff deposited in escrow with defendant Flora M. Carter, as escrow holder, a deed signed by plaintiff which was in form a grant deed conveying the said property to defendant Frank Mitchell; that said deed was so delivered in escrow to defendant Carter upon the instructions and agreement that it should be delivered to said escrow holder only upon payment to plaintiff of the sum of $5,000 and the delivery to plaintiff of a promissory note in the principal sum of $20,000, bearing interest at the rate of 8 per cent. per annum, $5,000 of which should be payable one year from date thereof and $5,000 each year thereafter until the same was entirely paid, which said note should be secured by a trust deed on the above-described property which should be a first lien thereon.

It was further alleged that after deposit of the deed in escrow, the defendant Mitchell obtained the possession thereof without the knowledge or consent of plaintiff and without having complied with the terms of the escrow, and caused said deed to be recorded in the office of the county recorder of Los Angeles county; that subsequent to the improper delivery and recording of said deed, defendant Mitchell created certain incumbrances upon and made certain conveyances of said property in favor of the other defendants named in the complaint, who had knowledge of the claims and rights of plaintiff; that plaintiff never received the $5,000 in cash nor the promissory note secured by deed of trust or any trust deed or security.

The prayer of the complaint was for a cancellation of all instruments and documents signed by plaintiff in connection with said property; that each defendant reconvey to plaintiff any right, title, or claim to said property; that in event said deeds and conveyances be not canceled and annulled that it be decreed that said property is subject to a vendor's lien for the sum of $25,000, with interest, and that it be decreed that said property and all of the right, title, interest, claims or demands of defendants, or any of them, be foreclosed and sold according to law.

It was found by the court that the allegations of plaintiff's complaint were true, and, by reason thereof, it was ordered that plaintiff have judgment against defendants as prayed for in plaintiff's complaint. The judgment when filed, in addition to the relief prayed for and ordering deeds and reconveyances to be executed and delivered to the plaintiff, also provided: "And in the event that said deeds and reconveyances be not executed by said defendants and each and all of them reconvey unto plaintiff, said hereinafter described real property and each and every part thereof and in the event that plaintiff shall so elect so to do, plaintiff have judgment against said defendants and each of them for the sum of Twenty-five Thousand Dollars ($25,000.00) with interest thereon at the rate of seven per cent. (7%) per annum from April 24, 1929, until paid." Thereafter, on April 5, 1932, plaintiff filed his election to have judgment against the defendants for the sum of $25,000. Prior to this time, to wit, March 2, 1932, the defendant Long Beach Building & Loan Association, for itself alone, gave notice of motion for a new trial, which came on regularly for hearing on March 18, 1932, when it was ordered that said motion for new trial be submitted on briefs to Judge Gregory in chambers at Oroville, briefs to be in the hands of Judge Gregory not later than April 9, 1932. Thereafter, on the 29th day of March, 1932, Judge Gregory, while presiding in department L. B. "D." of the superior court in and for the county of Los Angeles in the city of Long Beach, vacated the order submitting the motion for a new trial and set it for oral argument on April 18, 1932, at which later date it was continued to April 19, 1932, when a review of the testimony was had and a discussion took place, at which time Judge Gregory stated:

"Also I find that inadvertently a judgment was granted against the Long Beach Building & Loan Association in favor of plaintiff and against it in the sum of $25,000.00 which was not intended, surely not by myself and I don't think it was by counsel for plaintiff. However, it crept into the judgment though not in the findings and that should be corrected. The judgment should be simply the cancellation of this note that I have just referred to placed in escrow by the Farmers etc. National Bank, in the sum of $2,513.80, also the deed and mortgage and any other papers which Jennings was induced to sign in these transactions are cancelled, set aside and held to be void.

"I am going to ask Mr. Taubman to prepare a modified or amended findings and a modified judgment in this action to be in strict harmony and according to the decision which I have just rendered. Also the plaintiff must herewith accept the new and modified judgment and so indicate by filing acceptance of same in the Clerk's office of the County of Los Angeles, California, or, in case the plaintiff refuses or fails to do so, a new trial must necessarily have to be granted. In case the plaintiffs do accept this modified judgment, a motion for a new trial will be overruled." Judge Gregory returned to his court at Oroville, California, and while correspondence was exchanged between him and the attorneys of record, no amended findings of fact, conclusions of law or modified judgment were ever signed or filed. In the fall of 1932 said judge was defeated for re-election to his office, and on January 9, 1932, defendant Long Beach Building & Loan Association filed its notice of motion to set said cause for trial, and on February 21, 1933, Judge Wilbur F. Downs, presiding in the superior court at Long Beach, California, made the following order: "Defendant's motion heretofore submitted is now granted as to the defendant Long Beach Building and Loan Association, only, and the case is set for trial on April 21st, 1933;" that said order so made by said Judge Downs was incorrectly and erroneously entered in the minutes of said superior court as follows: "Defendant's motion for a new trial heretofore submitted is now granted as to the defendant Long Beach Building and Loan Association, only, and the cause is set for trial on April 21st, 1933;" that on May 9, 1933, said Judge Downs corrected said erroneous minute entry nunc pro tunc, striking therefrom, among other things, the phrase "for a new trial." On April 21st the cause was continued to May 11, 1933, and on May 2d, petitioner, through his counsel, served counsel for defendant Long Beach Building and Loan Association with a "Notice of Motion for an Order Vacating Order Granting Motion for New Trial, and Setting Cause for Trial."

On May 10, 1933, petitioner filed his petition for a writ of prohibition to restrain the superior court from proceeding with a new trial, and alternative writ of prohibition was issued. It is claimed by petitioner that the superior court had no jurisdiction on February 21, 1933, to set said action for trial and that it had no jurisdiction to hold a new trial, for the reason that under section 660 of the Code of Civil Procedure, the power to pass on a motion for new trial in said action expired sixty days after the filing of the notice of intention to move for a new trial; that notice of intention to move for a new trial was filed in said action on March 2, 1932, and that the powers of said court to pass on said motion expired on April 30, 1932, and that a new trial was not granted in said action, but was denied by operation of law, and the judgment entered therein is final.

[1, 2] Petitioner's contention cannot be sustained by this court. When Judge Gregory on April 18, 1932, while passing on the motion for new trial, found that the judgment in the action contained an erroneous statement, he ordered counsel for plaintiff (petitioner here) to file a modified judgment, or "in case the plaintiff refuses or fails to do so, a new trial must necessarily be granted. In case the plaintiffs do accept this modified judgment, a motion for a new trial will be overruled."

"The well-settled rule is that, when a trial court makes and causes to be entered a conditional order granting or denying a motion for a new trial, its jurisdiction is exhausted, and thereafter it has no power to change or modify the order except for inadvertence or mistake in the entry thereof (Holtum v. Greif, 144 Cal. 521, 78 P. 11; United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, Ann. Cas. 1916E, 199; Compton v. Northwest Engineering Co., 116 Cal. App. 523, 2 P. (2d) 1014); and that, unless the party upon whom the condition is imposed complies with such condition within the limitation of time fixed therefor, the alternative portion of the order becomes operative and final at once, at the expiration of such period of time (Holtum v. Greif, supra; Brown v. Cline, 109 Cal. 156, 41 P. 862; Taber v. Bailey, 22 Cal. App. 617, 135 P. 975). Two cases in point from other jurisdictions wherein additional authorities are cited are Bourne v. Moore, 77 Utah, 184, 292 P. 1102, and Plecas v. Devich, 72 Utah, 578, 272 P. 197." Gloria v. A Colonia Portuguesa et al. (Cal. App.) 18 P.(2d) 87, 88.

[3] The conditional order in the cited case was worded in the present tense, it is true, and while the order before us was worded in the future tense, which is objected to by petitioner, who contends that because of the wording thereof it was necessary that another motion for new trial be made, after a consideration of the circumstances under which it was pronounced, we are convinced that a new trial was thereby granted, in the event the condition thereby imposed was not fulfilled.

The petition for the peremptory writ is denied, and the alternative writ heretofore issued is discharged.

We concur: CONREY, P. J.; HOUSER, J.

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134 Cal.App. 305

FUELLER v. JUSTICE'S COURT OF ENCINITAS TP., SAN DIEGO COUNTY, et al.

Civ. 1084.

District Court of Appeal, Fourth District, California.

Sept. 25, 1933.

1. Prohibition 🔑25.

In prohibition proceeding, fact allegations of petition are deemed admitted by general demurrer.

2. Criminal law 🔑90(4).

Where negotiable note for wages was given in San Diego county, payable in Los Angeles county, and payment refused in latter county, alleged nonpayment on demand established the offense, so that justice's court in San Diego county had no jurisdiction (St. 1911, p. 259, § 1, as amended by St. 1929, p. 973; Pen. Code, § 781).

3. Prohibition 🔑3(4).

In proceeding to prohibit commitment to jail for violation of probation order issued in justice's court, alleged remedy by appeal from threatened commitment order *held* not speedy and adequate remedy which would foreclose right to prohibition writ based on lack of justice's jurisdiction of offense (Pen. Code, § 1237).

4. Criminal law 🔑90(1).

Where justice had no jurisdiction of offense, all proceedings in justice's court were void.

5. Prohibition 🔑17.

When lack of jurisdiction is apparent on face of proceeding in lower court, preliminary objection is not necessary before making application for prohibition.

Prohibition proceeding by Frank A. Fueller against the Justice's Court of Encinitas Township, County of San Diego, State of California, and the Honorable O. P. Cochrane as Judge thereof.

Demurrer to petition overruled, and alternative writ of prohibition made peremptory.

David A. Sondel and Charles M. Fueller, both of Los Angeles, and Frank A. Fueller, in pro. per., for petitioner.

Thomas Whelan, Dist. Atty., and Frank P. Buckley, Deputy Dist. Atty., both of San Diego, for respondents.

JENNINGS, Justice.

This is a proceeding for a writ of prohibition. It appears from the petition upon which the alternative writ was issued that the petitioner was charged with a violation of the provisions of the Act of May 29, 1929, made effective on August 14, 1929, amending the prior Act of March 1, 1911 (St. 1911, p. 259; St. 1929, c. 373, p. 973), by a criminal complaint filed in the respondent court in the county of San Diego; that a trial of the action was had before respondent justice of the peace; that prior to the commencement of the trial petitioner moved the court to dismiss the complaint and to discharge petitioner from custody on the grounds that the statute upon which the prosecution was based was unconstitutional and that the offense, if it should be proved that any was committed, occurred in the county of Los Angeles outside of the township of Encinitas; that notwithstanding the said motion and over petitioner's protest the respondent court proceeded with the trial of the action and upon its conclusion adjudged that petitioner was guilty as charged in the complaint and as punishment therefor imposed sentence that petitioner be imprisoned in the county jail of the county of San Diego for a term of three months and in addition that he pay a fine of $250; that thereupon and within the time prescribed by law, petitioner gave oral notice of appeal to the superior court of San Diego county; that thereafter petitioner withdrew his oral notice of appeal and respondent justice of the peace granted probation to petitioner for a period of six months on condition that petitioner pay to the complaining witness certain sums of money on designated dates; that petitioner was unable to comply fully with the conditions imposed upon him by the court's order suspending execution of the sentence and the respondent justice of the peace had caused petitioner's arrest and thereafter ordered his release on his own recognizance to appear in the respondent court on a designated date; that, unless restrained by order of this court, respondent justice of the peace will commit petitioner to the county jail of San Diego county for a period of three months in default of payment by petitioner of the amounts specified in respondent's order suspending execution of sentence.

The petition further alleges that upon the trial of the action the respondent justice of the peace found substantially the following facts: That petitioner was engaged in the development of acreage for agricultural purposes in Los Angeles county; that such development required the drilling of wells for water; that petitioner secured the services of the complaining witness in the drilling of the wells; that at the time the complaining witness ceased work petitioner was indebted to him for the services performed in such well drilling in the sum of $237.70; that it was subsequently agreed between petitioner and the complaining witness that the former would give and the latter would receive a promissory note for the aforesaid amount and thereafter petitioner delivered to the complaining witness in Encinitas township a promissory note in the following form:

"$237.70. Whittier, Cal., March 11, 1932.

"Ninety days after date, for value received, I promise to pay to Ernest F. Carter or order at the Whittier National Trust & Savings Bank the sum of Two Hundred Thirty-seven & 70/100 Dollars, with interest at the rate of seven per cent per annum from date until paid, interest payable at maturity. Should the interest not be paid when due, then the whole sum of principal and interest shall immediately become due and payable and interest shall be compounded monthly thereafter at the same rate. Should suit be commenced to enforce the payment of this note, I agree to pay an additional sum of ten per cent on the sums then unpaid, as attorney's fees, in addition to the court costs in said suit. We and each of us do hereby agree, that the holder of this note may extend the time of payment thereof without notifying us at or after maturity. Principal and interest payable in gold coin of the United States.

"Address P. O. Box 261.

"Frank A. Fueller."

Address: "Whittier, Calif."

That thereafter the said note was presented for payment at the Whittier National Trust & Savings Bank, in the city of Whittier, county of Los Angeles, and payment was refused by said bank.

It is further alleged in the petition that petitioner, relying upon representations made by respondent justice of the peace that if petitioner were financially unable to make the payments specified in the probation order, said respondent would not require payments in excess of respondent's ability to pay, petitioner waived his right to appeal, which it is alleged was a substantial right and by reason thereof petitioner has no plain, speedy. and adequate remedy in the ordinary course of law; that a proceeding in habeas corpus is not available for the reason that, at the time of filing the petition, petitioner was not in custody and was not then illegally deprived of his liberty.

To the petition thus framed respondent has interposed a general demurrer based on the failure of the petition to state facts sufficient to justify the issuance of a writ of prohibition.

In support of his application for the issuance of the writ, petitioner advanced the same reasons which it is alleged he presented to respondent prior to the commencement of the trial as grounds for the dismissal of the complaint and for his discharge. These are: First, that the statute upon which the complaint is based is unconstitutional; and, second, that, assuming the validity of the statute, the offense was committed outside the territorial boundaries of the respondent court and was therefore an offense over which said court had no jurisdiction. Inasmuch as we entertain the opinion that petitioner's second contention is well founded, we shall not in this opinion give consideration to the contention that the statute is unconstitutional.

Section 1 of the statute which formed the basis of the complaint wherein petitioner was charged with the commission of a criminal offense contains the following provision: "No person, firm, association or corporation, or agent or officer thereof, shall issue, in payment of or as an evidence of indebtedness for wages due an employee, any order, check, memorandum, or other acknowledgment of indebtedness, unless the same is negotiable and is paid upon demand without discount in cash at some bank or other established place of business in the state." St. 1929, c. 573, p. 973.

[1, 2] From the allegations of fact contained in the petition which are admitted by respondent's demurrer, it clearly appears that the promissory note which was given in satisfaction of the balance due the complaining witness was actually delivered in Encinitas township, but that it was made payable and payment was refused in Los Angeles county. Respondent urges that since the note was issued in Encinitas township a necessary ele-

ment of the offense was committed in Encinitas township and therefore in accordance with the provisions of section 781 of the Penal Code jurisdiction of the offense was in the respondent court. While it is true that the offense with whose commission petitioner was charged could not have been committed unless the note had been issued, we think that the offense which was established by the admitted facts was, not the issuance of the note, but the nonpayment of it on demand. The statute clearly states "unless * * * paid upon demand." It cannot be contended that the giving of the note which was negotiable in form constituted a violation of the statute. The language of the proviso clearly permits the issuance of a promissory note provided it is negotiable. No offense therefore was committed until there was a refusal to pay the note when payment was demanded. It is not denied that demand for payment was made and was refused in Whittier, Los Angeles county. The locus of the offense which was committed was the place of refusal and not the place of issuance. Since the place where payment was refused was outside the territorial limits of the respondent court, it follows necessarily that respondent had no jurisdiction of the offense and petitioner's motion for dismissal of the complaint should have been granted. Antilla v. Justice's Court, 209 Cal. 621, 290 P. 43; In re Wyatt, 114 Cal. App. 557, 300 P. 132.

[3, 4] In opposition to the granting of the writ, respondent urges that the petition fails to show that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law. In this connection, it is contended that it must be assumed that what petitioner seeks to prohibit is the making of a further order modifying the probation order previously made by respondent, and that such order, if it should be made, would be an "order made after judgment, affecting the substantial rights of the party" and therefore appealable in accordance with the provisions of section 1237 of the Penal Code. We are not in accord with respondent as to the object of the writ which is here sought. It is our understanding, based on careful examination of the petition, that petitioner, admitting that he has not fulfilled the conditions imposed upon him by the order granting probation, seeks to prohibit his commitment to the county jail of San Diego county in accordance with the terms of said probation order. The probation order was dated January 14, 1933, and the petition herein was filed on June 24, 1933. At the time of filing the petition, therefore, if any appeal could have been taken from the order, the time for taking it had long since expired.

Assuming, however, that respondent's position in this regard is correct and that the purpose of this proceeding is to prohibit the issuance of a further order modifying the aforementioned order of January 14, 1933, and that an appeal would lie from such further order if made, we nevertheless entertain the opinion that upon the facts which are here presented, petitioner is not foreclosed from his right to the issuance of the writ which he here seeks. Since, in our opinion, respondent had no jurisdiction of the offense charged in the complaint, it necessarily follows that all proceedings in connection therewith are void. Among these proceedings are the judgment of conviction, the sentence imposed thereon, and the subsequent probation order. No less void would be any further order which respondent may make modifying the prior probation order. It cannot successfully be urged that the remedy of an appeal to be taken from such future order may properly be characterized as either speedy or adequate under the circumstances. Arfsten v. Superior Court, 20 Cal. App. 269, 128 P. 949; Broady v. Jennings, 70 Cal. App. 647, 234 P. 120.

[5] Finally, we are not impressed by respondent's complaint that the petition herein is premature and that petitioner should first have presented to respondent the objections which he here raises. The immediate answer to this contention is that the petition shows that petitioner did present the objections here raised to the respondent court prior to the commencement of the trial and that his objections were overruled by the court. Furthermore, we do not understand that it is the rule that, when lack of jurisdiction is apparent on the face of the proceeding in the lower court, a preliminary objection is necessary before making application for a writ of prohibition. Havemeyer v. Superior Court, 84 Cal. 327, 405, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Chaplin v. Superior Court, 81 Cal. App. 367, 380, 253 P. 954; McCarte v. Superior Court, 94 Cal. App. 507, 509, 271 P. 512.

The demurrer to the petition is therefore overruled, and the alternative writ of prohibition is made peremptory.

We concur: BARNARD, P. J.; MARKS, J.

134 Cal.App. 240

ROY v. SMITH et al. *

Civ. 4834.

District Court of Appeal, Third District, California.

Sept. 20, 1933.

Hearing Denied by Supreme Court Nov. 17, 1933.

1. Gas 🔑20(1).

Complaint alleging that gas company's negligence in supplying gas and in furnishing apparatus for furnace caused generation of carbon dioxide resulting in death by asphyxiation stated cause of action against gas company under doctrine of res ipsa loquitur.

> Complaint alleged in general terms that gas company had exclusive control over plant by means of which gas was supplied, and of the nature, character, pressure, and flow thereof, and that gas company changed burner of the floor furnace before accident occurred, and that its negligence with respect to nature and character of gas furnished and apparatus supplied caused the generation of carbon dioxide which resulted in the death of the deceased by asphyxiation.

2. Gas 🔑20(2).

Where complaint alleged that death resulted from carbon dioxide generated by defective nature of gas and manner of supplying, burden shifted to gas company to refute inference of negligence under res ipsa loquitur doctrine.

3. Appeal and error 🔑909(1).

On appeal from order sustaining demurrer to complaint alleging that gas furnace was extinguished by party after death of deceased, it must be assumed that flame was extinguished very soon after death, as regards gas company's liability for death.

4. Evidence 🔑9.

Application of scientific laws to facts of particular case is not matter of judicial knowledge.

5. Gas 🔑20(4).

In action for death by gas asphyxiation, court could not say as matter of law that flame of floor furnace was extinguished by carbon dioxide generated therefrom before deceased, reclining on bed two feet above floor, was asphyxiated.

6. Evidence 🔑20(2).

Court would assume that carbon dioxide generated by gas furnace would be carried to upper realm of room by force of current created by lighted furnace, and that it would suffocate person on bed two feet above floor before carbon dioxide extinguished flame.

7. Gas 🔑20(1).

In action for death by gas asphyxiation, allegation that furnace was equipped with vent pipe to permit gases to escape did not preclude recovery for alleged negligence in furnishing defective gas and inadequate apparatus.

8. Landlord and tenant 🔑169(3).

Complaint alleging that tenant died from asphyxiation by carbon dioxide generated from defective gas and defective apparatus in floor furnace did not state cause of action against landlord.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by John D. Roy, administrator of the estate of Fern Mildred Roy, deceased, against Anna L. Smith and another. From an order sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed as to named defendant, and reversed as to the Pacific Gas & Electric Company, with directions.

See, also (Cal. App.) 21 P.(2d) 151.

Robert H. Schwab, of Sacramento, for appellant.

Thomas J. Straub and W. H. Spaulding, both of San Francisco, and W. U. Goodman and Joseph M. Raines, both of Fairfield, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

From a judgment which was entered against the plaintiff pursuant to an order of court sustaining a general and special demurrer to the third amended complaint and specifically denying leave to amend the pleading, the plaintiff has appealed.

The complaint alleges that the defendant Smith is the owner of Bay View Court Apartments at No. 215 York street in the city of Vallejo; that on November 19, 1930, and for a long time prior thereto, the deceased, Fern Mildred Roy, was a tenant and occupied rooms in the apartments; that during all of said time the apartments were heated by means of gas furnaces which were installed in the floors of the living rooms; "that said gas furnace was equipped with a vent pipe which was connected with the outside of said apartment so as to permit the escape of gases from said furnace"; that during all of said time the gas furnace remained in the same condition, and that prior to said date it was frequently used by said deceased without injurious effect; that during all of said time the defendant Pacific Gas & Electric Company was a public utility corporation engaged in supplying to the public and to said apartment house natural gas for domestic and heating purposes; that the defendant Pacific Gas &

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*Hearing denied 26 P.(2d) 650.

Electric Company had exclusive control of the plant used for supplying gas for cooking and heating in said apartments, and shortly before the death of said Fern Mildred Roy the use of artificial gas for said purpose was discontinued and natural gas was thenceforth supplied in lieu thereof; that for the purpose of said change in the character of the gas used, it became necessary, and the company did change the burner of said gas furnace; that said gas company at all times had the exclusive control over the distributing plant together with the character, pressure, and flow of the gas supplied to said floor furnace; that after said change had been made in the nature of the gas burner and the character of the gas supplied, and on November 19, 1930, the said Fern Mildred Roy, for the purpose of heating her apartment, turned on and lighted the gas furnace and then reclined upon the bed in her room, and "while she was so lying upon her bed she was overcome by carbon dioxide gas and died therefrom." The complaint then concludes with this statement: "That said defendant Pacific Gas and Electric Company so negligently and carelessly supplied said natural gas to said apartment for use in said gas furnace so that said carbon dioxide gas was created by burning said natural gas through the burners as installed by said Pacific Gas and Electric Company in said gas furnace in said apartment. That said carbon dioxide gas was created to such an extent that said Fern Mildred Roy died from the effects thereof." The prayer then asks for damages for the death resulting from the negligence alleged.

To this complaint the defendants demurred on the ground that the pleading fails to allege facts sufficient to state a cause of action, and upon the further ground of uncertainty in failing to allege what created the carbon dioxide or how their negligence contributed to the death of Fern Mildred Roy. This demurrer was sustained without leave to amend. Judgment was entered accordingly.

[1, 2] We are of the opinion the complaint states a good cause of action against the Pacific Gas & Electric Company. The pleading alleges in general terms that the company had exclusive control over the plant by means of which the gas was supplied, and of the nature, character, pressure, and flow thereof. It is also alleged the company changed the burner of the floor furnace just before the accident occurred, and that its negligence with respect to the nature and character of gas furnished and the apparatus supplied caused the generation of carbon dioxide which resulted in the death of Mrs. Roy. The plaintiff relies upon the doctrine of res ipsa loquitur. Having alleged that death ensued from the presence of carbon dioxide which was generated by its defective nature and by the manner of supplying the gas together with the apparatus with which it was furnished, the burden shifts to the company to refute the inference of negligence on its part. Jianou v. Pickwick Stages System, 111 Cal. App. 754, 296 P. 108, 109; 19 Cal. Jur. 713, § 127. In the Jianou Case, supra, it is said: "The very hypothesis of the doctrine [of res ipsa loquitur] is that the plaintiff has no knowledge of just what caused the accident, and that, since the instrumentality by means of which the accident occurred is solely within the control of the defendant, negligence will be inferred upon proof of a prima facie case, in the absence of an adequate explanation on the part of the defendant exempting him from liability."

The language seems peculiarly applicable to the challenged pleading in the present case. On the doctrine of res ipsa loquitur, the complaint in the present case states facts sufficient to shift the burden to the gas company to refute the inference of negligence.

The respondents assert that since the complaint alleges that "said gas furnace continued to burn from the time Fern Mildred Roy lighted the same until after her death when said gas furnace was extinguished by another person," it was physically impossible for her to have died from the effect of carbon dioxide because that noxious element is heavier than air and therefore would have settled to the floor, smothering the flame of the furnace before it suffocated the victim. It is claimed that the court will take judicial notice of the scientific fact that carbon dioxide is heavier than air, and that it will extinguish burning fuel. Upon the application of this scientific principle the respondents maintain the claim that it was impossible for the deceased to have lost her life as a result of the presence of carbon dioxide.

[3] As we have pointed out in a previous opinion rendered on a motion to dismiss this appeal on the same ground (Roy v. Smith, 21 P.(2d) 151, 153), the respondents have carried this application of the principle of judicial notice of scientific facts too far. It will be observed the complaint alleges the gas furnace was extinguished by another person after the death of Fern Mildred Roy. For the purpose of passing on the demurrer it must be assumed the flame of the furnace was extinguished very soon after the death of Mrs. Roy. In the case of Kraner v. Halsey, 82 Cal. 209, 211, 22 P. 1137, 1138, it is said: "The demurrer must be determined on the allegations of the pleading before the court. A court is not allowed to speculate on what might have happened, or what might not have occurred."

[4] The special demurrer does not raise the question as to when the furnace was extinguished. We have said in the Roy Case, above cited, that even though the laws of nature and science are well enough known to become matters of judicial knowledge, the application of such laws to the facts of a particular case may still remain valid subjects of controversy. As we suggested in the case last mentioned: "Granting that carbon dioxide is heavier than normal air, that it has a tendency to settle to the lowest available point, and that the pressure of a sufficient quantity of it will extinguish burning wood or other fuel, still we are unable to say, as a matter of law, just what quantity or density is required to extinguish the burning flames of a gas furnace which is continuously fed by natural gas under high pressure. Neither are we able to say, as a matter of law, just what quantity of carbon dioxide is required to asphyxiate a human being under various conditions."

[5, 6] Granting the scientific fact contended for by the respondents with respect to the specific gravity of carbon dioxide and its tendency to extinguish burning fuel, we are unable to say, as a matter of law, that the flame of the floor furnace would have been extinguished before the victim who reclined on a bed, which was elevated some two feet above the surface of the floor, was suffocated by the noxious fumes. It is reasonable to assume the carbon dioxide, which was generated by the burning of the gas in the furnace, would be carried in the upper realm of the inclosed room by the force of the current created by the lighted furnace, and that it might suffocate a person reclining on a bed two feet above the level of the floor before the carbon dioxide settled to the floor in sufficient quantity and density to extinguish the flame. This makes it apparent that the scientific principle relied upon by the respondents, which must be applied on the doctrine of judicial knowledge, is not conclusive under the circumstances of this case. There is a specific allegation that Mrs. Roy died from the effect of the carbon dioxide.

[7] Finally, the respondents assert that because the complaint alleges "that said gas furnace was equipped with a vent pipe which was connected with the outside of said apartment so as to permit the gases to escape from said furnace," the pleader is precluded from recovering damages for alleged negligence in furnishing defective gas or inadequate apparatus. It is evident that if the vent pipe was adequate to carry off the noxious gas, the victim would not have died from the effect of carbon dioxide. The pleader asserts that it was not adequate to carry off the noxious gas when he alleges "that said Fern Mildred Roy died from the effects thereof." This may be reconciled with the above-challenged statement. The pleader does not say the vent pipe actually carried off the noxious gas. He alleges that it was installed "so as to permit the gases to escape." Taking the pleading as a whole we must assume that the pipe was not adequate for the purpose for which it was intended.

[8] For the foregoing reasons, we are of the opinion the third amended complaint states a good cause of action against the defendant Pacific Gas & Electric Company. It fails to state a good cause of action against the defendant Smith.

The judgment is affirmed as to the defendant Smith and is reversed in so far as it applies to the defendant Pacific Gas & Electric Company, with directions to overrule the demurrer and permit the filing of an answer thereto.

We concur: PULLEN, P. J.; PLUMMER, J.

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134 Cal.App. 254

DAVIS v. KITTLE MFG. CO.

Civ. 4741.

District Court of Appeal, Third District, California.

Sept. 21, 1933.

1. Courts 🔑489(3).

State court has no jurisdiction of case arising under patent laws (Jud. Code § 256 [28 USCA § 371]).

2. Courts 🔑489(3).

State court has jurisdiction of action of which patent is subject-matter, where case arises under contract (Jud. Code § 256 [28 USCA § 371]).

3. Courts 🔑489(3).

State court has jurisdiction to determine question relating to patent rights whenever such questions arise collaterally to main cause of action over which state has jurisdiction; such questions not "arising under patent laws" (Jud. Code § 256 [28 USCA § 371]).

4. Courts 🔑489(3).

State court had jurisdiction of action by inventor against manufacturer for royalties from sale of camp beds invented by plaintiff, who applied for patents (Jud. Code § 256 [28 USCA § 371]).

5. Patents 🔑219(2).

Inventor *held* not precluded from recovering royalties under contract because patent was not issued, since inventor of unpatented device may make valid contract for its manufacture, use, or sale.

6. Patents ⚷211(1).

Exclusive right granted to person other than patentee to use and sell patented device within named district excludes owner of letters patent from selling or using same in that region.

7. Patents ⚷219(2).

That inventor of camp beds violated contract by manufacturing beds which by contract were to be manufactured exclusively by defendant did not preclude recovery by inventor for royalties; defendant possessing right to counterclaim.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by Mansell A. Davis against the Kittle Manufacturing Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 24 P.(2d) 550.

Stick, Moerdyke & Gibson, of Los Angeles, for appellant.

Roscoe R. Hess, of Los Angeles, for respondent.

TUTTLE, Justice pro tem., delivered the opinion of the court.

By this action plaintiff seeks to recover damages arising out of the breach of a contract to pay royalties due from the manufacture and sale of camp beds alleged to have been invented by him. Trial was had by the court, and the judgment in the sum of $16,295.04 was rendered in favor of plaintiff. Defendant now appeals from this judgment.

For his first cause of action plaintiff alleges in his complaint the execution of the following contract between him and defendant:

"This Agreement, made and entered into in duplicate at Los Angeles, California, this 2nd day of March, 1923, by and between Mansell A. Davis, of Los Angeles, California, hereinafter known as party of the first part, and Kittle Manufacturing Company, of Los Angeles, hereinafter known as party of the second part,

"Witnesseth:

"That Whereas, the party of the first part has designed a certain folding camp bed on which he has made application for letters patent in the patent office of the United States of America; and

"Whereas, the party of the second part is desirous of securing the right to manufacture and sell said camp bed for the full life of any patents granted thereon; now

"Therefore, in consideration of the mutual covenants hereinafter contained, it is agreed:

"First: The party of the first part hereby grants to the party of the second part the exclusive license to manufacture and sell camp beds made under or covered by any and all patents, which said party of the first part now has or may hereafter obtain, whether upon the original device or on any improvement thereon, or any form or style of camp bed or improvement thereon. Said exclusive license shall cover the States of California, Oregon, Washington, Idaho, Nevada, Utah and Arizona.

"Second: It is understood that said party of the first part is now prosecuting a claim, in the United States Patent Office, for a patent on a camp bed, and said party of the first part agrees to continue to prosecute said claim with all possible diligence and to bear all expenses connected therewith. All subsequent patents on improvements on said original camp bed shall be taken in the name of said party of the first part and the necessary expense thereof shall be shared equally by said parties during the existence of this contract. Said parties shall share equally all necessary expense incurred in obtaining subsequent patents which said party of the first part may hereafter secure, during the life hereof, on any other form or style of camp bed or improvement thereon.

"Third: The party of the second part shall not manufacture or sell or be interested in the manufacture or sale of any other camp bed which could in any way be considered a modification of this bed.

"Fourth: All necessary expense of litigation to enjoin the infringement of, or to otherwise protect the patents contemplated herein shall be shared equally by each party, but should second party notify first party of infringement by a third, the first party does not forthwith proceed to stop such infringement, then and in that event the party of the second part may take any necessary steps to stop said infringement, in which case first and second parties will share expense alike.

"Fifth: Said party of the second part agrees to pay said party of the first part a royalty of seventy-five cents (75c) each on the first One Thousand (1000) beds manufactured and sold during each contract year from and after the date hereof, and fifty cents (50c) each on all beds manufactured and sold in excess of said amount of 1000. Said party of the second part agrees to advance to said party of the first part the sum of Two Thousand ($2,000.00) Dollars on account of said royalties, payable as follows: One Thousand $1,000.00) Dollars upon the execution hereof, receipt whereof is hereby acknowledged, and Two and 50/100 ($2.50) Dollars on each of the first four hundred (400) beds manufactured and sold. No further payments of royalties shall be made until the amount due on account of said royalties shall have exceeded the sum of Two Thousand ($2,000.00) Dollars.

"Sixth: Said party of the second part agrees to use all reasonable diligence in prosecuting the sale of this bed, and use their best efforts to promote the sales in the territory assigned to them.

"Seventh: All royalties accruing on beds sold and delivered during the calendar month shall be paid between the first and tenth days of the succeeding calendar month. Said party of the first part or his duly appointed representative shall have the right, at all reasonable times, to inspect the sales records of said party of the second part.

"Eighth: This contract shall be binding upon and inure to the benefit of the respective parties hereto, their heirs, personal representatives, assigns or successors.

"In Witness Whereof, said parties have hereunto set their hands the day and year first above written.

"M. A. Davis
"Party of the First Part
"Kittle Manufacturing Company
"By R. N. Prichard
"Party of the second part."

It is further alleged that on July 3, 1922, plaintiff had filed an application in the United States Patent Office for a patent on the camp bed, and that on March 16, 1926, letters patent No. 1577204 were issued upon said application; that after the execution of said contract plaintiff filed an application for a patent on a camp bed which was a modification of the bed covered by the first patent, and on March 16, 1926, letters patent No. 1577205 were issued upon said second application; that on December 17, 1925, plaintiff filed an application, No. 75995, for a patent on a camp bed which was a modification of the camp bed rereferred to in the contract, and covered by said patents, and that plaintiff is now diligently prosecuting his claim of patent in said application which is now pending in the Patent Office; that prior to said date of December 17, 1925, and during the year 1925, defendant, at the request of the plaintiff herein, and under the direction of the plaintiff, made drawing for the patent claimed in said application No. 75995 and furnished material to the plaintiff for the manufacture of a model of the camp bed, a patent for which application was made in said application No. 75995, and that at the time of the making of said drawings and the furnishing of said material defendant knew that said drawings and said material were to be used by the plaintiff in connection with the application of the plaintiff for a patent on the modification of the camp bed claimed by the plaintiff in the application for patents then pending and for which letters patent Nos. 1577204 and 1577205 were thereafter issued to the plaintiff as aforesaid. A supplement to the first cause of action was filed, which contains the following allegations: "That the defendant, during the latter part of the year 1925 manufactured and sold and was interested in the manufacture and sale of another camp bed in some respects different from the camp bed referred to in said contract dated March 2, 1923, and attached to the complaint herein as Exhibit 'A', but in its essential features only slightly modified from the bed referred to in said contract and in contemplation by the parties at the date of the execution thereof, said other camp bed being of the type and structure referred to in said patent application No. 75995; that defendant has continued in the manufacture and sale of such other camp bed, down to the date hereof and that the plaintiff is informed and believes, and therefore alleges that the number of such other camp beds so manufactured and sold is in excess of 18,000 beds; that said manufacture and sale of said other camp beds has been in violation of said contract dated March 2, 1923, and that as a result thereof, the plaintiff has been damaged in an amount equivalent to the royalties payable under the terms of said contract." Plaintiff prays for judgment, after an accounting, for all royalties due under said contract.

The second cause of action is based upon another contract which is identical with the first, except that it grants an exclusive license in the entire United States, outside of the states enumerated in the first contract. A supplement to the second cause of action was also filed, and its allegations are practically the same as those found in the supplement to the first cause of action.

Defendant in its answer admits the issuance of the two patents to plaintiff. As to the application for the third patent, defendant alleges in his answer that the camp bed embodied therein was not invented by plaintiff, but was invented by defendant, who has filed an application for a patent covering the same, and is now diligently prosecuting its claim, and that said application is now pending. Defendant further avers that plaintiff's second patent, No. 1577205, differs materially and substantially from the camp bed described in patent No. 1577204, and denies that the camp bed described in the second patent is a modification of the bed described in the first patent. As to the pending application for a third patent, No. 75995, defendant alleges that the bed described therein is wholly different in construction and mechanical principles from the beds described in the two patents, and denies that said bed described in the said application is a modification of the beds described in the two patents. It is also alleged that the bed described in patent No. 1577205 was jointly invented and designed by plaintiff and defendant; that by reason of severe competition it became unprofitable to manufacture the bed covered by patent No. 1577205; that subsequent to the 1st day of January, 1926, plaintiff and defendant agreed to abandon and terminate said agreements, and did each relieve the other of all further obligations thereunder; that defendant has made full payment of all royalties up to and including December 1, 1925, and that no payments have been made since said date; that plaintiff, in January, 1927, organized and became president of a corporation which proceeded to manufacture a camp bed described in and covered by said two patents and said application, or which were modifications of said beds. The answer to the second cause of action is practically the same.

Turning to the appellant's opening brief we find an extended discussion of certain legal principles, but no error is pointed out which would render such principles applicable. No complaint is made upon the basis that evidence was wrongfully admitted or excluded, nor is the measure of damages attacked. Our own conclusion is that appellant's points and authorities are directed toward the insufficiency of the evidence to uphold the findings, and we shall proceed upon that theory.

The court found with respondent upon every allegation of the complaint which we have mentioned, and against every defense set up by appellant. The parties agreed, at the conclusion of the trial, that the number of beds manufactured by appellant subsequent to December 1, 1925, could be ascertained by the court from an affidavit to be filed by appellant. This was done, and the precise number of beds so manufactured and for which royalties were allowed, was found by the trial court, and no question is raised as to such fact.

It appears that the camp beds manufactured by appellant under said contract, and covered by the two patents granted to respondent, were of a heavy type and design, and were known as the "heavy-weight" bed, while the beds manufactured by appellant after December 1, 1925, were of a lighter character, and were known as the "light-weight" beds. The latter beds, appellant contends, were not invented by respondent, nor were they a modification of the other heavy type beds; hence they do not come under the terms of the contract, and no royalties are due thereon. The trial court found that said "light-weight" beds were invented by respondent and covered by his application for patent, and furthermore, that such bed was a modification of the other beds covered by the patents, and upon which appellant paid royalties for several years. It will be observed that the language of the contract is extremely broad, in that appellant is prohibited from manufacturing or selling, or from being interested in the manufacture or sale of any camp bed which could in any way be considered a modification of this bed. The evidence is spread over many volumes of the transcript, but from the examination we have made we are satisfied that there is ample support for the findings upon these issues.

It appears that appellant filed an application for a patent covering the "light-weight" bed manufactured by it. At the time of the filing of said application there was also pending an application filed by respondent covering a similar type of bed.

[1-4] Appellant contends that our state courts have no jurisdiction over the subject-matter of the case. It is true that under United States Code, title 28, § 371, 28 USCA § 371 (Judicial Code, section 256), the courts of the United States have exclusive jurisdiction "of all cases arising under the patent-right, or copyright laws of the United States." Under that act it is well settled that a state court has no jurisdiction of a case arising under the patent laws. 20 R. C. L., p. 1181. "But where an action or suit is brought on a contract of which a patent is the subject-matter, either to enforce the contract or annul it, the case arises on the contract and not under the patent laws, and a state court has jurisdiction. Accordingly, an action may be maintained in a state court to enforce the payments of royalties or license fees—and while it is elementary that a state court has no jurisdiction with respect to a case arising under the patent laws, it is equally well settled that a case involving patent rights does not necessarily 'arise under the patent laws,' and that a state court has jurisdiction to determine questions relating to patent rights whenever such questions arise incidentally or collaterally to a main cause of action over which a state court has jurisdiction." 20 R. C. L., par. 63, pp. 1181–1182. "Such a provision does not deprive the state courts of the power or the duty, when the question arises collaterally, of deciding whether the patent which is relied on is of any validity." Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435. The cause of action is based upon contract, and the matter of patent rights is incidental to the main issue. It therefore follows that our state courts have jurisdiction over the subject-matter of this controversy.

[5] Appellant next contends that "plaintiff cannot collect royalties on future inventions until he secures a patent on his future inventions." The rule appears to be otherwise. "The license may be given before issuance of patent. * * *" 48 C. J., p. 264. "The inventor of an unpatented device may make a valid contract for its manufacture, use, or sale. It is no objection to the validity of such a contract that any person may manufacture it until a patent is issued. * * * If, therefore, the defendant contracted to pay a royalty before the patent was issued, the plaintiff is entitled to recover." Hamilton v.

Park & McKay Co., 112 Mich. 138, 70 N. W. 436, 437, citing numerous authorities. This contention is without merit.

[6] The trial court found that plaintiff, early in 1927, organized, or caused to be organized, a corporation known as "Champion Folding Furniture Company," with its offices in the state of Illinois; that he was the holder of some 2,500 shares of stock in said corporation; that for a time he was the president and general manager thereof; and that said corporation manufactured certain camp beds in several respects similar to the camp bed described in application No. 75995, but also differing in certain particulars. The court further finds that it is not true that plaintiff, by or through said corporation, or in any manner, or by any means, has at any time manufactured or sold in any territory the camp beds described in said letters patent No. 1577204 or No. 1577205, or by said application No. 75995, and that plaintiff was not the inventor or patentee of said bed so manufactured by said Champion Company. By the contract between these parties plaintiff granted to defendant the "exclusive license to manufacture and sell camp beds." Some of these "Champion" beds were sold by the said corporation in the territory wherein defendant was given an exclusive license under the contract. It is admitted that the evidence is without conflict upon this fact. In this connection, it is the contention of appellant that he was evicted by respondent from the enjoyment of the exclusive license granted by the contract. It is no doubt the rule that "the exclusive right granted to a person other than the patentee to use and sell a patented device within a named district of country excludes the owner of the letters patent from selling the same or using the same in that region." Brush Elec. Co. v. Cal. Elec. Light Co. (C. C. A.) 52 F. 945, 959.

[7] Appellant concludes that the conduct of respondent in connection with the formation of the "Champion Company," and the sale of beds by said company while respondent was president thereof, constitutes a failure of consideration and is a defense to the action for royalties. The trial court, however, found that respondent was not the inventor of said "Champion" beds, and furthermore, that neither respondent nor "Champion Company" manufactured or sold any beds of the type described in the contract between the parties. We are satisfied that there is evidence in the record to sustain these findings, and the contention made is without merit. We might also add that if the contention of appellant were sustained by evidence which is without conflict, proof of such facts would not result in a failure of consideration and preclude recovery upon the part of respondent in his action for a breach of contract. Under such facts appellant would have the right to cross-complain or set up a counterclaim based upon a breach of the implied obligation of respondent not to sell the same bed in the territory mentioned in the contract. Upon the point of eviction we therefore hold that under the findings of the court there was no eviction and no failure of consideration.

Summing up the entire matter, it would appear that several years after the contract was entered into and respondent had performed under its terms, the type of bed contemplated by the agreement, by reason of competition from other bed manufacturers, became commercially unsuccessful. Appellant therefore ceased to manufacture more of the exact type agreed upon, and commenced to manufacture and sell a lighter type of bed. The trial court, however, found, upon conflicting evidence, that this lighter type was a modification of the original bed contemplated by the contract. As appellant had bound and obligated itself not to manufacture or sell any other camp bed which could in any way be considered a modification of the bed mentioned in the contract, it must respond in damages for the manufacture and sale of this modified type of bed.

The judgment is just and proper in all particulars, and, accordingly, it is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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134 Cal.App. 294

PEOPLE v. CORKERY.

Cr. 2398.

District Court of Appeal, Second District, Division 1, California.

Sept. 25, 1933.

1. Robbery 🔑12.

Evidence showing that, before defendant left scene of robbery, property had been taken from victims, established robbery rather than attempt to commit robbery.

2. Robbery 🔑15.

Defendant, while escaping from scene of robbery, was liable for any act committed by accomplice in commission of crime.

3. Criminal law 🔑20.

Where overt act discloses intention to commit crime, subsequent intention to withdraw should be manifested by free and voluntary act.

4. Criminal law 🔑1036(1), 1044.

Admission of evidence relating to accomplice's acts after defendant left scene of robbery *held* not prejudicial, absent objection and request for instruction on abandonment of felonious intent.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Elbert L. Corkery was convicted of robbery, and he appeals.

Judgment and order denying motion for new trial affirmed.

Leonard Wilson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, of Los Angeles, for the People.

HOUSER, Justice.

Defendant appeals from a judgment of conviction of the crime of robbery, as well as from the order by which his motion for a new trial was denied.

Omitting unnecessary details which relate to the facts and circumstances that are connected with the robbery in question, it appears that in the course of its perpetration by defendant and another man, after one of the two victims had surrendered certain personal property to defendant's companion in the crime, one of the said victims screamed for help, whereupon both the robbers started to leave the scene of the robbery and appellant did immediately depart therefrom. However, instead of continuing in his flight with appellant in the projected escape, the second robber temporarily remained for the purpose of completing the robbery, and thereupon proceeded to and did take certain other personal property from the immediate possession of the said victims.

[1] The principal point presented by appellant as a reason for the reversal of the judgment and the order by which his motion for a new trial was denied arises from the asserted fact that before the crime was completed he abandoned his intention to commit the crime of robbery and consequently that at most he was guilty of attempt only to commit the offense. But the evidence clearly shows that, at a time before the defendant departed from the scene of the robbery, a part of the personal property of the victims had been taken from them. Appellant's guilt, therefore, was complete before he made any attempt to withdraw from the commission of the offense. However, he contends to the effect that after he had abandoned the effort to further despoil the victims of their property, he was no longer liable for what occurred between his companion in the crime and the persons who were being robbed; and consequently that the admission of evidence that related thereto was prejudicial to him in that its reception may have discredited, and probably did discredit, the evidence offered by him for the purpose of establishing his innocence.

[2-4] By many authorities, the principle is announced that escape by the perpetrators of a crime in general is part of the conspiracy to commit the crime (People v. Woods, 147 Cal. 265, 81 P. 652, 109 Am. St. Rep. 151; People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Albritton, 110 Cal. App. 188, 294 P. 76; People v. Wheaton, 64 Cal. App. 58, 220 P. 451); and consequently that the act or declaration of one of the conspirators committed or made by him respectively during the time of such escape is binding upon each and all of the conspirators; from which it should follow that at least during the time that appellant herein was engaged in making his escape from the scene of the robbery he was liable for any act which was committed by his aider and abettor in the commission of the crime.

It should be clear that an abandonment of an intention to commit a criminal offense should be a free and voluntary act on the part of the person seeking to commit it. In order that it be entitled to be thus characterized, whatever may be deemed a worthy, inducing cause, or the legal effect of such an abandonment, it is patent that the withdrawal from the attempt should not be immediately caused by a desire to escape identification, detection, or arrest. In other words, where an overt act has disclosed the intention of a person to commit a criminal offense, his subsequent intention to abandon, or to withdraw from, the commission of such offense, or its consequences, should be manifested by his own free and voluntary act, as distinguished from conduct induced or prompted by outside or foreign influences.

In section 226, volume 1 (11th Ed.), Wharton's Criminal Law, where authorities are cited in support thereof, the rule is announced as follows: "If an attempt be voluntarily and freely abandoned before the act is put in process of final execution, there being no outside cause prompting such abandonment, then this is a defense; but it is otherwise when the process of execution is in such a condition that it proceeds in its natural course, without the attempter's agency, until it either succeeds or miscarries. In such a case, no abandonment of the attempt, and no withdrawal from its superintendence, can screen the guilty party from the results." See, also, State v. Gray, 19 Nev. 212, 8 P. 456.

In State v. Forsha, 190 Mo. 296, 88 S. W. 746, 757, 4 L. R. A. (N. S.) 576, which in its essentials is not dissimilar in its facts to those of the instant case, it is said: "We are unwilling to sanction as the law of this state that a defendant can first, by words and actions, put in operation a difficulty, or aid and abet in the commencement of it, and, after having by his course of conduct brought the principal actors into a deadly contest, that he can then flee from the scene of the struggle and thereby relieve himself absolutely from the results of such fatal difficulty. Such is not the law of this state, and the court very properly refused the instructions requested upon that subject."

In the case of Sheppard v. State, 172 Ala. 363, 55 So. 514, 515, it is said: "If this defendant entered into the conspiracy to murder the deceased, which resulted in the accomplishment of its design, she could not relieve herself of guilt by abandoning the actual attack after taking part in its inception."

So in State v. Taylor, 173 La. 1010, 139 So. 463, 474, the court approved the instruction given by the trial court that: "A conspirator cannot escape responsibility for an act which is the natural result of a criminal scheme which he has helped to devise and carry forward because as the result either of fear or even of a better motive he concludes to run away at the very instant when the act in question is about to be committed and when the transaction which immediately begets it has actually been commenced."

In Commonwealth v. Doris, 287 Pa. 547, 135 A. 313, 315, it appeared that immediately following the commission of the robbery and at the time when one of the robbers who had been arrested was being held in custody, another of the robbers in attempting to make his escape shot and killed a police officer. With reference to such a situation, the Supreme Court of Pennsylvania made the following declaration of the law: "It is said, however, in the case of Doris, that, as he had been seized by officers of the law shortly after the retreat began, therefore he cannot be held responsible for what later happened. This overlooks the fact that he joined in the common design and is responsible for the acts of each naturally to be expected to occur in carrying it out. It is true that he could have abandoned the enterprise and given sufficient time to the others to do likewise, and thus have relieved himself from liability for subsequent acts of his fellows. But he cannot escape responsibility for an act which is the probable consequence of the criminal scheme which he has helped to devise and carry forward. To have this result, there must be an actual and effective voluntary withdrawal before the act in question has become so imminent that its avoidance is practically out of the question." (Citing authorities.) See, also, People v. Chapman, 224 N. Y. 463, 121 N. E. 381; People v. Nichols, 230 N. Y. 221, 129 N. E. 883; Conrad v. State, 75 Ohio St. 52, 78 N. E. 957, 6 L. R. A. (N. S.) 1154, 8 Ann. Cas. 966; State v. Klein, 97 Conn. 321, 116 A. 596.

In People v. Ortiz, 63 Cal. App. 662, 670, 219 P. 1024, 1027, the court said: "Responsibility of an accessory 'does not cease simply because, after starting the ball, he changes his mind, and tries, when too late, to stop it. To emancipate him from the consequences, not only must he have acted in time, and done everything practicable to prevent the consummation, but the consummation, if it takes place, must be imputable to some independent cause.' Wharton's Criminal Law (11th Ed.) § 267."

From the record herein, it is also noted that, with reference to evidence introduced by the prosecution relative to the pertinent events which occurred after the escape of appellant had been effected, the only objection interposed by said defendant was as to testimony which was proposed to be given by one of the victims of the robbery, and that such objection consisted in the following statement by one of the attorneys then representing said defendant, to wit: "We would like to object to any testimony, as being binding on the defendant Corkery, from this time on, after the man whom she identifies as Corkery, left the house."

All the remaining testimony, not only of that witness, but as well of the other victim of the robbery, was introduced in evidence without objection by defendant. In addition thereto, it should be observed that no instruction to the jury was requested by the defendant relative to the determination by it of the question of whether the acts and conduct of the said defendant constituted a withdrawal or abandonment by him of his intention to commit the crime of robbery. It follows that neither of the contentions of appellant can be sustained.

It is ordered that the judgment and the order by which the motion of defendant for a new trial was denied be, and they are, affirmed.

We concur: CONREY, P. J.; YORK, J.

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134 Cal.App. 232

PEOPLE v. WILLIAMS.

Cr. 1736.

District Court of Appeal, First District,
Division 2, California.

Sept. 20, 1933.

1. Criminal law 🔑808½.

In robbery prosecution, instruction in statutory language, relating to manner of impeaching witness *held* not improper (Code Civ. Proc. § 2051).

2. Witnesses 🔑397.

Contradictory or inconsistent statements previously made by witness are admissible solely for purpose of impeachment.

3. Witnesses 🔑362.

Evidence showing that witness had been convicted of felony, or that his general reputation for truth, honesty, and integrity is bad, may be considered as tending to establish truth thereof.

4. Criminal law 🔑824(10).

Defendant, if desiring instruction relating to limited purpose for which jury might consider evidence of prior conviction of felony, should propose properly framed instruction.

5. Criminal law 🔑785(3).

In robbery prosecution, defendant's instruction that evidence impeaching witness or evidence of contradictory statements could not be considered in determining truth thereof *held* properly refused in both original and amended form.

Requested instruction would have told jury that evidence introduced for purpose of impeaching witness, or evidence of contradictory statements made by witness for purpose of impeachment, could not be considered as tending to establish truth of matters contained therein. The amended instruction omitted reference to contradictory statements and was properly refused as being meaningless and containing incorrect statement of law.

6. Criminal law 🔑1173(2).

In robbery prosecution, refusing instruction that evidence impeaching witness or evidence of contradictory statements could not be considered in determining the truth thereof *held* not prejudicial error.

It was not prejudicial error to refuse the instruction, because from record it was evident that jury could not treat alleged contradictory statement as tending to establish the truth of the matter contained therein, in view of evidence showing only one contradictory statement, and denial of complaining witness that he made such contradictory statement.

7. Criminal law 🔑814(17).

In robbery prosecution, defendant's instruction on circumstantial evidence as basis for conviction *held* properly refused, where there was direct evidence that defendant committed offense.

8. Criminal law 🔑829(1).

Refusal of requested instruction is not error, where substance thereof is amply covered in instructions given.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

James Williams was convicted of robbery in the second degree, and he appeals.

Judgment and order denying motion for new trial affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant was duly convicted of the crime of robbery in the second degree. He appeals from the judgment of conviction and the order denying his motion for a new trial.

On January 28, 1933, an establishment known as a "club" was robbed by a man wearing a black mask made out of a piece of sock. Defendant had frequently visited the place prior to the robbery. Shortly after the commission of the offense he was found in a nearby apartment. He was positively identified by three witnesses to the robbery, and the prosecution also introduced evidence of circumstances pointing to his guilt. Defendant took the stand and attempted to prove an alibi. Among the first questions asked of him by his own counsel was one relating to his prior conviction of a felony, which he admitted.

[1] The only questions raised on this appeal relate to the giving and refusing of certain instructions by the trial court. Appellant first complains of the giving of what may be termed a stock instruction relating to the manner of impeaching a witness. The portion of the instruction complained of was given in the identical language of section 2051 of the Code of Civil Procedure. There was no error in giving this instruction. People v. Egan, 91 Cal. App. 44, 49, 266 P. 581; People v. Vanderburg, 67 Cal. App. 217, 219, 227 P. 621. While it is true, as pointed out by appellant, that there was no evidence of the general reputation of appellant for truth, honesty, or integrity, said instruction was not directed at the testimony of any particular witness nor at any particular type of impeachment. It did not assume, as contended by appellant, that evidence of appellant's "bad reputation existed in the record."

[2-6] Appellant also claims that the trial court erred in refusing to give the following proposed instruction: "The court instructs the jury that evidence which is adduced at the trial of a case of this character by questions asked for the purpose of impeaching any witness (or evidence of contradictory statements made by such witness for the purpose of impeachment), cannot be received by you or applied by you in this case as tending to establish the truth of the matter contained therein, but may alone be considered in so far as it has a tendency to affect the credibility of the witness sought to be impeached thereby. The prosecution in this case cannot prove that the defendant in this case is guilty by evidence which impeaches any witness." The record shows that there was a marginal note opposite the portion of the in-

struction in parentheses, which note read, "Out N. C. C."; the "N. C. C." being the initials of counsel for appellant. In support of his contention that this instruction should have been given, appellant cites and relies upon People v. Peck, 43 Cal. App. 638, 185 P. 881, and People v. Davenport, 13 Cal. App. 632, 110 P. 318. These authorities, however, involved testimony showing contradictory or inconsistent statements previously made by a witness. Such statements are admitted solely for the purpose of impeachment and they cannot be considered by the jury for any purpose other than for impeachment of the particular witness. The proposed instruction in its original form was obviously framed for the purpose of advising the jury that such statements could not be used "as tending to establish the truth of the matter contained therein." When counsel for appellant struck out the portion relating to such inconsistent statements the proposed instruction became practically meaningless, and was an incorrect statement of the law. This is true, for if there is evidence in the record showing that a witness has been convicted of a felony or that his general reputation for truth, honesty, and integrity is bad, such evidence can be considered by the jury "as tending to establish the truth" thereof. There was no error in refusing this instruction in its amended form, and if appellant had desired an instruction relating to the limited purpose for which the jury might have considered his own evidence of his prior conviction of a felony, he should have proposed a properly framed instruction for that purpose. We have assumed in what has been said that the parentheses and notation, "Out N. C. C.," indicated that the portion of the proposed instruction inclosed in parentheses was withdrawn by appellant. If we are incorrect in this assumption, we still believe that there would have been no prejudicial error in refusing the instruction in its original form. Only one alleged contradictory statement appears in the record. The defense offered evidence tending to show that the complaining witness had previously stated that the amount of money stolen was greater than the amount to which he testified on the trial. The complaining witness denied that he had made such contradictory statement. It was not claimed by either the prosecution or the defense that appellant had stolen the greater amount of money, and under such circumstances we are satisfied that the jury did not treat such contradictory statement "as tending to establish the truth of the matter contained therein."

[7] Appellant further complains of the refusal of the trial court to give the following instruction: "The court instructs the jury that when the prosecution depends for a conviction upon circumstantial evidence, it is the law that in the chain of facts relied upon each fact must be established to a moral certainty and beyond a reasonable doubt. A reasonable doubt as to any link in the chain of circumstantial evidence entitled the defendant to an acquittal." While such an instruction may be proper where the prosecution relies entirely upon circumstantial evidence, it is not error to refuse it where there is direct evidence showing that the defendant committed the offense. People v. Burns, 121 Cal. 529, 531, 53 P. 1096; People v. Baldwin, 117 Cal. 244, 251, 49 P. 186.

[8] A further proposed instruction offered by appellant was not given, but was marked by the trial court as "Given Elsewhere." This instruction likewise could properly have application only to a case of circumstantial evidence where "there are two possible and reasonable conclusions that can be drawn from the facts." We doubt whether the refusal of said instruction would have been erroneous in the present case, but, in any event, we find that the substance of the proposed instruction was amply covered in the instructions given.

The judgment and order denying the motion for new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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134 Cal.App. 215

CHRISTENSEN v. LUCERNE HOLDING CO. et al.

Civ. 8782.

District Court of Appeal, Second District, Division 1, California.

Sept. 19, 1933.

1. Appeal and error ⚷102.

Order sustaining demurrer to complaint without leave to amend is not appealable.

2. Appeal and error ⚷113(2).

Order sustaining demurrer to complaint without leave to amend not being appealable, succeeding order denying motion to vacate former order is likewise not appealable.

Appeal from Superior Court, Los Angeles County; J. C. Needham, Judge.

Action by Harry Christensen against the Lucerne Holding Company and others. From orders and judgments sustaining demurrers to complaints, without leave to amend, the plaintiff appeals.

Appeals dismissed.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Harry T. Young and Fred H. Luth, both of Los Angeles, for appellant.

Hulme, Hastings, Bartlett & Bridges, of Los Angeles, for respondents.

HOUSER, Justice.

From the record herein it appears that in due course of proceedings had in an action pending in the superior court, respective orders were entered in the minutes of the court by which the separate demurrer to the complaint presented by each of the defendants therein was sustained "without leave to amend"; upon which orders a formal judgment was made and entered as to one defendant, on September 13, 1932, and as to the other two defendants, on September 19, 1932; also, that before said judgments were made and entered, a motion presented to the court by the plaintiff for an order to vacate and set aside "the order and judgment * * * sustaining the demurrers of the defendants * * *; to enter its order overruling the said demurrers; or that plaintiff be given leave to file an amended complaint"—was denied. It also appears that prior to the making and entry of the judgment on the orders by which the separate demurrer of each of two of the said defendants was sustained, but after the making and the entry of the judgment on a similar order affecting the third defendant, plaintiff served and filed his notice of appeal "from the judgment and order of said court made and entered on the 19th day of July, 1932, sustaining the demurrers of the [two] defendants, Lucerne Holding Company, a corporation, and K. S. Littlejohn, without leave to amend, the order of said court made and entered on the 28th day of July, 1932, denying said plaintiff's motion for permission to amend, the judgment and order of said court made and entered on the 8th day of September, 1932, sustaining the demurrer of the [third] defendant, Albert A. Comey, sued in said action as John Doe, without leave to amend, and from the whole of said judgments and orders."

Following the filing by plaintiff in this court of the transcript on appeal and his opening brief, the defendants presented their instant motion to dismiss each of said appeals on the ground "that said appeals were, and each of them was, taken from nonappealable orders and that said judgments and orders are not appealable."

[1] Notwithstanding the existence of certain authorities which in general terms may indicate the propriety of a contrary rule, the following cases, with authorities therein respectively cited, are directly in point to the effect that an order sustaining a demurrer without leave to amend is not appealable: Sahakian v. City of Los Angeles, 91 Cal. App. 737, 267 P. 571; Cornic v. Stewart, 179 Cal. 242, 176 P. 164; Worth v. Witt, 62 Cal. App. 134, 216 P. 90; Milburn v. Kennedy, 105 Cal. App. 408, 287 P. 980.

[2] And the authorities of this state also agree on the principle of law that, since an order by which a demurrer is sustained without leave to amend is not appealable, a succeeding order by which the vacation of the former order is denied is likewise nonappealable. Harper v. Hildreth, 99 Cal. 265, 269, 33 P. 1103; Ferry v. O'Brien, 63 Cal. App. 620, 623, 219 P. 467; Gillis v. Bloome, 121 Cal. App. 27, 29, 8 P.(2d) 905.

The motion is granted, and the appeals are dismissed.

We concur: CONREY, P. J.; YORK, J.

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134 Cal.App. 229

UNION TANK & PIPE CO. v. MAMMOTH OIL CO., Limited, et al.

Civ. 8994.

District Court of Appeal, First District, Division 2, California.

Sept. 20, 1933.

1. Mechanics' liens 🔑260(6).

Failure to commence action to enforce mechanic's lien within time prescribed is, when pleaded, bar to recovery (Code Civ. Proc. § 1190).

2. Mechanics' liens 🔑260(4).

Filing of complaint to enforce mechanic's lien stopped running of statute of limitations only as to those made party defendants (Code Civ. Proc. § 1190).

3. Limitation of actions 🔑121(2).

Answering defendants *held* not made parties defendant under allegations pertaining to fictitious defendants in original complaint in mechanic's lien foreclosure where amended complaint, filed after statutory bar became effective, named both answering defendants and fictitious defendants, and action as to fictitious defendants was dismissed at trial (Code Civ. Proc. § 1190).

4. Pleading 🔑46.

To give effectiveness to allegations pertaining to fictitious defendants, plaintiff must designate persons to whom he refers, by service of summons or by appropriate amendment.

5. Mechanics' liens 🔑260(6).

Mechanic's lien foreclosure, not commenced against defendants until after 90 days from filing of lien claim, *held* barred by limitations (Code Civ. Proc. § 1190).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Union Tank & Pipe Company against the Mammoth Oil Company, Limited, E. R. Gurnsey, R. J. Seaman, Georgia Gurnsey, Emma Seaman, and another. From part of the judgment in favor of E. R. Gurnsey, R. J. Seaman, Georgia Gurnsey, and Emma Seaman, plaintiff appeals.

Affirmed.

Dertbick, Cusack & Ganahl, of Los Angeles, for appellant.

Todd, Pawson, Watkins & Anderson, of Long Beach, for respondents.

OGDEN, Justice pro tem.

This is an action to foreclose a mechanic's lien upon real property. The two defendants other than respondents having defaulted, judgment was entered in favor of appellant as to them. Respondents pleaded the provisions of section 1190 of the Code of Civil Procedure as a defense to appellant's cause of action as against them, which plea was sustained by the trial court and judgment accordingly entered in favor of respondents. From this portion of the judgment plaintiff appeals.

The claim of lien was filed on September 10, 1930. On December 3, 1930, well within the period of ninety days thereafter prescribed by section 1190 of the Code of Civil Procedure, the original complaint in the action was filed naming as party defendants the Mammoth Oil Company, Limited, Signal Oil & Gas Company, Limited, and as fictitious defendants several Does. With respect to the latter defendants, it was alleged in the usual form that they claimed some interest in the premises either as owners or otherwise, that their true names and the exact nature of their interest were unknown, and that when ascertained request to amend would be made. Summons was issued thereon, served upon the two defendant companies, and filed. Thereafter, on December 23, 1930, a date beyond the 90-day period, appellant filed an amended complaint naming as party defendants the respondents as the owners in fee of the property and in addition thereto the same defendants named in the original pleading with the same allegations in respect to the fictitiously named defendants. An alias summons was issued thereon and respondents served therewith, together with a copy of the amended complaint, to which they answered.

[1, 2] The record discloses no request for, or the making of, any order substituting the names of respondents in place of the fictitiously named defendants in the original complaint. On the contrary, the action was dismissed as to all fictitious defendants at the commencement of the trial. Section 1190 of the Code of Civil Procedure is a statute of limitations providing the time within which an action may be brought to enforce a mechanic's lien, Hughes Brothers v. Hoover, 3 Cal. App. 145, 84 P. 681, and the failure to commence the action within the time prescribed is, when pleaded, a bar to recovery. The filing of the original complaint stopped the running of the statute only as to those who were made party defendants thereby, but the statute continued to run in favor of others until made parties to the action. Jeffers v. Cook, 58 Cal. 147.

[3, 4] We cannot say that respondents were made party defendants by the filing of the original complaint. The case at bar is not such a case as in Hoffman v. Keeton, 132 Cal. 195, 64 P. 264, where a defendant sued under a fictitious name, and whose true name was subsequently substituted by proper amendment, was held to be a party to the action from its commencement. The mere intention of appellant to sue the owner of the property whoever he may be is not sufficient. In order to give effectiveness to allegations pertaining to fictitious defendants, the plaintiff must designate the persons to whom he refers by either, and properly by both, the service of summons or appropriate amendment. McKinlay v. Tuttle, 42 Cal. 570; Mercantile Trust Company v. Stockton Terminal & E. R. Co., 44 Cal. App. 558, 186 P. 1049.

The fact that the amended complaint in which respondents are named as defendants with new and appropriate allegations also names the same fictitious defendants named in the original pleadings, and repeats the allegations in respect thereto, strongly indicates that the pleader did not consider the respondents to be the same defendants referred to by fictitious names. That they were different entities must be concluded from the dismissal of the action against the fictitious defendants and its prosecution against respondents.

[5] The action not having been commenced against respondents until after the expiration of 90 days from the filing of the claim of lien, judgment was properly entered in their favor.

Judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

134 Cal.App. 290

PEOPLE v. ODZA.

Cr. 2393.

District Court of Appeal, Second District, Division 1, California.
Sept. 25, 1933.

1. Criminal law 🔑957(1).

On new trial motion, attempted impeachment of verdict by juror who participated therein is inadmissible.

2. Criminal law 🔑1156(1).

On appeal from denial of new trial motion, trial court's determination of question whether verdict was arrived at by means other than fair expression of opinion on part of jurors *held* conclusive, in absence of abuse of discretion.

3. Criminal law 🔑956(4).

Circumstances *held* not to disclose that trial court abused discretion in deciding that earthquake shocks occurring during jury's deliberations were not cause of verdict.

Circumstances relied on to support contention of defendant were that jury was deadlocked for several hours; that upon returning jurors seemed upset and exhibited relief; that verdict was dated by foreman in jurybox; that upon polling of jury, two jurors answered in such low tone of voice that they had to repeat answers; and that one of jurors sought to impeach verdict by letter.

4. Criminal law 🔑829(1).

Refusal of defendant's instructions adequately covered by given instructions *held* not ground for reversal.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Herbert G. Odza was convicted of grand theft on three counts, and he appeals.

Affirmed.

Robert F. Shippee, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant was convicted on each of three counts of grand theft. He appeals from the ensuing judgment and from an order by which his motion for a new trial was denied.

Appellant concedes the fact that the evidence adduced on the trial of the action was sufficient to sustain the verdict of the jury. However, he makes the point that the verdict "was arrived at by means other than a fair expression of opinion on the part of the jurors"; and in that connection urges that since during the time the jury was deliberating on its verdict several severe earthquake shocks were experienced, the probabilities are "that the continuous earthquake shocks were the causes of the adverse verdicts and not the evidence presented to the jury."

In support of his contention, appellant relies upon each of several seemingly unimportant circumstances, as follows:

[1-3] That the jury was "deadlocked" from the time of its retiring at 5:08 p. m. until 9:22 p. m. (which included a period of one and one-half hours during which the jury was at dinner); that on returning its verdict, the members of the jury seemed somewhat "upset," and exhibited relief upon coming into the courtroom; that the verdicts signed in the jury room were not dated therein, but later were dated by the foreman in the jury box; that upon polling the jury it was necessary for each of two of its members to repeat his affirmance of the verdict, the first answer of such jurors being too low to be heard; and finally, upon a letter from one of the jurors by which he sought to impeach his own verdict. It is apparent that none of the first four of such specified contentions, nor all of them combined, presents an unusual situation in the trial of causes by jury. In fact, each of such conditions is but a common everyday observation of judges and other persons connected with such trial work. The authorities are universal that attempted impeachment of the verdict by one of the jurors who participated therein is an inadmissible fact. On the other hand, as appears by the record herein, the fact that after the verdict had been returned and the jury had been discharged, at least a majority of the members of the jury voluntarily remained in the courtroom "apparently out of no other interest than their interest or curiosity in connection with the ultimate outcome of the case," refutes the idea that the verdict was the result of anything other than the evidence introduced on the trial of the action. At any rate, in the absence of an abuse of discretion, the question submitted to this court for its determination was one which, having been presented to and determined by the trial court, is beyond legal inquiry by this tribunal. Since no abuse of discretion by the trial court is discernible, it follows that the point presented by appellant cannot be sustained.

[4] Appellant also predicates prejudicial error on the failure of the trial judge to give to the jury, at the request of defendant, certain specified instructions. But since it unquestionably appears from the record

herein that each of such instructions was adequately covered by other instructions which the trial court gave to the jury, it becomes clear with respect to such specification of error that appellant has no just cause for complaint.

It is ordered that the judgment and the order by which the motion for a new trial was denied be, and the same are, affirmed.

I concur: YORK, J.

CONREY, Presiding Justice.

I concur. I think that this appeal is frivolous. There should be some way to avoid the public expense of a 638-page reporter's transcript at the instance of a party who (as later shown by his brief on appeal) had no use for such transcript.

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134 Cal.App. 319

RAPAPORT v. CIVIL SERVICE COMMISSION OF STATE OF CALIFORNIA et al.

Civ. 4197.

District Court of Appeal, Third District, California.

Sept. 26, 1933.

Hearing Denied by Supreme Court Nov. 24, 1933.

1. Hospitals 🔑4.

Charge that assistant physician at state hospital accepted fee for medical service from named person in violation of statute *held* insufficient to justify his dismissal as not covering statutory exceptions (Pol. Code, § 2157; Gen. Laws 1931, Act 1400, § 14).

> Pol. Code, § 2157, prohibits assistant physicians at state hospital from engaging in private practice, but provides that they may give necessary medical care to hospital officers and employees or in emergency cases, no rules and regulations prohibiting them from accepting compensation for such services were referred to in charge, and it did not state that accused was guilty of private practice.

2. Hospitals 🔑4.

Charge of inefficiency of assistant physician at state hospital and his neglect of duty in failing to visit certain wards *held* insufficient to authorize his dismissal (Gen. Laws 1931, Act 1400, § 14).

> The charge did not allege any facts indicating inefficiency, nor that alleged neglect of duty was incompatible with or inimical to public service, that any patient suffered because of it, or that it was willful and intentional or without sufficient cause; "failed" signifying merely that accused fell short of visiting designated wards.
>
> [Ed. Note.—For other definitions of "Fail," see Words & Phrases.]

3. Hospitals 🔑4.

Failure to perform act is not "neglect of duty," authorizing removal of assistant physician at state hospital, unless willful, intentional or inexcusable (Gen. Laws 1931, Act 1400, § 14).

> "Neglect of duty" has been defined as careless or intentional failure to exercise due diligence in performance of official duty and including willful neglect or misfeasance and malfeasance involving failure in performance of legal duties, while "neglect," as distinguished from "omitted," means to omit by carelessness, design, etc.
>
> [Ed. Note.—For other definitions of "Neglect," "Neglect of Duty" and "Omit," see Words & Phrases.]

4. Hospitals 🔑4.

Complaint must state sufficient facts to show actual unprofessional conduct of assistant physician at state hospital to authorize his removal by state civil service commission, whether he objects to sufficiency thereof or not (Pol. Code, § 2157; Gen. Laws 1931, Act 1400, § 14).

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Application by Walter Rapaport for a writ of certiorari to review and annul an order of the Civil Service Commission of the State of California and the members thereof, dismissing petitioner from his position as assistant physician at the Mendocino State Hospital. From a judgment denying the application, petitioner appeals.

Reversed, commissioners' order annulled, and cause remanded with directions.

A. L. Wessels, of Ukiah, and Jesse E. Nichols and Harry M. Gross, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Lilburn Gibson, Dist. Atty., of Ukiah, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal from the judgment of the trial court denying the application of the petitioner for a writ of certiorari annulling and setting aside the findings and judgment of the respondents dismissing the petitioner from his position as an assistant physician at the Mendocino State Hospital.

The return made by the respondents in this case is exceedingly voluminous, and the brief filed in behalf of the petitioner calls attention to many points of procedure alleged to be defective, which, from the views hereinafter set forth, need not be referred to in this opinion.

The charges filed against the petitioner upon which respondents based their judgment is in the following words and figures, to wit:

"Unprofessional Conduct: (a) In that you accepted from one S. H. Cox a fee for medical service in violation of section 2157 of the Political Code of the State of California, which provides that assistant physicians shall not engage in private practice, but shall devote their entire time and attention to the duties of their office.

"Inefficiency and Neglect of Duty: In that, on or about June 29, 1929, and on several occasions you failed to visit ward 7 of the Mendocino State Hospital, and that on or about June 22, 1929, and on several occasions you failed to visit ward 4 of the Mendocino State Hospital, which wards were a portion of the service assigned to you, in your professional capacity for several consecutive days, resulting in the patients of these wards being without medical attention during such periods."

Charge B scheduled "Unprofessional Conduct," was dismissed by the commissioners, and requires no further mention.

Section 14 of Act No. 1400, Deering's General Laws of California, 1931, volume 1, page 630, relative to the powers of the Civil Service Commission, specifies the grounds upon which officers and employees may be removed, to wit: "Incompetency, inefficiency, insubordination, dishonesty, intemperance, immorality, profanity, discourteous treatment of the public or other employees, improper political activity, wilful disobedience, violation of the provisions of this act or of the rules and regulations of the commission, or for any other failure of good behavior or any other act or acts which are incompatible with or inimical to the public service."

Section 2157 of the Political Code reads as follows: "The medical superintendents and assistant physicians shall not engage in private practice, but shall devote their entire time to the duties of their positions. Nothing in this section shall, however, be regarded as prohibiting them from giving necessary medical care and treatment to the officers and employees of the hospital residing at the hospital or in the immediate vicinity thereof, or in cases of emergency."

[1] It will be observed that the charge which we have set forth does not cover the excepted provisions of section 2157, supra. This section of the Code does not inhibit the private practice of a physician in so far as that practice and medical attention refers to officers and employees of a hospital, residing at the hospital, or in the immediate vicinity thereof, or in cases of emergency. There are no facts set forth in the charge showing that the petitioner has violated the provisions of section 2157 of the Political Code. It does not prohibit a physician from accepting a fee for services performed in giving medical attention to officers or employees of the institution, residing at the hospital, or in the immediate vicinity thereof; nor does it inhibit either the medical superintendent, or any of the assistant physicians from giving medical attention in cases of emergency.

While not sufficient as a charge to show that the petitioner violated the section of the Code referred to, the testimony shows beyond contradiction that the medical attention assigned as "unprofessional conduct" was given to an employee of the Mendocino State Hospital by the name of S. H. Cox, and that Cox paid him the sum of $50 for such services. No rules or regulations governing the conduct of assistant physicians of the Mendocino State Hospital, or specifying that assistant physicians shall not accept compensation for rendering medical services to an employee of the institution, have been called to our attention. If such rules and regulations exist, however, they would not supply the lack in the charge purporting to set forth unprofessional conduct, as there is no reference to any rule or provision forbidding a physician accepting such compensation. In fact, it is not set forth in the charge that the petitioner has been guilty of any private practice. The only charge is that he accepted a fee from one S. H. Cox in violation of section 2157, supra, which, as we have just shown, does not state a cause of action and does not set forth any circumstances or acts violative of law.

[2] As to the second charge sustained by the commissioners, purporting to show inefficiency and neglect of duty, it is sufficient first to call attention to the fact that there is not a word in the charge indicating inefficiency, nor is there anything in the record called to our attention, indicating that petitioner was either inefficient or incompetent, or has done any act coming within the provisions of section 14 of Act No. 1400, supra. The section does not purport to give the commission authority to discharge an employee on the ground of neglect. However, if the neglect were shown to be such as to be incompatible with or inimical to the public service, it might be that a liberal construction of the section would give the power of removal to the commission. This, however, is not alleged against the petitioner. We find only the simple statement that the petitioner on several occasions failed to visit ward 4 of the Mendocino State Hospital, and on several occasions failed to visit ward 7 of said hospital. There is no allegation that the public service was in any way impaired, nor that a single pa-

tient suffered by reason of such failure. Nor do we think that an allegation which simply says that a physician failed to visit a ward, without setting forth facts showing that such failure is willful and intentional, gives the commission any jurisdiction. For aught that appears in the charge the failure might have been due to any number of sufficient causes. It does not appear that the petitioner purposely failed to visit either ward 4 or ward 7. For all that appears his services may have been required in other wards in the institution, and no time was given in which he could have visited the wards in question on the 22d day of June, 1929, or thereabouts. It may be here stated that a review of the testimony preponderates very greatly in favor of the petitioner that he did visit the wards in question on the days referred to. If the commission had jurisdiction, of course, on a conflict of evidence we would be bound by its findings.

[3] If neglect of duty were specifically mentioned as a cause for removal, the charge filed against the petitioner would still be insufficient upon which to place petitioner upon trial. The mere failure to perform a certain act, with nothing more, does not constitute either a neglect of duty in fact or in law. The elements which we have mentioned showing either willfulness, intention, design, or inexcusableness, must be present.

In 46 C. J. p. 988, referring to the removal of officers for neglect of duty, we find the following: " 'Neglect of duty' means the careless or intentional failure to exercise due diligence in the performance of an official duty, the degree of care depending on the character of the duty, and includes, therefore, wilful neglect and such forms of misfeasance and malfeasance as involve a failure in the performance of the duties required by law. * * * In some cases, by constitution or statute, the refusal or neglect to perform the duties pertaining to the office is made a cause for removal. Under such provisions it has been held that a public officer should not be removed from office unless he has refused or neglected to perform an official duty pertaining thereto in some substantial respect, which, under the existing conditions, would lead all reasonable minds to conclude that the act complained of was an intentional violation of law. But it is not necessary to show that the officer acted with no evil or corrupt intent or motive, it being sufficient if it appear that the act was done intentionally, designedly, without lawful excuse, and therefore was not accidentally done."

In the case of In re Chadbourne, 15 Cal. App. 363, 114 P. 1012, this court had occasion to pass upon the meaning of the words "neglect" and "omitted." It was there held that the words are not synonymous; that to neglect means to omit by carelessness, design, etc. In the present case the allegation simply sets forth that the petitioner "failed." There is a difference in the meaning between the words "neglect" and "failed." The word "failed" in its primary meaning signifies, as used in the charge, that the plaintiff fell short of visiting the wards in question; while to charge the petitioner with neglect for such failure it must show, as we have stated, that it was the result of willfulness, intention, design, or some deliberate purpose.

It may be also observed that there is no allegation that the petitioner willfully failed, or intentionally failed, or designedly failed. All it really amounts to is that the petitioner left unperformed his visits to the respective wards.

[4] The language of the Supreme Court in denying a hearing in the case of Dyment v. Board of Medical Examiners, 57 Cal. App. 260, 207 P. 409, 412, is applicable here: "The act does not contemplate a formal method of procedure. The person charged may at the hearing object either formally or informally to the sufficiency of the complaint. But, whether he does or not, the complaint must be sufficient in its statement of facts to show actual unprofessional conduct by the person charged, or it will not give the board power or jurisdiction to revoke his certificate, and if a revocation is ordered on such a complaint the holder thereof may maintain a proceeding in certiorari to have it annulled for the want of jurisdiction of the board to make the order."

The charges filed by the superintendent of the Mendocino State Hospital against petitioner not having stated any facts constituting cause for removal, the respondents in this case had no jurisdiction to make such order.

While other objections have been urged by the petitioner, what we have stated is decisive on this appeal.

It follows that the order of the superior court should be and the same is hereby reversed. That the order of the respondents, in removing the petitioner, should be and the same is hereby annulled, and the cause remanded to the superior court with directions to enter judgment annulling the order of the respondent commission removing the petitioner as assistant physician at the Mendocino State Hospital.

We concur: PULLEN, P. J.; THOMPSON, J.

134 Cal.App. 199

ROSS v. MAHONEY et al.

HUME v. MAHONEY et al.

Civ. 1080.

District Court of Appeal, Fourth District, California.

Sept. 15, 1933.

1. **Appeal and error 🔑766.**

Appeal was not dismissed because brief attacking certain instructions did not state other instructions given, where before hearing appellants filed supplement containing all instructions (Court Rules V, § 3, VIII, § 2).

2. **Appeal and error 🔑766.**

Consolidated appeal of two judgments was not dismissed because of insufficiency of statement, but appellants were permitted to furnish proper statement within 15 days (Court Rules V, § 3, VIII, § 2).

3. **Appeal and error 🔑766.**

Appeal was not dismissed for alleged insufficiency of statement where brief disclosed serious question as to whether trial court took case from jury on a specific issue (Court Rules V, § 3, VIII, § 2).

Appeals from Superior Court, San Diego County; L. N. Turrentine, Judge.

Actions by Sara E. Ross, guardian ad litem for and on behalf of Charles H. Ross, and by Donald Hume, by Ruby May Le Bard, guardian, against Roy S. Mahoney and another. From judgment for plaintiffs, defendants appeal, and plaintiffs move to dismiss appeal or affirm judgment.

Motion denied.

Frank J. Macomber, of San Diego, for appellants.

R. T. Walters, of Whittier, and J. C. Hizar, of San Diego, for respondents.

BARNARD, Presiding Justice.

The respondents have moved to dismiss the appeal or affirm the judgment in these cases under rule V, section 3, of the rules of this court, upon the grounds that the opening brief filed by the appellants fails to set forth on its first page the statement required by rule VIII, section 2; that the opening brief attacks certain instructions of the court without setting forth all other instructions given which bear upon the same subject; and that the appeal is frivolous and without substantial merit.

[1] Before the time set for hearing this motion the appellants filed a printed supplement to their opening brief containing all of the instructions given, which may be taken as meeting that objection although not in the form most convenient for the court.

[2] It is argued that a more extended statement of the questions involved is warranted in this case since it covers two judgments in consolidated cases. If that fact be taken into consideration the fact remains that the statement in the brief contains three pages and fails in several respects to comply with the rule referred to. Under the circumstances of this case we think the appellants should be permitted to furnish a proper statement in printed form to be pasted in the opening brief, and they are directed to furnish such a statement within 15 days from the filing of this opinion.

[3] An examination of the opening brief discloses that a serious question is presented as to whether the court, by a certain instruction, did not take from the jury the right and duty of determining, in accordance with subdivision (d) of section 113 of the California Vehicle Act (as amended by St. 1931, p. 2120, § 34) whether a speed in excess of 45 miles per hour at the time of the accident involved herein was or was not negligence. This question requires a careful consideration in which the court should have the benefit of such assistance as the parties may be able to render, and is one which should not be disposed of on a motion of this nature.

The motion to dismiss the appeals or affirm the judgments is denied.

We concur: MARKS, J.; JENNINGS, J.

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134 Cal.App. 237

SAN FRANCISCO BAY TOLL-BRIDGE CO. v. LESLIE CALIFORNIA SALT CO. et al.

Civ. 8799.

District Court of Appeal, First District, Division 2, California.

Sept. 20, 1933.

1. **Appeal and error 🔑1011(1).**
Shipping 🔑86(2⅜).

If presumption of negligence exists from collision of vessel with bridge, it is but evidence of negligence which may be overcome by other evidence creating conflict, and trial court must determine conflict.

2. **Shipping 🔑86(2¾).**

Evidence sustained finding that vessel was not negligent in colliding with bridge.

3. **Shipping 🔑86(2¾).**

Evidence sustained finding that bridge owner's negligence in operation of bridge was proximate cause of vessel's collision therewith.

Appeal from Superior Court, San Mateo County; Maurice T. Dooling, Judge.

Action by the San Francisco Bay Toll-Bridge Company against the Leslie California Salt Company and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Orrick, Palmer & Dahlquist, of San Francisco, for appellant.

Oliver Dibble, Lloyd M. Tweedt, and Derby, Sharp, Quinby & Tweedt, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an appeal from a judgment denying plaintiff relief in an action for damages and awarding defendant damages against the plaintiff. The cause was tried by the court without a jury, and the appeal is taken upon typewritten transcripts.

On the evening of April 8, 1929, the steamer Pyramid, owned and operated by the defendant, collided with the northwest dolphin of the bridge, owned and operated by the plaintiff and spanning the southern part of San Francisco Bay between Alameda county and San Mateo county. At about 8:38 p. m. of that day the Pyramid, proceeding southerly from San Francisco, had reached a point about a mile north of the bridge and there gave the required signal for the bridge tender to raise the lift span of the bridge to permit the vessel to pass through. No answering signal came from the bridge and a second signal was given with like result. The captain of the Pyramid then had its engines stopped and gave a third signal with the vessel proceeding at slow, or half speed, ahead. This was answered with a signal from the bridge tender for the vessel to come ahead, which it did at slow, or half speed, until it had reached a point about 400 feet from the bridge. Then the captain saw that the lift span would not be raised in time to permit the vessel to pass through the bridge and the engines were reversed full speed. At that time the vessel was headed directly for the center of the span with the wind and tide generally in the direction in which the vessel was proceeding. The vessel drew but three feet of water, and when the engines were reversed the wind and tide caused it to turn slightly to the east and to collide with the northwest dolphin of the bridge at about midships.

There is some dispute in the evidence as to the speed of the vessel, its position in the channel, and the time occupied by the bridge tender in raising the span. In all three instances the trial court found in accordance with the testimony offered by respondent and appellant does not claim that these findings are not supported by some competent evidence.

On this appeal the single question is the sufficiency of the evidence to support the findings of the trial court. It is stated by the appellant in the following language: "A vessel proceeding through a lift span of a bridge lawfully constructed across navigable waters should use reasonable skill and care to avoid injuring the bridge and is presumptively negligent if it collides with the bridge. The trial court erred in finding that the collision of the steamship Pyramid with the northwest dolphin of the bridge owned by appellant was not caused by the negligent operation and navigation of the vessel by respondent."

[1, 2] Assuming the correctness of appellant's statement that there is a presumption of negligence if the vessel collides with the bridge, it must be apparent that such presumption is nothing more than evidence of negligence which may be overcome by other evidence and that this merely creates a conflict in the evidence which the trial court must determine. When, as here, there is competent evidence tending to show want of negligence on the part of the defendant, the finding of the trial court that the defendant was free of negligence cannot be disturbed.

[3] Upon the issue of plaintiff's negligence in the operation of the bridge the trial court found that the proximate cause of the collision was plaintiff's delay in raising the lift span and in carelesssly and negligently signaling the vessel to come ahead notwithstanding such delay. This finding is amply supported by evidence which is without substantial conflict. Appellant does not urge that this finding is not supported by competent evidence, but merely argues that the trial court should have found the appellant free from negligence in the operation of the bridge. To pass on the questions presented by the appellant it would be necessary to try the case de novo on the evidence of negligence and want of negligence of the respective parties. As this is not the function of an appellate court and as there is no question of law presented at any stage of the appeal, an affirmance of the judgment must necessarily follow.

The judgment is affirmed.

We concur: SPENCE, J.; STURTEVANT, J.

134 Cal.App. 293

PEOPLE v. HIDALGO.

Cr. 2396.

District Court of Appeal, Second District, Division 1, California.

Sept. 25, 1933.

Criminal law 🔑430.

In forgery prosecution, certified copy of minutes of directors of corporation, introduced to show persons authorized to draw checks, *held* admissible (Civ. Code, § 371).

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Joe Hidalgo was convicted of forgery, and he appeals.

Judgment affirmed.

Delamere F. McCloskey, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant appeals from a judgment which followed his conviction on each of six counts of forgery.

In the same action, a former appeal was presented to this court by defendant from a like judgment, and an order by which his motion for a new trial was denied because of the lack of evidence to support the said judgment; and therein the said judgment, as well as the order in question, were ordered reversed. On this appeal, defendant again attacks the judgment rendered against him for the same reason that he advanced on his former appeal. The foundational facts herein appear in the statement of facts in the opinion rendered in the former appeal, to which reference may be had. People v. Hidalgo (Cal. App.) 18 P.(2d) 391. In the course of the opinion therein, attention is specifically directed to each of the various defects in the proof. It is deemed unnecessary herein either to repeat the facts of the case as shown by the evidence or to recite the several objections again presented by appellant. Suffice it to say that, in the opinion of this court, none of the said objections of appellant is well taken. As to each of the apparent deficiencies in the evidence which existed on the former trial, the same was amply remedied by competent evidence introduced on the second trial.

The only new point suggested by appellant is to the effect that defendant was prejudiced by the admission in evidence over his objection of a certified copy of certain minutes of the board of directors of Baker Ice Machine Company, Inc., which was introduced for the purpose of showing the names of the persons who were authorized to draw checks against moneys of the corporation which were deposited in any bank. That such point is untenable, see section 371 of the Civil Code; People v. Ratliff (Cal. App.) 22 P.(2d) 245.

It is ordered that the judgment be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

CURTIS v. KASTNER. *

Civ. 967.

District Court of Appeal, Fourth District, California.

Sept. 19, 1933.

Rehearing Denied Oct. 14, 1933.

Hearing Granted by Supreme Court Nov. 16, 1933.

1. Negligence 🔑117.

Plea of contributory negligence is available to defense, though not pleaded in answer, where plaintiff's contributory negligence appears from evidence introduced in his behalf.

2. Appeal and error 🔑999(3).

Whether plaintiff, running along edge of alley abutting rear of premises and crashing against projecting eaves of defendant's garage in daytime, was contributorily negligent, *held* for trial court.

3. Appeal and error 🔑110.

Order denying motion for new trial is not appealable.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Gladys Curtis against Ella I. Kastner. From a judgment for defendant, plaintiff appeals.

Affirmed.

Edward T. Lannon, of San Diego, for appellant.

Chester C. Kempley, of Los Angeles, for respondent.

MARKS, Justice.

This action grew out of an accident which happened at about 3:30 o'clock in the afternoon of the 15th day of July, 1928, a bright, clear day. The parties lived in houses, the rears of which abutted on Bluebird lane in La Jolla, in the city of San Diego; both residences being in the same block. There was a garage on the rear of respondent's lot, the

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 30 P.2d 26.

eaves of which projected into Bluebird lane at an elevation of between five feet and five feet seven inches above the pavement. Appellant was five feet nine and one-half inches tall. She struck her head against the projecting eaves, causing the serious injury which gave rise to this action for damages.

The trial court found that appellant was guilty of contributory negligence and rendered judgment against her. It is only necessary for us to determine whether or not this finding is supported by the evidence, for it is evident that if the negligence of appellant contributed to her injury she cannot recover.

Appellant divides her attack on this finding into two parts: First, that contributory negligence is not properly plead and that therefore the finding is outside of the issues framed by the pleadings; and, second, that it is without evidentiary support.

[1] We have examined the answer and have concluded that it properly presented the defense of contributory negligence under the rule announced in Hoffman v. Southern Pacific Co., 84 Cal. App. 337, 258 P. 397, 400. Furthermore, all the evidence offered on the question was presented by appellant. "Where plaintiff's contributory negligence appears from * * * the evidence introduced in his behalf, this plea is available to the defense, although it is not pleaded in the answer." Hoffman v. Southern Pacific Co., supra.

Appellant described the happening of the accident in her direct examination as follows: "We were starting to drive to Torrey Pines; we had a young niece who had arrived, just for the afternoon, from the East, and was going on that evening, and we wanted to show her the city; we started to drive to show her Torrey Pines, and we left our house and turned on Prospect and I noticed that our puppy had followed the car. I was anxious to take the dog home before we went on, so I asked my husband to stop, and he stopped just about the end of Bluebird lane and I got out and called my puppy, and ran, watching my puppy, ran along Bluebird lane. I had my head down looking at the puppy, and I crashed into the roof, not knowing that the roof was there."

In her cross-examination she testified as follows:

"A. We stopped, I got out of the machine, went around and back of the machine to get the dog; we hadn't had him very long, he was quite a puppy. I was the only person he would follow, so I couldn't catch him, so I kept on following him along, and jollying him along, and I ran so he would run with me, and I ran along the alley with my head down, looking at him.

"Q. Was the dog ahead of you or behind you? A. No, sort of alongside, he was sort of prancing up at me, don't you know, the way puppies do.

"Q. You had your eyes focused on the dog? A. Yes.

"Q. You were not paying any particular attention to where you were going? A. No—well—."

[2] We are of the opinion that the trial judge might well draw the reasonable inference from the foregoing testimony that a person exercising ordinary prudence and care, running along the edge of an alley abutting the rear of the premises on which she lived should look where she is going, and that if she did not look and crashed into an obstruction, she was guilty of contributory negligence.

"The general rule applicable to negligence cases may be stated to be: That, even when there is no conflict in the evidence, negligence is a question of fact for the jury, if different conclusions upon the matter can rationally be drawn from the evidence (Fernandes v. Sacramento, etc., R. R. Co., 52 Cal. 45; McKeever v. Market St. R. R. Co., 59 Cal. 294; Chidester v. Consolidated D. Co., 59 Cal. 197; House v. Meyer, 100 Cal. 592, 35 P. 308); but, if but one conclusion can reasonably be reached from the evidence, it is a question of law for the court." Murray v. Southern Pac. Co., 177 Cal. 1, 6, 7, 169 P. 675, 676.

It has also been said: "In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45." Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 44, 26 A. L. R. 123.

[3] An order denying a motion for new trial not being appealable, the attempted appeal therefrom is dismissed.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

219 Cal. 59

JACOBS v. STATE BAR OF CALIFORNIA.

L. A. 14184.

Supreme Court of California.
Sept. 26, 1933.

1. Attorney and client 🔑57.

Suspended attorney *held* to have failed to meet burden of showing error in board's decision based on finding that such attorney filed return to attachment known by him to be false and unlawfully returned garnished money (St. 1927, p. 41, § 26; Code Civ. Proc. § 544).

2. Attorney and client 🔑46.

Creation of civil liability would not release attorney from obligation to answer charges of wrongdoing in handling of funds if otherwise he is amenable to disciplinary process of State Bar Act (Code Civ. Proc. § 544).

3. Attorney and client 🔑38.

In disbarment proceeding, "moral turpitude" comprises everything done contrary to justice, honesty, or good morals (Code Civ. Proc. § 544).

[Ed. Note.—For other definitions of "Moral Turpitude," see Words & Phrases.]

In Bank.

Application by D. A. Jacobs to review an order of the Board of Governors of the State Bar of California in disbarment proceeding.

Petitioner ordered suspended for three years.

Frank J. Golden, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

Petition to review the recommendation of the respondent, the State Bar of California, that the petitioner be suspended from the practice of law for a period of three years.

The petitioner was cited to appear before the local administrative committee in Los Angeles upon charges of conversion and misappropriation of funds; for knowingly making a false return on a garnishment; and upon two other charges, including one of unethical conduct in revealing to a third party information prejudicial to his client. The accusations were made by two complainants, Julius Fried and Miss Wilmetta Crawford. The petitioner is about fifty years of age, and has practiced law in Los Angeles since his admission in 1907 without any charge heretofore having been brought against him.

In 1931 Julius Fried and W. James Hamlin were the two-thirds and one-third owners, respectively, of the stock in a chain corporation known as Orange Julius, Limited, and its corporate subsidiaries. Fried was the president and collected the money taken in by the stores in Los Angeles. The petitioner herein had been the attorney for the company. In June, 1931, Hamlin suspected Fried of peculations, and he requested the petitioner to call Fried into his office. Upon his arrival, Fried faced Hamlin's accusation of misappropriating cash register receipts to the extent of upwards of $100,000. Fried assigned to Hamlin all of his stock in the corporations and resigned as president, although he was still retained by Hamlin as an employee to help the company, if possible, out of its then difficult financial condition.

In the latter part of 1931 Fried approached the petitioner, Jacobs, to open negotiations with Hamlin for the repurchase by Fried of the stock turned over to Hamlin, or a controlling portion thereof, but without disclosing the real purchaser. At this time Hamlin and the company were represented by another attorney, Victor Ford Collins, and the petitioner continued to act for the company only for the purpose of completing some tax work. The petitioner represented Fried in the negotiations which followed.

Negotiations between Jacobs and Hamlin for the purchase of the stock went forward. Fried put up $500 in cash as earnest money, for which Jacobs receipted. Hamlin, however, held out for $15,000 as a cash payment upon $25,000 as the full purchase price of the stock. On January 21, 1932, Fried put into Jacobs' hands $14,500, consisting of a $10,000 bill, four $1,000 bills and five $100 bills. Fried accompanied Jacobs part way to the bank, but, when Jacobs arrived at the bank alone, he changed his mind about depositing the money and placed it in his safe. Within an hour an attachment, issued in an action brought by the company against Fried, was served on Jacobs. The next day, "over-persuaded," as he admits by Fried's conduct and demands, the petitioner changed the $10,000 bill and returned to Fried $7,500 of the money.

It was also about this time that Jacobs prepared for Fried a purported receipt and security, dated January 21, 1932, executed by Fried, for delivery to the complainant Miss Crawford. Fried and Miss Crawford claimed that the money put up by Fried belonged to Miss Crawford. Jacobs also learned for the first time that Miss Crawford, at whose home Fried resided, was the same person reputed to be Mrs. Fried. These and other facts in the record not necessary to note specifically support the petitioner's belief and the respondent's conclusion that the money deposited with Jacobs in fact belonged to Fried.

Both Miss Crawford and Fried accuse the petitioner of not having turned back to Fried the sum of $7,500 on January 22, 1932. The petitioner on the hearing exhibited from his own possession a form receipt signed by him dated "1–21–1932," receipting for the sum of $14,500 from Julius Fried. Across the face of this, in the petitioner's handwriting, appears: "$7,500 of this money refunded and receipt taken up and cancelled. 1–22–32. D. A. J." In the petitioner's receipt book, wherein he kept carbon copies, the copy form in the place from which this original receipt would have been taken is blank by virtue of erasure. The petitioner had at first evaded the demand of the district attorney's office for the receipt book, and then admitted on the hearing that he had become "panicky" and erased the copy in an attempt to "cover up."

The petitioner made no return to the first attachment served on him. A second attachment or garnishment was served on him. Finally, on February 25, 1932, Hamlin's attorney, Mr. Collins, wrote a letter to the petitioner demanding that a return be made. The petitioner noted an answer on Mr. Collins' letter and returned it to him, to the effect that he held $7,500 subject to attachment in the case and would make a return any time he was required to do so. About the middle of March, the petitioner made a written return to the sheriff that he held $7,000 subject to his claims for compensation. The petitioner contends that the sum of $7,000 was inserted in error, and that it should have read $7,500. Subsequently he deposited with the sheriff seven cashier's checks of $1,000 each, and admittedly retained $500, which he claimed to be due him for services rendered. He contends that his services were rendered, not as attorney, but as escrow holder. Inasmuch as he held $15,000 in that capacity for the period of only one hour, that he held that sum for about twenty-four hours subject to the attachment, and, in spite of the fact that $15,000 should promptly have been returned to the sheriff, he returned $7,500 to Fried and retained the balance as a garnishee only, together with the fact that no claim for compensation was made or discussed and was obviously an afterthought, the excuse for refusing to return the additional $500, as found by the respondent, is palpably weak, if not entirely groundless.

The petitioner defends his action in returning to Fried $7,500 of the attached money by stating the expectation nursed by him at the same time that his action would be approved by Hamlin, although in the same breath he is compelled to admit that Hamlin had not yet been informed of the deposit by Fried of the sum of $15,000 just prior to the levy. In defense of the reasonableness of this expectation, the petitioner discloses the fact that the action in which the attachment was levied was settled by the equal division between Hamlin, or the company, and Fried, of the $7,000 deposited with the sheriff.

The local committee found that the petitioner filed a return to the attachment in the pending action known by him to be false as to the amount returned. As to the misappropriation and conversion charge, the committee found that the evidence did not support a conclusion adversely to the petitioner in any respect except as to the sum of $500 purported to have been retained by the petitioner as his compensation in the escrow transaction. In the face of testimony by Hamlin that he had had Fried trailed by detectives and had independently observed or drew his own deduction that Fried was the undisclosed purported purchaser of the controlling interest in the company, the committee found that the charges of revealing information were not supported. The only other charge found by the committee to be supported was a fifth charge added by amendment wherein the petitioner was accused of unlawfully returning to Fried monies garnisheed in the hands of the petitioner. Although the committee also found that the monies were returned by Jacobs with the reasonable expectation that his action would be approved by Hamlin, it nevertheless recommended disbarment. The findings of the committee were adopted by the board.

The petitioner on this review admits the wrongdoing in so far as the charges are found to be supported by the evidence; but he relies upon the finding respecting the reasonableness of his expectations as to the final outcome of the controversy between Hamlin and Fried, together with his contention that he was entitled to withhold a reasonable fee in the matter, as supporting his claim for complete exoneration. Unquestionably the board took into consideration these claims of the petitioner, together with his age and former record, in modifying the recommendation to suspension for three years, instead of adopting the committee's recommendation of disbarment.

[1, 2] The petitioner on the record herein has failed to meet the burden devolving upon him to show that the board's decision is erroneous or unlawful. Aydelotte v. State Bar, 209 Cal. 737, 290 P. 41; Stats. 1927, chap. 34, p. 41, § 26. In support of his attempted showing, he contends that he was not acting as an attorney in the transaction, but claims that he acted merely as an escrow holder, and that the only liability to which he became subjected by his returning $7,500 to Fried is the civil liability imposed by section 544 of the Code of Civil Procedure. The creation of a civil liability, statutory or otherwise, would not release him from his obligation to answer the charges of wrongdoing in the handling of funds in his care, if otherwise he is amenable to the disciplinary process of the State Bar

Act. It may be assumed that he was acting merely as an escrow holder in the transaction. It is the additional fact of his status as an attorney licensed to practice and member of the state bar that brings him within its disciplinary reach whenever "the commission of any act involving moral turpitude, dishonesty or corruption" is involved. Code Civ. Proc. § 287, subd. 5. In this connection we are constrained also to note the inconsistency between the petitioner's position that he acted as an escrow holder merely and his reliance upon cases involving claims and liens as an attorney for services rendered as such pursuant to which he urges the right to retain moneys to satisfy his client's debt to him for services rendered.

[3] The petitioner's attempt to have this court confine within narrower limits the definition of what constitutes moral turpitude cannot succeed. This court has heretofore declared the standard in that respect, viz., that moral turpitude comprises everything done contrary to justice, honesty, or good morals. Lantz v. State Bar, 212 Cal. 213, 218, 298 P. 497, citing In re Coffey, 123 Cal. 522, 56 P. 448.

It is ordered that the petitioner be, and he is hereby, suspended from the practice of the law in this state for the period of three years from and after the filing of this order.

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219 Cal. 80

SNYDER v. SNYDER.

L. A. 13651.

Supreme Court of California.

Sept. 27, 1933.

Divorce 🔑245(1), 309.

Trial court, having denied application to modify divorce decree as to allowance to former wife and child, could not modify divorce decree three months later on identical state of facts (Civ. Code, § 139).

In Bank.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Application by Guy Snyder to modify the decree of divorce with regard to allowance to Eva M. Snyder and minor child. From an order reducing the allowance, Eva M. Snyder appeals.

Reversed.

See, also, 216 Cal. 616, 15 P.(2d) 510.

William Ellis Lady, of Los Angeles, for appellant.

W. H. Abrams, of Los Angeles, for respondent.

PRESTON, Justice.

Appeal by plaintiff in a divorce action from an order made February 9, 1932, reducing the amount allowed her from defendant, for herself and minor child, from $50 to $30 per month, and specifying that said allowance is to be for the benefit of the child only. The interlocutory decree in favor of plaintiff, entered March 7, 1930, also awarded to her the custody of the child. It is conceded that said decree, as well as section 139 of the Civil Code, reserved to the court the right to modify, from time to time, its orders with respect to these matters.

On October 10, 1931, defendant obtained an order to show cause, in re modification of said decree, to reduce the original allowance of $50 to $20. He supported his application by his own affidavit and set up the fact that he had remarried and that his family now consisted of his second wife and her two minor children, all of whom he was supporting, and that his earning power was not to exceed $140 per month. Plaintiff filed a counteraffidavit. On November 12, 1931, the application was heard and denied by the court. Subsequently, and on February 2, 1932, upon practically an identical affidavit, a second order to show cause was issued and served on plaintiff's attorney. Under said affidavit alone, without the development of a single new fact, the court on February 9, 1932, modified said maintenance allowance by reducing it from $50 to $30 per month, as first hereinabove stated, and plaintiff appealed. Her appeal is made upon a duly prepared record. Respondent has not furnished us with a brief.

It is not necessary to determine whether the showing made by defendant on either of the orders to show cause set forth grounds sufficient to authorize the modification of said maintenance order. For it is clear that the court, having denied the application on November 12, 1931, was without authority on February 9, 1932, to alter said decree upon an identical state of facts. It would be incongruous to allow an appealable order to become final and yet to concede the power of a court at a later date, upon the same state of facts, to issue an order nullifying it. The rule of law in this particular is stated in 1 Ruling Case Law, p. 948, as follows: "Authority to modify the allowance, however, does not include the right to alter the award upon the state of case existing when the decree was entered, or to review the action of the chancellor therein. The parties had their day in court, with the right of appeal if the decree was deemed erroneous, and it cannot be supposed that it was intended that the court should sit in review of its own decrees, or that the same or some succeeding chancellor presiding in the same court should, after the lapse of indefinite time, have power to reverse, alter or modify a decree for alimony upon the facts existing at the time of its entry." See, also, to the same effect, 19 C. J. 273. This rule is followed by the District Court of Appeal in Molema v. Molema, 103 Cal. App. 79, 283 P. 956. See, also, a case directly in point decided by the Supreme Court of the state of Idaho, Simpson v. Simpson, 51 Idaho, 99, 4 P.(2d) 345.

The order is reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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219 Cal. 89

McDANIELS v. DICKEY et al.

L. A. 12810.

Supreme Court of California.

Sept. 28, 1933.

1. Eminent domain 🔑153.

Right to compensation for condemnation of property is personal, and does not run with the land or pass to vendee thereof after right accrues, in absence of express agreement to that effect.

2. Eminent domain 🔑153.

Where deed executed one month and two days subsequent to interlocutory judgment awarding compensation for land condemned conveyed property subject to an easement on part thereof under condemnation proceedings, vendors *held* entitled to compensation awarded, where condemnation proceedings were not abandoned within 30 days after entry of interlocutory judgment which constituted in effect a "final judgment," and final order of condemnation being a "special order made after final judgment" (Code Civ.Proc. §§ 1251, 1252, 1255a).

[Ed. Note.—For other definitions of "Final Decree or Judgment," and "Special Order," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Elizabeth G. McDaniels against G. W. Dickey and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

For prior opinion, see 16 P.(2d) 299.

Edward H. Estill and Edmond Wheeler Pottle, both of Los Angeles, for appellant.

Alonzo D. Hitchcock, of Van Nuys, for respondents G. W. Dickey and others.

Erwin P. Werner, City Atty., and Ivan L. Hiler, Deputy City Atty., both of Los Angeles, for respondent City of Los Angeles.

IRA F. THOMPSON, Justice.

This appeal is from a judgment of dismissal entered pursuant to an order sustaining without leave to amend the demurrer of the defendants G. W. Dickey, Loraine Dickey, and Charles K. Heard to appellant's complaint.

The complaint alleges, in effect, that on February 20, 1928, an action in eminent domain was commenced by the city of Los Angeles against G. W. Dickey, Loraine Dickey, and others as the owners of a parcel of property described in the complaint in condemnation; that thereafter and on the 17th day of May, 1929, an interlocutory judgment was entered in book 730 at page 80 of Judgments; that by the terms of the interlocutory judgment it is provided that the total compensation proper to be paid to the defendants G. W. Dickey and Loraine Dickey as the owners of the aforementioned parcel of land was the sum of $1,276.73; that the compensation for the property has not been paid; and that final judgment in said proceedings has not been entered.

The complaint then alleges that on or about the 19th day of June the defendants G. W. Dickey and Loraine Dickey by grant deed, recorded on August 6, 1929, sold and conveyed to plaintiff certain real property situated in the city of Los Angeles, county of Los Angeles, and more particularly described as the east 80.28 feet of the west 105.28 feet of the south 175 feet of lot 66, plat 1000 "as per map recorded in Book 19 page 1 et seq. of Maps in the office of the County Recorder of said County; subject to an easement on the Easterly portion thereof under proceedings for condemnation instituted in Superior Court of said County in Case No. 245510.

"Subject to all taxes for the fiscal year 1929–30; Subject to street bonds for improvement of Blvd. upon this and other property;

"Subject to conditions, restrictions, reservations, rights, rights of way and easements of record."

It was also alleged that the defendants agreed with the plaintiff "that the sum of money to be paid under said proceedings in condemnation * * * for an easement over the easterly portion thereof should be paid to the plaintiffs" and that the necessary papers therefor would be executed; and that defendants had refused to execute an assignment evidencing plaintiff's right to receive the compensation from the city. The prayer of the complaint was that the city be required to pay the amount of the award into court or retain the same until plaintiff's right to a portion thereof could be determined.

The defendant city filed an answer by which it set forth the amount of the award and of the assessment and asked for an order authorizing it to deposit the balance of the award, after deducting the assessment, with the clerk. The defendants Dickeys and Charles K. Heard demurred to the complaint as already indicated, on the ground that the facts alleged were insufficient to constitute a cause of action.

While it is alleged in the complaint that there was an agreement between the parties that the compensation should be paid to the appellant, yet it is conceded in appellant's brief that the agreement alleged was not a separate or oral agreement but, as stated in her reply brief, was "the agreement to be gathered from the four corners of the deed executed and delivered by respondents to appellant."

[1, 2] Therefore, the sole question we have to solve is whether, by the deed executed a month and two days subsequent to the entry of the interlocutory judgment, the vendee became entitled to the compensation awarded by that judgment. It may, however, be helpful to notice that the language of the present deed is not that it is "subject to condemnation proceedings," but that it is "subject to an easement on the easterly portion thereof under proceedings for condemnation. * * *" In Russakov v. McCarthy Co., 206 Cal. 682, on page 686, 275 P. 808, 810, it is said: "That a person, to be entitled to moneys awarded as compensation for the condemnation of property, must establish an interest or estate in the thing condemned, is, as an abstract proposition of law, unquestionably sound. But the right to compensation is a personal one which does not run with the land, and does not pass to a vendee of the land after the right accrues, in the absence of an express agreement to that effect. Where the right accrues after a conveyance, a vendee or optionee is entitled to compensation for the damage he has suffered. 10 Cal. Jur. 356, and cases cited." Nor is the case of Security Co. v. Rice, 215 Cal. 263, 9 P.(2d) 817, 82 A. L. R. 1059, contrary to this rule. In that case the deed, without any exception or any other provision, was executed long prior to the interlocutory judgment and it was held that the purchaser was entitled to the award money.

The question, therefore, narrows itself down to this inquiry, whether the right to compensation had accrued prior to the execution of the deed. In Vallejo, etc., R. R. Co. v. Reed Orchard Co., 177 Cal. 249, 251, 170 P. 426, 427, this language was employed: "In such proceedings the award constitutes a judgment in favor of defendant and against the plaintiff for the amount thereof, payment of which, unless the proceeding within the time be abandoned by plaintiff as provided in section 1255a of the Code of Civil Procedure, shall be made within 30 days after final judgment (section 1251, Code Civ. Proc.), and in the absence of such payment of the money awarded or deposit thereof made in court, defendant may have execution to enforce the judgment as in civil cases (section 1252, Code Civ. Proc.). In this respect the rights of defendant are substantially identical with those of a plaintiff recovering a money judgment against a defendant in a civil action." And it is to be noted that the interlocutory judgment is in truth the "final judgment" referred to in sections 1251 and 1255a of the Code of Civil Procedure, and that the "final order of condemnation" is a "special order made after final judgment." California S. R. Co. v. S. P. R. Co., 67 Cal. 59, 63, 7 P. 123, 126; Glenn County v. Johnston, 129 Cal. 404, 62 P. 66; City of Los Angeles v. Pomeroy, 132 Cal. 340, 64 P. 477.

From these observations it necessarily follows that the right to compensation accrued to respondents prior to their sale of the property to the appellant (regardless of whether the accrual actually occurred at the entry of the interlocutory judgment or upon the expiration of the thirty days therefrom, during which period, under section 1255a of the Code of Civil Procedure, the condemnor would have the right to abandon the proceedings). It also seems to be obvious that that is the reason the parties inserted in the deed the expression "subject to an easement on the easterly portion thereof under proceedings for condemnation. * * *"

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

219 Cal. 175

CHITWOOD v. HICKS, County Auditor.

L. A. 14204.

Supreme Court of California.

Oct. 3, 1933.

1. Statutes ⚷93(8).

Statute providing that each superior judge in counties of twelfth class having more than one superior judge, of which there was but one, should appoint stenographer, and fixing salary of stenographer, *held* unconstitutional as local and special act (St. 1931, p. 2512; Const. art. 4, § 25, subd. 33).

2. Statutes ⚷93(8).

Statute relating to appointment of stenographer by superior judge of counties of twelfth class having more than one superior judge, being unconstitutional as local and special act, *held* not sustainable because contained in separate statute rather than General County Government Act (St. 1931, p. 2512).

SHENK, J., dissenting.

In Bank.

Application by Aileen Chitwood for writ of mandate to be directed to Ray T. Hicks, as Auditor of Riverside County, directing him to issue warrant in payment of salary.

Writ denied.

Prior opinion, 19 P.(2d) 70.

Sarau & Thompson, C. L. McFarland, and Geo. A. Sarau, all of Riverside, for petitioner.

Earl Redwine, Dist. Atty., of Riverside, for respondent.

PER CURIAM.

The sole issue in this proceeding is whether chapter 1199, Statutes of 1931, page 2512, is special legislation in violation of section 25, article 4, subdivision 33 of the Constitution, prohibiting the Legislature from enacting local or special laws in cases where a general law can be made applicable.

This statute provides that in counties of the twelfth class, having more than one superior judge, there shall be appointed by each judge of said court a competent stenographer or secretary to assist said judge and fixes the salary for such position. Riverside county is a county of the twelfth class having two superior judges, and is the only county in the state belonging to that class.

In pursuance of the provisions of said statute, the petitioner was appointed by one of the superior judges of said county to the position designated in said act. The auditor of said county refuses to draw a warrant in her favor for her salary, and this proceeding was instituted to compel the respondent to draw such a warrant.

[1] In Pratt v. Browne, 135 Cal. 649, 67 P. 1082, the validity of an act of the Legislature purporting to fix the salary of the phonographic reporter of the superior court of counties of the thirtieth class was before this court. Ventura county was then a county of that class. The petitioner in said proceeding was the phonographic reporter of the superior court of that county, and, upon the refusal of the respondent, the auditor of said county, to draw a warrant in petitioner's favor in payment of his salary as such reporter, the petitioner sought to compel the respondent to do so. In that case the court held that the position of phonographic reporter of the superior court was not a county office, and therefore the Legislature, under its power to classify counties for the purpose of fixing the compensation of county officers, could not classify them for the purpose of fixing the salary of an officer or employee who was not a county officer. No better answer to petitioner's contention in this proceeding can be made than is made by the following language of this court taken from the opinion of Pratt v. Browne, pages 651, 652 of 135 Cal., 67 P. 1082, 1083:

"It therefore logically follows that, as there is no such county officer as official reporter of the superior court, the classification of counties is a false quantity in the solution of the question here. If the legislature had no power to classify for the purpose of fixing the salary of the official reporter of the superior court, the fact that the act fixing the salary refers to counties of the thirtieth class does not change the result. It is the same as if Ventura county had been mentioned by name. No change of words or phrases, or calling Ventura county by another name, can change the result. The portion of the act in dispute must therefore be considered as an act fixing the salary of the reporter (whoever he may be) of Ventura county at the sum of $100 per month. It was said by this court, in bank, in Marsh v. Hanly, 111 Cal. 370, 43 P. 975: 'There can be no question that the act is local and special, since by its terms it is to "apply to, take effect in, and be in force only in counties of the first and second classes,"—that is to say, San Francisco and Los Angeles;' and, in speaking of a classification for other purposes than those named in the constitution, the court said: 'But the fact that these and the other counties of the state have been classified for a purpose which the constitution recognizes as a proper and necessary one does not relieve a law relating to other and distinct matters from the objection that it is local and special, if by its terms it is limited in its application or operation to one or more classes of counties less than the whole.'

"A law applicable to one county, and not founded upon any natural, intrinsic, or constitutional distinction, and no reason appearing as to why the act is not made to apply generally to all classes, is special and local, and therefore unconstitutional. Rauer v. Williams, 118 Cal. 403, 50 P. 691; Darcy v. Mayor, etc. San Jose, 104 Cal. 643, 38 P. 500; Dougherty v. Austin, 94 Cal. 621, 28 P. 834, 29 P. 1092, 16 L. R. A. 161; Welsh v. Bramlet, 98 Cal. 226, 33 P. 66; City of Pasadena v. Stimson, 91 Cal. 248, 27 P. 604. The portion of the act relating to the salary of the official reporter of Ventura county, when measured by the above tests, must fall. No reason appears why a special and local law should be applied to this county. In fact, we have a general statute on the subject of reporter's fees."

By the statute now before us, the Legislature not only attempted to fix the salary of a person holding a position not a county office, and one in no way connected with a county office, but also attempted to create the position itself. According to the rule announced in Pratt v. Browne, supra, it can do neither. There is no natural or intrinsic distinction between Riverside county and many of the other counties of the state which justified the Legislature in singling out that county from all the other counties of the state and providing that the superior judges of that county should have clerical assistance in the discharge of their duties.

Petitioner relies upon the case of Noel v. Lewis, 35 Cal. App. 658, 170 P. 857, 858, in support of her claim that the statute in question is not vulnerable to attack upon constitutional grounds. There is a radical distinction between the act of the Legislature considered by the court in that case and the statute which petitioner seeks to sustain. That case involved an act of the Legislature (St. 1909, p. 940) creating the position of secretary of the superior court and made it applicable to "all counties, and cities and counties, having a population of three hundred thousand inhabitants and over." It is apparent that the Legislature in that act did not single out any one county of the state and create in that county the position of secretary of the court without regard to the above provision of the Constitution limiting its powers in that regard. The act was made applicable to all counties and cities and counties of the state having a certain number of inhabitants or over. If perchance only one county of the state contained the requisite population required by said act, then there was a natural and intrinsic distinction between that county and all other counties of the state, which justified the Legislature in making the statute applicable to such county only.

[2] There can be no question that the business in the courts of the larger counties is more involved and complicated than in the smaller counties of the state. The former require a greater number of judges, and a proper correlation of the work of the various departments of the court requires, not only additional clerical assistance, but assistance of a distinctive character and different from that employed in counties with only a limited number of judges. That population of a county is a natural and intrinsic distinction justifying a classification upon that ground is evidenced by the Constitution itself, which makes the population of the various counties of the state the basis upon which the Legislature may classify them for the purpose of fixing the salaries of county officers. The case of Noel v. Lewis, supra, is in no way in conflict with Pratt v. Browne, supra, and there is nothing in that case which sustains the position of the petitioner. We are not impressed with the argument that legislation of the type here involved may be sustained because it is contained in a separate statute rather than in a general County Government Act, as was the case in Pratt v. Browne, supra. The constitutional inhibition against the enactment of local and special laws is general and inclusive, and is not limited to any particular mode of enactment. It might be well to add that the law regulating and governing counties which formerly formed the basis of the so-called County Government Act is now a part of the Political Code, and that we no longer have in this state any separate statute known as the County Government Act.

The petition is denied, and the alternative writ is discharged.

I dissent: SHENK, J.

219 Cal. 72

PEOPLE v. JOHNSON.

Cr. 3615.

Supreme Court of California.

Sept. 26, 1933.

Rehearing Denied Oct. 26, 1933.

1. Homicide 🔑309(6).

Instruction on manslaughter and instruction that defendant could not be convicted of murder if he did not enter house with intent to steal *held* properly refused, where undisputed evidence showed entry with burglarious intent and killing amounting to first degree murder (Pen. Code, § 189).

2. Criminal law 🔑627½.

In murder prosecution, refusal to direct occupant of burglarized premises and police officers to permit defense counsel to enter house for obtaining evidence *held* not error, in absence of evidence to justify such direction or of occupant's consent (Pen. Code, § 1119).

3. Criminal law 🔑723(1).

In murder prosecution, prosecutor's statement that defense counsel's contention regarding ballistic expert was all "baloney" *held* not misconduct.

Term "baloney" has acquired a generally accepted meaning as a slang expression, and is defined as stuff and nonsense.

4. Criminal law 🔑706.

Prosecutor's statement that all ballistic expert could have said was that specified bullet came out of .38 caliber revolver, made in reply to defense counsel's statement that he could not further examine expert, *held* not misconduct under facts.

Such statement was not misconduct in view of the fact that, though ballistic expert was detained in another court when defense wished to cross-examine him, the defense rested five days thereafter without any attempt in the meantime to call expert for further examination.

5. Criminal law 🔑730(1).

Defendant *held* not prejudiced in murder prosecution because defense counsel was declared guilty of contempt for interrupting prosecutor's argument, where counsel was not removed from courtroom and participated in proceedings.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Glen Johnson was convicted of murder, and he appeals.

Affirmed.

George T. Davis and Eli Freed, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Seibert L. Sefton, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Joseph A. Garry, Asst. Dist. Atty., both of San Francisco, for the People.

Chandler & Quayle and Edward J. Bloom, all of San Francisco, amici curiæ.

SHENK, Justice.

In a prosecution of the defendant for murder, the death penalty was imposed.

By information the defendant was charged with the murder of Harry F. Darling on the 8th day of June, 1932, in the city and county of San Francisco. By a second information he was charged with the murder of Mervin Reardon at the same time and place. He was also duly charged with a prior conviction of a felony, to wit, grand larceny, and the service of a state prison sentence therefor in the state of Utah. He entered pleas of not guilty and not guilty by reason of insanity to the charges of murder and denied the prior conviction. At the beginning of the trial, the defendant withdrew his denial of the prior conviction and admitted the same. The murder charges were tried together. After the verdicts of guilty were returned, the defendant withdrew his pleas of not guilty by reason of insanity. He appeals from the judgments and from an order denying his motion for a new trial.

The facts and circumstances attending the homicides were presented by the prosecution, and are undisputed in every material respect.

About 9 o'clock in the evening of June 8, 1932, the kitchen door-bell rang at the residence of Andrew J. Bell located at 206 Justin drive, in St. Mary's Park, a residential section of the city. Mr. Bell, a police officer of the San Francisco police department, was on duty from midnight until 8 a. m., and had retired shortly after 7 o'clock on the 8th. Mrs. Bell had also retired. She heard the bell ring, but refrained from responding to the signal until she heard a "fumbling" of the doorknob. She opened the door and saw two men with flashlights. She screamed, and Officer Bell responded in time to observe the two men make their get-away into the night. At the trial Mrs. Bell identified the defendant herein as one of the two men. Officer Bell requested his wife to notify the Ingleside police station at once by telephone of the suspicious presence of the men in the neighborhood, which was done, and Bell proceeded to dress in preparation for the pursuit. Three police officers responded to the call on motorcycles, and a search of the neighborhood was begun. At 9:50 a police radio message was sent out that there were burglars in the house at 256 Justin drive, which was several doors removed from the residence of Officer Bell, but on the same street. Bertel A. Nelson lived at 256 Justin drive with his wife, but on that evening they were away from home. The deceased, Harry F. Darling, who resided next door to the Nelsons, saw two men enter the Nelson house and notified the police department. In response to the resulting police radio call, numerous police officers proceeded to Justin drive, including Officer Reardon, the decedent, and Officers McKenna, Cook, Loftus, Garrick, and McGreevy. When they arrived on the street, they met Officer Bell and the police officers who had responded to the call sent in by Mrs. Bell, and immediately inquired about the location of 256 Justin drive, as they had been notified to investigate a burglary at that address. Upon being notified of the location, the officers surrounded the house and proceeded to gain entrance thereto. Officers Reardon, McKenna, and McGreevy entered through the basement door and turned on the lights in the kitchen, hallway, breakfast room, and on the front porch. Officer McKenna then let Officer Bell and civilian Darling in the front door. Officer Cook, who had gone to the rear of the house, saw by means of a flash-light a man in the house at one of the bedroom windows. Cook called to the officers inside that a man was in the bedroom, and Bell heard the call. Officer McKenna searched the east bedroom. In a closet in the east bedroom Officer Bell saw a man's hand on top of a large cardboard box. Bell commanded the man behind the box to come forth, and upon his refusal fired a pistol shot into the frame of the closet door; whereupon one Benn Moore, the confederate of the defendant herein, appeared. Moore was immediately handcuffed by Officer McKenna. The party then proceeded with Moore into the living room. At the same time Moore was questioned as to where his partner was. He replied that he had been there, but that he did not know where he then was. As the officers were questioning Moore, the latter complained that the handcuffs were too tight, and requested Officer McKenna to loosen them, which he did. Then Officer Reardon exclaimed: "There is somebody behind there," pointing to the radio which was standing near the corner of the room. Thereupon Officers Reardon, Bell, Loftus, and civilian Darling started toward the radio. Officer Reardon took the lead and moved the radio slightly. As he did so, the defendant emerged from behind the radio and fired five shots from his revolver in rapid succession. The first shot mortally wounded Officer Reardon. There were powder burns on his clothing where the bullet entered his body. The second shot mortally wounded civilian Darling. The third shot wounded Officer Bell, the fourth wounded Officer Loftus, and the fifth was aimed at Officer McKenna, but missed him and the bullet lodged in the wall of the room. The wounded officers returned the fire, and the defendant was hit in three places, but he survived after a season in the hospital. Simultaneously Moore broke away from Officer McKenna and attempted to approach the defendant, whereupon Officer McKenna shot Moore down, inflicting a wound from which Moore died. Officer McKenna then took the gun from the defendant's hand and removed the five empty cartridges. This gun was a .38 caliber five-cylinder revolver, and the same was received in evidence.

[1] No extenuating circumstances were shown. The defendant did not take the stand, and the evidence produced on his behalf did not even tend to contradict the evidence on behalf of the people as to what took place at the time of the homicides. Counsel for the defendant endeavored to inject into the case the element of extenuation by offering an instruction to the effect that, if the jury should believe that the defendant entered the house at 256 Justin drive and that at the time of such entry he did not intend to commit theft, but had a different kind of intention, "such as an intent to use the house for a hiding place," then he was no more than a trespasser and could not be found guilty of the intent necessary to make him guilty of burglary; that in such event he could not be found guilty of murder in the first degree unless he should be found guilty of the specific intent to commit murder. An instruction on manslaughter was also offered. The court properly refused these instructions because of the absence of evidence to support them. Counsel intimated in his examination of prospective jurors that evidence would be produced which would justify such instructions, but none was produced. The evidence conclusively shows that on the evening of June 8th entrance was gained to the house of Officer Bell at 206 Justin drive by means of a glass cutter; and that the defendant and Moore entered the house at 256 Justin drive by breaking off boards from a window and cutting the glass near the catch with a glass cutter. After his arrest, a glass cutter was found on the person of the defendant; also a set of keys and two .38 bullets were taken from him. It was also shown without contradiction that just before the shooting affray the bureau drawers in the bedrooms at 256 Justin drive were opened and the contents strewn over the room; that two small banks in the house had been opened with an instrument or tool, and the money therein, consisting of numerous small coins, had been removed. A pair of nippers or small pruning shears were taken from the person of Moore. From these and other facts in the record, and with no explanation to counteract the plain inferences to be drawn therefrom, the court in the first instance was compelled, and thereafter the jury was justified, in concluding that the defendant and his confederate had entered the house with burglarious intent, and that the killing was murder in the first degree as provided in section 189 of the Penal Code. Likewise, there is no room

for a legitimate inference that the defendant was in the house at the time merely as a refuge or hiding place. There was also no warrant under the facts for the giving of an instruction on manslaughter.

[2] During the course of the trial, the defendant's counsel moved the court for an order directing the occupant of the premises at 256 Justin drive and the members of the police department to permit counsel for the defendant to enter the house and examine and inspect the scene of the crime, for the purpose of obtaining evidence. The denial of the motion is urged as prejudicial error. Assuming that the court had the power to make such an order, there was no sufficient showing in this case to justify it. Under section 1119 of the Penal Code, the court is authorized, in its discretion, to order that the jury be taken to the place where the offense is alleged to have been committed for the purpose of inspection, but we are not advised of any authority in the court to make an order merely on motion and without a sufficient showing, including the consent of the occupant of the premises, permitting counsel for a party to enter the private premises of another for such a purpose. If the occupant consent, and the members of the police department were to obstruct counsel in making an inspection, the court undoubtedly could, upon a proper showing, control and direct the activities of the police in that respect. But, as stated, no sufficient showing was made in this case, and the assignment of error is without merit.

[3, 4] Counsel complains of certain language used by the assistant district attorney in his argument to the jury, and assigns such language as misconduct. The testimony throughout the trial showed that .38 bullets were used at the time of the affray. All of the witnesses who testified on that subject so stated. On cross-examination of Officer McKenna defendant's counsel sought to impeach the witness by the production of the record of his testimony at the coroner's inquest. The transcript of this record represented this witness as stating that a .32 revolver was taken from the defendant at the time of his arrest. The witness promptly stated that the report of his testimony at the inquest was a clerical error, that the revolver taken from the defendant was a .38, and that his written report showed that it was a .38. Defendant's counsel attempted to make much of this discrepancy, and stated in his argument that he wanted to cross-examine Sergeant Latulipe further as a ballistic expert, but could not do so because that officer was a witness in the federal court. In the course of his reply, the assistant district attorney referred to a portion of the argument of the defendant's counsel as follows: "That is all baloney about the ballistic expert. * * * All that Sergeant Latulipe could have done within reason is this: He could have said, 'Yes, I put those bullets under a microscope,' or whatever instrument they use, and that bullet came out of a .38 calibre revolver.' And that is all he could have said." It is contended that the first statement is unjustifiable ridicule of opposing counsel's argument, and that the second statement was a positive statement of a fact which was not true. The statements complained of must be considered in the light of the record, which discloses that, although Sergeant Latulipe was detained in another court at the time the defendant's counsel desired further to cross-examine him, to wit, on October 14th, the defense rested on October 19th, five days later, and there was no attempt on behalf of the defendant in the meantime to call the sergeant as his witness or for further cross-examination.

The term "baloney" may be said to have acquired a generally accepted meaning as a slang expression. Funk and Wagnalls' New Standard Dictionary of 1932 defines it as "stuff and nonsense." If the definition had been used in the argument instead of the term itself, it could not be said that it would have been outside the realm of legitimate argument. The jury undoubtedly understood the term in its generally accepted sense, which corresponds to the accredited definition, and, although the use of the term may be said to have been undignified, we are unable to conclude that the rights of the defendant were prejudicially affected thereby. The same conclusion must be reached as to the other language complained of when the whole record is taken into consideration.

[5] The final contention in support of the appeal is that the rights of the defendant were prejudiced by reason of the fact that during the closing argument of the assistant district attorney the defendant's counsel was declared by the court to be guilty of contempt. During the course of the trial there had been much acrimony between counsel, and such as would provoke justifiable reproof on the part of the court. The record shows that throughout the trial the court had been patient and considerate of the defendant's counsel and solicitous for the rights of the defendant. At numerous times the court had felt called upon to direct counsel for the defendant as to his proper conduct and frequently admonished him as to his demeanor. Finally, during the closing argument of the assistant district attorney and immediately following the second remark assigned as misconduct and above quoted, the defendant's counsel interjected: "That is a lie." Whereupon the court declared counsel for the defendant guilty of contempt, and directed the bailiff to take him in charge. Said counsel was not, however, removed from the courtroom, and was permitted thereafter with his cocounsel to participate in the proceedings.

It is not reasonable to assume that the result would have been different if this incident had not taken place.

We find nothing in the record to warrant a reversal. The judgments and the order denying the motion for a new trial are therefore affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; IRA F. THOMPSON, J.; CURTIS, J.; LANGDON, J.; SPENCE, Justice pro tem.

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219 Cal. 113

WEDGE et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

L. A. 12750.

Supreme Court of California.

Sept. 30, 1933.

Rehearing Denied Oct. 30, 1933.

1. Vendor and purchaser 🔑15.

Where, at time of execution of contract of sale, lot may not be used for single purpose for which it has value and to which its use is restricted by contract, there is failure of consideration.

2. Evidence 🔑433(8), 434(11).

Provisions in land contract relieving vendor from liability for representations of agent not embodied in contract do not relieve vendor from responsibility for own fraud or mistake, or fraud or mistake of managing officers, where vendor is corporation.

3. Vendor and purchaser 🔑15.

Where land contract permitted use of lot only for residence purposes, and parties were unaware of right of way under condemnation judgment which permitted only fireproof structures, rendering erection of residence practically impossible, there was failure of consideration, entitling purchasers to rescind, though existence of right of way was matter of record.

4. Principal and agent 🔑145(4).

One dealing with agent as principal can hold either agent or undisclosed principal, but cannot hold both.

5. Banks and banking 🔑90.

Where purchasers entered into land contract with bank, the legal title holder, and were unaware of secret trust for beneficial owners, purchasers, rescinding contract for failure of consideration, could elect to hold bank liable as principal for return of purchase price.

6. Limitation of actions 🔑96(2).
Vendor and purchaser 🔑119.

Where purchasers were financially unable to build on lot for more than five years after execution of land contract, and then learned for first time of condemnation judgment preventing erection of residence, action for rescission, promptly brought upon discovery of mistake, *held* not barred by limitation or laches (Civ. Code, § 1691).

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by George N. Wedge, also known as Geo. N. Wedge, and another against the Security-First National Bank of Los Angeles and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Prior opinion, 17 P.(2d) 770.

H. S. Clewett and Joseph J. Rifkind, both of Los Angeles, for appellants.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondents.

SEAWELL, Justice.

By the judgment appealed from the court below decreed rescission of a contract for the sale of a lot in the city of Los Angeles entered into between defendant Security Trust & Savings Bank as seller and plaintiffs as purchasers, and awarded plaintiffs a money judgment for $3,656.31. Said sum represents the amount paid on the purchase price, plus taxes and interest. The defendant Security-First National Bank of Los Angeles is the successor in interest of Security Trust & Savings Bank by virtue of a bank consolidation.

The lot in suit is triangular in shape. It has a frontage of approximately 150 feet on Farewell avenue, the entire length of the block, and also a frontage of 114 feet on Waverly drive. The northwesterly corner is an acute angle formed by the intersection of said public ways. The purchase price was $3,000. Plaintiffs, George N. Wedge and Herbert F. Wedge, who are brothers, paid $2,000 upon execution of the contract on or about March 12, 1924. The balance was provided to be paid in monthly installments of $33.50. In May, 1929, before plaintiffs had paid the purchase price in full or received a deed, they discovered that the city of Los Angeles had a right of way 120 feet in width across the lot for power line purposes, upon which no building could be erected, with the possible exception of an absolutely fireproof structure. Inasmuch as the major portion of the lot lay within the right of way, plaintiffs claimed said right of way rendered it valueless. Upon the bank's refusal to cancel the contract and restore the consideration which plaintiffs had paid, they brought this action for rescission based on fraud and failure of consideration. The court below entered judgment for plaintiffs, from which defendants prosecute this appeal.

Plaintiffs had observed the electric transmission wires, which passed over the property at a considerable height, when they first viewed the property. Said wires were carried by steel towers built on concrete blocks. One of these towers was situate on the southwest corner of Farewell avenue and Waverly drive, directly opposite the lot purchased by plaintiffs. They were interested in erecting a bungalow court and feared the presence of said transmission lines. In answer to their inquiries as to whether they could build under the wires, Gould, the salesman with whom they were negotiating, replied, "Absolutely, yes." Mrs. Lena Wedge, wife of George N. Wedge, testified that Gould said in her presence and in the presence of plaintiffs: "Why, how could those wires possibly make any difference? If you object to wires, where in the world are you going to build a court in this city? * * * How in the world could these wires so high up as they are make any difference in your building either to the people who are living there?"

The judgment by which the right of way across said lot was condemned to the city in 1917 provided that "no combustible material or structure shall be erected on said right of way, nor shall any combustible material be stored permanently left thereon." Approximately three-fourths of the total area of plaintiffs' lot is within this right of way. Plaintiffs contend that by the terms of said judgment no structure whatsoever could be built upon the right of way, since the word "structure" is not preceded by the word "combustible," while defendants contend that only combustible structures are prohibited. The contract of sale specifically provides that no building except a single family residence, a double bungalow or duplex house, or bungalow court shall be erected on the property, and buildings of this class are seldom of fireproof construction. In view of our prevailing modes of construction, a provision against the erection of any residence buildings except fireproof structures is so severe a limitation on the right to build as in effect to prevent building.

The entire area which lies outside the right of way cannot be built upon due to its triangular shape. This section is 95.80 by 42.5 by 91.65 feet. The depth of the section decreases from 42 feet along the east line of the lot to zero. Approximately one-third of the frontage of 95 feet on Waverly drive has a depth of 15 feet or less. A building could not extend into the long, narrow apex of the triangle. Further, even if the provisions of the contract do not require that a building actually fronting on Waverly drive should be set back 15 feet from the line, in view of the manner in which residences are generally placed, a residence building facing Waverly drive could not well be built up to the line of the lot on Waverly. The erection of a bungalow court, required by the contract to consist of not less than four buildings, or of a duplex house, would certainly be an impossibility. To build a presentable single family residence, required by the contract to cost $4,000, would be a difficult architectural problem, if indeed it is possible at all.

[1] In defense of the action for rescission defendant banks rely on a provision in the contract of sale to the effect that the buyer waived all claims for damages because of any representations made by any person whomsoever other than as contained in the agreement. All oral representations as to the availability of the lot for building were made by the salesman Gould. However, the contract of sale specifically provided that upon lots 1 to 25, which included plaintiffs' lot, no building could be erected other than a single family residence to cost $4,000, a double bungalow or duplex to cost $5,000, or a bungalow court to consist of at least four residence buildings to cost at least $1,500 each. The subject-matter of the contract is a residence lot, located in a residence subdivision and restricted to use for residence purposes. The seller has said to the purchaser by the terms of the contract: "You cannot use this property for anything except residence purposes." If at the time of execution of a contract of sale the lot may not be used for the single purpose for which it has value and to which its use is restricted, there is a failure of consideration.

[2, 3] The contract herein appears to be the result of mistake, rather than actual fraudulent intent. Although there is no direct proof on the point, it is to be inferred that the bank in signing the contract was unaware of the existence of this right of way 120 feet in width. In fact there is no proof that Gould, the salesman, knew that the major portion of the lot was unavailable for general residence purposes. The purchase price fixed by the contract, $3,000, is evidence of the good faith of the bank. It is not to be presumed that the bank would fix such a price had it known of the existence of the right of way. Provisions which may relieve the seller from liability for representations of an agent not embodied in the contract under the doctrine of Gridley v. Tilson, 202 Cal. 748, 262 P. 322, do not relieve the seller from responsibility for his own fraud or mistake, or fraud or mistake of managing officers where the seller is a corporation. Simmons v. Ratterree Land Co. (Cal. Sup.) 17 P.(2d) 727. And in no event can the seller escape liability on the provisions of the contract. Here there has been a basic failure of consideration as to the express subject-matter of the contract, which the seller intended to

sell and the purchaser to buy; that is, a residence lot. Recovery is had on the written contract, rather than on oral representations in conflict with or entirely outside the provisions of the contract.

The fact that the existence of the right of way upon the judgment of condemnation may have been a matter of record does not bar plaintiffs. As between plaintiffs and third parties, plaintiffs would be charged with constructive notice of all matters of record, but this defense is not available to the bank which as seller was a party to the contract. Furthermore, but for the acts of the salesman Gould, who as to plaintiffs was the agent of defendant bank, plaintiffs doubtless would have discovered the judgment. They suggested that the transaction be escrowed with a title company and that an abstract be secured. Gould dissuaded them by assurances that the bank customarily acted as an escrow agent, and that as they were dealing with a bank of long established and unquestioned responsibility they could rely absolutely on the title. A title report would doubtless have revealed the right of way 120 feet in width.

[4, 5] The defendant banks seek to avoid liability to restore to plaintiffs the amount paid on the theory that the bank which signed the contract as seller was not the real principal in the transaction, but the agent of the real owners, for whom the salesman Gould was acting, and that it merely executed contracts and deeds as directed by said owners, and turned over payments received to them. The bank held the fee title of record. It offered to prove that it held title to secure an indebtedness of the beneficial owners to it. The contract was made in the name of the bank as seller, and signed by its vice president, without any indication that it was acting in a trust or representative capacity. Plaintiffs made payments on the contract to the bank. They did not learn of the existence of the secret trust until they demanded return of the amount paid, and were informed that the decision lay with the beneficial owners. They dealt with the bank as principal and relied on its integrity as a long-established financial institution. A third party who has dealt with an agent as principal can hold either the agent or his undisclosed principal, but cannot hold both. Craig v. Buckley (Cal. Sup.) 21 P.(2d) 430; Klinger v. Modesto Fruit Co., Inc., 107 Cal. App. 97, 290 P. 127. In the case herein plaintiffs have elected to hold the agent as principal by bringing the action against it without joinder of the undisclosed principals. In Gist v. Security Trust & Savings Bank (Cal. Sup.) 24 P.(2d) 153, the plaintiffs had joined and procured a judgment against the undisclosed principals. That case is not authority for relieving the bank herein from full personal liability where the plaintiffs have elected to hold it alone as principal.

[6] The action is not barred by the statute of limitations or laches. The contract was executed on or about March 12, 1924. In May, 1929, plaintiffs consulted a builder with reference to construction of a bungalow court, and were informed that the high power wires would interfere with building. They then ascertained from the city the terms of the judgment condemning the right of way to it, and immediately thereafter made demand upon the bank for return of the amount paid. The bank seems to have been impressed with the justice of the claim, but took the position that relief should be sought from the beneficial owners. Written notices of rescission were delivered to the bank on June 12 and June 24. Negotiations were had with reference to a settlement, but the matter was not adjusted, and the complaint was filed on August 19. Plaintiffs acted promptly upon discovering the mistake and failure of consideration. Section 1691, Civil Code; Gist v. Security Trust & Savings Bank, supra; Sherratt v. Hellman Com. T. & S. Bank, 112 Cal. App. 542, 297 P. 582; Tracy v. Smith, 175 Cal. 161, 165 P. 535. Defendants cannot complain because plaintiffs did not discover the mistake sooner. They had not been in a financial position to build prior to May, 1929, and hence were not led to discover the mistake prior to that date. That plaintiffs acted in good faith is apparent from the fact that they paid $2,000 on execution of the contract and thereafter continued to make payments until discovery of the city's rights.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; THOMPSON, J.

219 Cal. 98

CALIFORNIA PEAR GROWERS' ASS'N v. JOHNSON, State Treasurer.

Sac. 4721.

Supreme Court of California.

Sept. 29, 1933.

Rehearing Denied Oct. 27, 1933.

1. Taxation ⚷376(1).

Corporate franchise tax assessed against nonprofit co-operative agricultural products marketing association on basis of 1/60 of amount association returned to members during year *held* authorized, notwithstanding other nonprofit co-operative associations were assessed only $8 (Const. art. 13, § 14 [d]; Pol. Code, §§ 3664d, 3667).

2. Taxation ⚷317(2).

State Board of Equalization has wide discretion in evaluating corporate franchises (Const. art. 13, § 14 [d]; Pol. Code, §§ 3664d, 3667).

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the California Pear Growers' Association against Charles G. Johnson, as state treasurer of the state of California. Judgment for defendant, and plaintiff appeals.

Affirmed.

Milton D. Sapiro and Sapiro & Hayes, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

WASTE, Chief Justice.

Plaintiff brought this action to recover a corporation franchise tax paid under protest. Judgment was entered for the defendant and plaintiff appeals.

Plaintiff is a nonprofit co-operative marketing association without capital stock or corporate excess, incorporated under the laws of the state of California, and having its place of business in this state. During all the time here pertinent, it was engaged in marketing pears, produced by its members, on a nonprofit basis, returning to its members the proceeds of the sales less necessary selling expenses. It does not declare or pay dividends, and is not engaged in business for its own account.

The state board of equalization, in determining the value of plaintiff's franchise for the year 1928, considered, among other things, the business done by plaintiff for its members during the year 1927, as indicated by the amount of money returned to the members and by crop and market conditions of the product handled, and determined that a reasonable value of the advantages enjoyed by plaintiff as a result of the corporate franchise was one-sixtieth of the amount which plaintiff had so returned during the year 1927. On that basis, the board levied a tax, computed at the legal rate, amounting to $301.50, which plaintiff paid under protest, and now seeks to recover.

[1] When the assessment and tax here involved were levied and collected, the state board of equalization applied the same process of arriving at the value of the franchise tax of all nonprofit co-operative associations marketing agricultural products, but assessed a nominal franchise tax of $8 against all other nonprofit co-operative associations. Appellant contends that the tax ascertained and arrived at by the method adopted by the board of equalization and assessed on its franchise is arbitrary, discriminatory, and unauthorized. The State Constitution (article 13, § 14, subd. (d) provided, at the time here pertinent, that all franchises (with designated exceptions) should be assessed at their actual cash value, in the manner to be provided by law. The law, at the same time, provided (Pol. Code, § 3664 d) that these franchises "shall include the actual exercise of the right to be a corporation and to do business as a corporation under the laws of this state. * * *"

It must, of course, be conceded that the method used by the state board of equalization in arriving at the tax in the present case is not the method approved by this court for arriving at the value of corporate franchises for purposes of taxation of corporations having stock structures; but it does not follow, for that reason, that the tax may not be valid. The franchise of appellant was the identical thing assessed by the board of equalization, and it is unquestionably the thing that was required by the Constitution and the law to be assessed. The fact that the assessment of the appellant and other nonprofit co-operative marketing associations marketing agricultural products may appear excessive, when compared with the nominal franchise tax levied against all nonprofit associations other than nonprofit co-operative marketing associations marketing agricultural products, does not, of itself, make the assessment invalid. Pacific Coast S. S. Co. v. Richardson, 186 Cal. 70, 72, 198 P. 1034, and cases cited. It nowhere appears that there was, on the part of the assessing board, a conscious failure to exercise that fair and impartial judgment which the law requires of it. This court held in Utah Construction Co. v. Richardson, 187 Cal. 649, 203 P. 401, 402, that it was not essential that the Legislature prescribe the method of valuation to be employed in estimating the value of corporate franchises, but that it "may delegate to its taxing officers the power to adopt a suitable method, and, in the latter case, the assessors must

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value the property according to their best judgment and with honest purpose." Therefore, the contention of appellant cannot be considered by the court, for the method pursued by the board in making the assessment, while not following any procedure laid down by law, so far as we are able to find, is, nevertheless, a method that could have been prescribed by law and may readily be sanctioned as reasonable. There being neither averment nor contention that fraud or mistake entered into the fixing of the assessment, that matter cannot be gone into by the courts. Miller & Lux v. Richardson, 182 Cal. 115, 128, 187 P. 411.

[2] The Legislature has prescribed (Pol. Code, § 3667) what information the owner or holder of franchises subject to taxation shall report in writing to the state board of equalization. Appellant complied with the requirements of this section. The board of equalization is directed to "ascertain and determine from [these] reports or from the best information it can obtain the actual cash value on the first Monday in March of each such franchise, and shall assess and levy the taxes thereon in accordance with the provisions of subdivision (d) of section fourteen of article thirteen of the Constitution of this state." It is apparent that the law placed a very wide discretion and freedom of action in the state board of equalization in the matter of determining the value of corporate franchises. The cases already cited hold that in the absence of fraud or mistake the action of the board cannot be inquired into.

The judgment here appealed from is affirmed.

We concur: SHENK, J.; SEAWELL, J.; PRESTON, J.; IRA F. THOMPSON, J.; LANGDON, J.; CURTIS, J.

219 Cal. 85

FREEMAN v. GRAY-COWAN, Inc., et al.

L. A. 14116.

Supreme Court of California.

Sept. 27, 1933.

1. Appeal and error 🔑907(3).

Reviewing court must assume that findings were supported, where appeal is on judgment roll alone.

2. Appeal and error 🔑882(17).

Parties who voluntarily try issue without specific pleadings cannot complain that findings are outside issues framed by pleadings.

3. Appeal and error 🔑907(3).

Reviewing court entertaining appeal on judgment roll alone in action to quiet title must assume, in support of judgment, that deeds introduced for undisclosed purpose were introduced to prove title, though title was not put in issue by pleadings.

4. Appeal and error 🔑907(3).

Every intendment is indulged in favor of judgment when appeal is taken on judgment roll alone.

In Bank.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by William A. Freeman against Gray-Cowan, Inc., and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

M. S. Meyberg, of Los Angeles, for appellants.

C. E. Spencer, of Beverly Hills, and William A. Freeman, of Los Angeles, in pro. per.

IRA F. THOMPSON, Justice.

This appeal is from a judgment in favor of plaintiff quieting his title to the easterly 10 feet of the southerly 98.25 feet of lot 1 of Grand View boulevard tract as per map recorded in book 7, page 122 of maps, records of Los Angeles county, and decreeing that defendants have no right, title, or interest therein, and restraining them from claiming any title thereto or interfering with plaintiff's possession, use, enjoyment, or occupation thereof, and directing them to remove all obstructions placed thereon by them or at their direction.

The complaint alleged ownership by the plaintiff of the south 98.25 feet of lot 1 "(except the Easterly 10′ thereof)"; that the defendants were the owners of the easterly 10 feet thereof; that the plaintiff owned a right of way over the 10-foot strip which was the only means of access to the flats and garages maintained by plaintiff on the remainder of the south 98.25 feet of lot 1; and that the defendants now forbid the use of the right of way by the plaintiff and his tenants and had placed an obstruction thereon and threatened to forcibly prevent the use thereof. The answer of defendant George W. Cowan denied all the allegations of the complaint and denied that he had any interest in the 10-foot strip except as a stockholder and officer of Gray-Cowan, Inc., which corporation owned the 10-foot strip. The answer of Gray-Cowan, Inc., denied that plaintiff owned or was in possession of a right of way over the strip or that the same was necessary as a means of ingress or egress to the other part of the lot as alleged in the complaint, thus admitting, by failure to deny, plaintiff's ownership of the southerly 98.25 feet of lot 1 except the easterly 10 feet, its own corporate capacity, and its ownership of the easterly 10 feet of the southerly 98.25 feet of lot 1.

[1] With the issues thus presented the court found that all the allegations of the complaint were true except the allegations of defendants' ownership of the 10-foot strip; that George W. Cowan had no right, title, or interest therein; and that, by reason of a sale under a deed of trust, plaintiff "became the owner in fee of the aforesaid ten-foot strip." This appeal being on the judgment roll alone, it must be assumed that these findings were supported by the evidence.

[2] The defendants have appealed upon the theory that the findings and judgment are not supported by the pleadings for the reason that the title to the 10-foot strip was not put in issue. The general rule is that a finding outside the issues must be disregarded. However, where the parties voluntarily submit and try an issue without any specific pleadings they may not thereafter complain that the findings and judgment were not within the issues framed by the pleadings. McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Poledori v. Newman, 116 Cal. 375, 48 P. 325; Baar v. Smith, 201 Cal. 87, 255 P. 827; Kirk v. Culley, 202 Cal. 501, 505, 261 P. 994. The reason for the exception to the rule is that the failure to object to the evidence as not within the issues constitutes a waiver of the objection, and it is therefore not subject to the qualification that evidence which is relevant to an issue actually raised by the pleadings cannot be considered as authorizing the determination of an issue not presented. Crescent Lumber Co. v. Larson, 166 Cal. 168, 171, 135 P. 502.

[3, 4] However, the record is not before us and it is impossible to determine whether objections were made to the introduction of the deeds which established title in the plaintiff. Nor is it possible to ascertain with respect to what issue or for what purpose the offer was made. In accordance with the rule that every intendment must be indulged in favor of the judgment, we must assume that the evidence was introduced in support of the issue of title. In Silvers v. Grossman, 183 Cal. 696, 702, 192 P. 534, 537, it is said: "And where the appeal is upon the judgment roll alone, so that the record fails to disclose whether or not, at the trial, objections were interposed to evidence as not within the issues, it has been held that it will be presumed in support of the findings and judgment that the pleadings were treated as sufficient to raise the issues upon which the findings were made and that evidence in support of such issues was introduced and went in without objection (Illinois Trust & S. Bank v. Pacific Ry. Co., 115 Cal. 285, 296, 47 P. 60; McDougald v. Hulet, 132 Cal. 154, 159, 64 P. 278; Beardsley v. Clem, 137 Cal. 328, 332, 70 P. 175), although the rule may be different where such a presumption would result in the reversal of the judgment (Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400)." A most pertinent statement is also found in Poledori v. Newman, supra, at page 377 of 116 Cal., 48 P. 325, 326, as follows: "Upon a direct appeal from the judgment, upon the judgment roll alone, it will be assumed in support of the judgment that all objections to evidence in support of the findings were waived. If objection to the introduction of any evidence had been made upon the ground that the defect to which it related was not alleged in the complaint, the court would have permitted the plaintiffs to amend their complaint. Parties will not be permitted to lie by and keep silent when evidence is offered, and, after the court has rendered its judgment, object thereto upon the ground that the evidence sustaining it was inadmissible under the issues presented by the pleadings." It is obvious that appellants cannot prevail.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; PRESTON, J.

219 Cal. 95

RANDELL et al. v. RANDELL et al.

L. A. 13295.

Supreme Court of California.

Sept. 28, 1933.

1. Partition ⚷87.

Under contract providing that if any of owners of fruit ranch failed to make needed contributions promptly, another co-owner could make it, finding in action to partition property that one co-owner's share was enhanced by services to value of $4,500 and use of automobile to value of $422.94 *held* not error.

2. Appeal and error ⚷204(5).

Accounts, having been offered in evidence and testified to without objection, could not be questioned on appeal.

In Bank.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action to partition real and personal property by George H. Randell and another against Ralph R. Randell and another. From the judgment, defendants appeal.

Affirmed.

Drumm, Tucker & Drumm, of Santa Ana, for appellants.

Head, Wellington & Jacobs, of Santa Ana, for respondents.

LANGDON, Justice.

This is an action to partition property consisting of an 80-acre fruit ranch near Orange, Cal., shares in a water company, and about $1,300 cash. Plaintiff George Randell is the father of defendant Ralph Randell and of Laura Randell. Plaintiff lived on the property and managed and cared for it, keeping all books and other records. Defendant Ralph Randell lived in Washington, D. C., and his sister lived in Los Angeles. Said defendant and his sister advanced money to plaintiff for the purpose of improving the property, and in September, 1922, a statement of their interests was prepared. Shortly afterwards, in October, 1922, a written contract was drafted and signed by the parties, based on the above-mentioned statement. In January, 1928, Laura Randell sold her interest to her father, and the present action involves only the remaining two parties, and their wives. The trial court gave its interlocutory judgment, finding that the contract determined the interests of the parties, that plaintiff was the owner of 55/100 thereof, and defendant of 45/100. Subsequently the referee filed his report, and this appeal was taken.

[1] The written contract of October 20, 1922, provides that the interests of the parties shall be determined by their "contributions." Defendant's chief attack on the judgment is that it gives plaintiff credit for certain items which are not properly included within the meaning of contributions. The contract defines the term as follows: " 'Contributions' means all cash and other values hereafter furnished, in accordance with the provisions of this agreement, by any of the undersigned for use in connection with 'the property,' if and to the extent that such cash and other values are approved in writing by all of the undersigned." The court allowed plaintiff credit for numerous items, including $4,500 for services in overseeing work on the ranch (7½ years at the rate of $50 per month); and $422.94 for use of an automobile at 7 cents per mile. Defendant argues that plaintiff is not entitled to credit for these items because the other parties did not approve them in writing. There are several answers to this contention. The contract makes the further provision "that whenever the needs of 'the property' requires a 'contribution,' all of the undersigned shall have the right to furnish parts of such 'contributions' in proportion to their then 'equities.' Provided, that if any of the undersigned shall fail promptly to furnish their such part or parts, or any portion thereof, then the remaining of the undersigned may furnish such delinquent part or parts, or such portion thereof, on a similar pro rata basis." The only reasonable interpretation to be given this provision is that despite the absence of written approval, a contribution might be properly made by one party where necessary, and where the others failed to meet their share. This was, in fact, the situation. Plaintiff lived on the property, and both of his children permitted him to carry on all of his activities without objection. Indeed, the requirement of written approval was disregarded by the parties from the inception of the agreement, money being spent by plaintiff and accounts being submitted therefor without any attempt at prior approval. It follows that the trial court was not in error in its findings on these items.

[2] Defendant also claims that an error in computation was made in crediting plaintiff with the share which he purchased from his daughter Laura. Without going into a detailed analysis of these figures, which appear to be correctly computed, it is sufficient to point out that the accounts were offered in evidence and testified to without objection to any items. The same may be said as to the argument that many of the items were uncertain and unexplained.

No points of substance are raised by appellant.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; THOMPSON, J.

219 Cal. 101

LANGLEY et ux. v. ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited.

Sac. 4796.

Supreme Court of California.

Sept. 29, 1933.

Rehearing Denied Oct. 27, 1933.

1. Process ⇨149.

Testimony of plaintiffs' counsel in action on automobile liability insurance policy that insured, against whom plaintiffs obtained default judgment in damage suit, said he received copy of summons and complaint in mailed envelope, bearing his name except for middle initial, *held* admissible and prima facie sufficient to show his receipt thereof (Code Civ. Proc. § 1851; St. 1919, c. 367, p. 776).

2. Process ⇨96(4).

Averments of affidavit *held* sufficient to support order for publication of summons on ground that defendant was concealing himself to avoid service (Code Civ. Proc. § 412).

The affidavit set forth efforts to locate defendant in city to which he moved from county in which suit was brought and averred that, immediately after process server's visit thereto, defendant took up residence in another city, where he received mail only through general delivery, and that his address therein could not be ascertained from his former employer or through his trade or fraternal affiliations.

3. Process ⇨154.

Defendant actually receiving copy of summons and complaint cannot be heard to say that affidavit, on which service by publication was ordered, was defective.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by J. B. Langley and wife against the Zurich General Accident & Liability Insurance Company, Limited. Judgment for plaintiffs, and defendant appeals.

Affirmed.

For prior opinion, see 18 P.(2d) 445.

J. Hampton Hoge, of San Francisco, and Wakefield & Hansen and Chester O. Hansen, all of Fresno (William C. Crossland, of Fresno, and A. Dal. Thomson, of San Francisco, of counsel), for appellant.

Edward Bickmore, of Merced, for respondents.

PRESTON, Justice.

Appeal by defendant from judgment for plaintiffs in an action to recover upon a policy of automobile liability insurance issued by said defendant in favor of one W. T. Holland.

Plaintiffs, through the negligence of said Holland, suffered damage as the result of an automobile collision. They commenced an action against him under the name of W. H. instead of W. T. Holland. Service by publication was ordered and later a default judgment in the sum of $2,500 and costs was entered against him and in favor of plaintiffs. In order to recover the amount of said judgment, plaintiffs thereafter commenced the present action against defendant, as the insurer of W. T. Holland, whom they alleged to be the very Holland involved in the collision, theretofore sued as W. H. instead of W. T. Holland. Defendant offered no evidence and judgment was rendered for plaintiffs. Defendant thereupon appealed and, upon consideration of the cause by the honorable District Court of Appeal for the Third Appellate District, the said judgment was reversed. For a detailed statement of the facts and issues involved, reference is hereby made to said decision reported in 97 Cal. App. at page 434, 275 P. 963, 966.

The cause was then retried, pursuant to said judgment of reversal, upon limited issues suggested by the following language contained in said decision: "The judgment in the case of J. B. Langley and Lottie M. Langley v. W. H. Holland is not void on its face. It is a valid judgment against W. H. Holland, but, of course, would not be a judgment against W. T. Holland unless it was satisfactorily established that the W. H. Holland named in said judgment and the W. T. Holland named in the instant case are one and the same person and that the said W. T. Holland had the notice of said action required by law. * * * It may be that, on a retrial of this case, respondent will be able to produce evidence that in fact W. T. Holland received the complaint and summons which was mailed to W. H. Holland, painter at Los Angeles, Cal., general delivery, as aforesaid. The production of this evidence would be in line with the cases of [citing authorities]. * * *" At the conclusion of the trial the court found for plaintiffs. Judgment followed in their favor and, as above stated, defendant has appealed.

[1] We have examined with care the record presented. It establishes that the person sued as W. H. Holland was in truth and fact W. T. Holland, the individual involved in the collision and insured by defendant. The proof that W. T. Holland received the copy of summons and complaint mailed to W. H. Holland at Los Angeles consisted of testimony by counsel for plaintiffs to the effect that almost a year after rendition of the original judgment, Holland was brought into the Ventura county superior

court on proceedings supplemental to execution in another case arising out of the same accident, where he talked with counsel and stated that he had received said copy of summons and complaint mailed to W. H. Holland. This testimony was, in our judgment, admissible and prima facie sufficient to show that W. T. Holland received said document. For a discussion of this question we hereby adopt the following portion of the decision heretofore rendered herein by the honorable District Court of Appeal for the Third Appellate District, opinion by Mr. Justice pro tempore Parker: "The main controversy, of which the present issue is an incident, is the validity of the judgment against Holland, the insured. The strength of the judgment rests upon proof of receipt of the copy of summons and complaint. At all times it must be borne in mind that we are concerned with a judgment against Holland. If the present action were against Holland on the judgment it is obvious that his own admission would be competent. And on that issue, wheresoever it might arise, we are of the opinion that the admission would always retain its character of original evidence of the fact in dispute. Dismissing any question of limitation, let us assume that the instant case is reversed. Respondent could proceed against Holland on the judgment. Assuming then that Holland contested the validity of the judgment and raised this issue it would not be seriously disputed that the evidence of admission would be sufficient to sustain a finding against Holland. The liability of appellant rests upon the primary liability of its insured. It is admitted that the provisions of the policy and the provisions of the law (Stats. 1919, c. 367, p. 776) require that a judgment be had against the assured, making the loss certain, before an action can be maintained against the indemnity company. Section 1851 of the Code of Civil Procedure reads: 'And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties.' Here the dispute was primarily as to the obligation of Holland. This obligation rested upon a judgment, the binding effect of which was denied on the ground that Holland had not received the letter in question. The proof of the obligation rested upon the issue thus raised and evidence admissible against Holland was admissible as against appellant. We hold the evidence to have been properly received and retained." See, also, Butte County v. Morgan, 76 Cal. 1, 18 P. 115, and Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335.

[2, 3] Appellant contends that the judgment against Holland is void upon the face of the judgment roll because of insufficiency of the affidavit upon which service of summons by publication was ordered, due to a lack of showing therein of due diligence in endeavoring to locate Holland and securing personal service upon him. Briefly, it may be said that this affidavit sets forth efforts to locate Holland in San Rafael, whence he had removed from Merced county. It further avers that immediately after the visit of the process server to San Rafael, Holland took up his residence in Los Angeles, where he received mail only through general delivery and his address was unknown; that inquiry was made, but it could not be ascertained from his former employer or through his trade or fraternal affiliations. The affidavit concludes with the averment that defendant was concealing himself to avoid service of the summons and complaint upon him.

Conceding that these averments failed to show that due diligence was used in trying to locate and show the defendant at Los Angeles, by tracing him through the general delivery, or otherwise, and hence that they were insufficient to support an order for publication of summons upon the ground that defendant could not "after due diligence, be found within the state," yet they were sufficient to support the action of the court below, in ordering publication of summons, upon the ground set forth in the affidavit, to wit, that defendant was concealing himself to avoid service. Section 412, Code Civ. Proc. Moreover, if W. T. Holland in fact received a copy of the summons and complaint, he could not be heard to say that the affidavit was defective; indeed, if he did not move promptly, he would be denied the right to contest the suit on its merits. Palmer v. Lantz, 215 Cal. 320, 324, 9 P.(2d) 821; Boland v. All Persons, 160 Cal. 486, 117 P. 547.

We should indeed hesitate to reverse this judgment upon any of the technical grounds urged in view of the fact that Holland was actually apprised of the action against him by receipt of the copy of summons and complaint; that copy of the findings and judgment entered in said action was served upon him in Santa Barbara within a few weeks after the making and entry thereof and he made no effort to set aside the judgment or plead to the merits; and that appellant insurer was also informed by counsel for plaintiff, through correspondence, of the action against its insured but chose not to defend, even after being furnished with a copy of the summons and complaint.

We need not pause to consider whether, under the facts here shown, a personal judgment against Holland could be rendered as appellant has not raised this question and it is now too late to do so.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

219 Cal. 120

MILLER et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

L. A. 13181.

Supreme Court of California.

Oct. 2, 1933.

Rehearing Denied Oct. 30, 1933.

1. Evidence 🔑441(1).

Evidence to show antecedent agreement by trustee to sell lands if beneficiaries failed to do so was properly stricken, where documents evidencing trust merely reserved to trustee power to sell land if beneficiaries' sales were unsatisfactory (Civ. Code, § 1625).

2. Trusts 🔑237.

Trustee's expenditure of $10,097.22 for water system, though trust authorized only "approximately $6,000," and of $1,000 for building and other sums for incidentals, *held* justified where made in good faith with beneficiaries' consent, house and incidentals were necessary to authorized selling campaign and execution of trust, and assignees of beneficiaries' interest made no objection until failure of scheme.

3. Appeal and error 🔑173(2).

Objection that trustee had not accounted for all proceeds received by it on foreclosure sale of trust property could not be made for first time on appeal, particularly where briefs contained no indication of evidence bearing on subject.

4. Mortgages 🔑335.

Trustee's failure to expend sum set aside for particular development purpose did not prevent its foreclosure of mortgage where entire scheme had failed.

5. Trusts 🔑325.

Trustee's vouchers covering all sums paid out by it were admissible to prove expenditures shown, where other evidence showed expenditures in performance of trust and beneficiaries' approval of all vouchers except one or two.

In Bank.

Appeal from Superior Court, San Diego County; S. L. Strother, Judge.

Action by Walter Eden, for whom was substituted Edwin J. Miller, as executor of the last will and testament of Walter Eden, deceased, and Edwin J. Miller, against Security-First National Bank of Los Angeles, California, etc., trustee, and another. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Wier Casady, of Los Angeles, for appellants.

Farrand & Slosson, of Los Angeles, for respondents.

CURTIS, Justice.

Fred J. Etcheverry and Jessie Elizabeth Etcheverry, his wife, were the owners of a large tract of land situated in San Diego county comprising some 1800 acres. The land was incumbered with a first mortgage to secure the sum of $35,000, and a second mortgage to secure a loan of $2,000. The Etcheverrys were also indebted to other parties, among whom were Edwin J. Miller and Walter Eden, whom we will hereafter refer to as the plaintiffs or appellants. Miller and Eden had reduced their claims against the Etcheverrys to judgments in the superior court of the county of Los Angeles and the municipal courts of the city of Los Angeles. These judgments were four in number, and the total amount thereof was approximately $13,400. Certified copies of these judgments were recorded in the office of the county recorder of San Diego county. This was the condition of the affairs of the Etcheverrys in January, 1927, when they decided to refinance their indebtedness through the Pacific-Southwest Trust & Savings Bank of Los Angeles, the predecessor of the respondent Security-First National Bank of Los Angeles. Numerous conferences were held between the representative of this bank, the Etcheverrys, and plaintiffs, and a number of letters passed between the bank and plaintiffs preceding the final execution of the legal papers by means of which the Etcheverrys succeeded in refinancing their indebtedness. The bank was willing to loan the Etcheverrys $75,000 and take as security their note secured by a first lien on said real property. This sum was to be used to pay off the existing liens against said real property and other outstanding obligations of the Etcheverrys, except the amount due on the judgments in favor of plaintiffs, on which there was to be paid the sum of $2,681.77. The balance of the money was to be used in improving the property by developing water and installing a water system thereon and subdividing a portion of the land into smaller tracts for the purpose of sale. The Etcheverrys executed their note to the bank in the sum of $75,000 and to secure the same executed a grant deed of said real property to the bank. The bank in turn executed a declaration of trust naming the Etcheverrys as beneficiaries. The Etcheverrys also executed their promissory note for $11,307.94 in favor of the plaintiffs, being the balance due them on said judgments after the payment to them of said sum of $2,681.77, and to secure the payment of said last-named note the Etcheverrys assigned to the bank in trust for plaintiffs the beneficial interest of the Etcheverrys in said trust. This assignment was accepted and ratified by plaintiffs in writing by an endorsement thereon signed by them in the following words:

"We, Walter Eden and E. J. Miller, the Payees in the above described note, do hereby agree to and do approve, ratify and confirm the foregoing Assignment and Trust, and the said Declaration of Trust in all particulars.

"Dated: January 24th, 1927.

"Walter Eden.
"E. J. Miller."

On the same date, that is on January 24, 1927, plaintiffs delivered to the bank written satisfaction of their four judgments against the Etcheverrys, which were thereafter filed for record in the office of the county recorder of the county of San Diego. Thereafter the bank paid off the liens against said real property, and other obligations of the Etcheverrys which it was agreed should be paid from said sum of $75,000, including the sum of $2,681.77 to plaintiffs. These payments approximated $49,000, leaving $26,000 in hands of the bank to be held by it and disbursed in pursuance of the declaration of trust.

The provision of the declaration of trust regarding the disposition of said sum of $75,000 is as follows:

"Whereas, said Beneficiaries have deposited with the said Trustee the proceeds of the note hereinbefore referred to to-wit: Seventy-five Thousand Dollars ($75,000.00), and said Beneficiaries have heretofore instructed, and do hereby further instruct, said Trustee to disburse said moneys approximately as follows:

(1) To pay the present loan on a portion of the Trust Property		$35,000.00
(2) To pay a second lien on 93 acres of the Trust Property		2,000.00
(3) To pay—(a) Existing Judgment	7,000.00	
(b) Outstanding notes	5,000.00	12,000.00
(4) To pay for surveying a portion of the land for subdivision—410 acres		1,500.00
(5) To pay for the construction of roads for the subdivision		1,000.00
(6) To pay for installing a water system for the subdivision		5,000.00
(7) To pay for installing a pipe line from the present pumping plant from which to irrigate 210 acres of the Trust property		1,000.00
(8) To pay for an addition to present building upon the Trust property		1,000.00
(9) To be impounded for the development of 2 more wells and equipping the same to place about 400 additional acres under irrigation		16,500.00
		$75,000.00"

Other portions of said declaration of trust which are pertinent to the questions involved in this action are as follows:

"The Trustee shall subscribe to such map or maps and dedicate to public use such streets and alleys shown thereon, subdividing the property hereinbefore described, or any portion thereof, into lots, as may be directed by the Beneficiaries hereunder, subject to the approval of the Trustee, but at the cost and expense of the Beneficiaries hereunder.

"It is contemplated that at the date of this Declaration of Trust four hundred ten (410) acres in section 28 of the property covered hereby shall be subdivided into 5, 10 and 20 acre parcels. * * *

"If the sales organization selected by the Beneficiaries hereunder have not produced sufficient sales to satisfy the Trustee, the Trustee reserves the right in its sole discretion, so long as the Beneficiaries are indebted to the Payee hereunder, to cancel any such Agency Appointment and to appoint another Agent or Agents in lieu thereof to sell the property, and in its sole discretion to fix the selling prices, commissions and other matters necessary to effect the sales of the property."

The declaration of trust further fixes the conditions upon which the trustee will execute and deliver deeds to purchasers of lots in said trust, and the manner in which the proceeds of such sale shall be applied. It also provides for a sale of said tract of land upon the default of the beneficiaries to pay the interest or principal of said promissory note as the same shall fall due, or upon the default of said beneficiaries to comply with other requirements of said declaration of trust on their part to be performed.

After the final execution and delivery of said deed, the declaration of trust, and assignment as above related, the bank paid out from the remainder of said sum of $75,000 loan in its hands various sums of money, so that the total amount of disbursements made by the bank on account of said loan was $67,909.31. These disbursements, made by the bank subsequent to the execution and delivery of said deed and declaration of trust, were made, so the bank claims, in accordance with the terms of the declaration of trust and, therefore, constituted a part of the loan secured by said trust deed and declaration of trust. The plan to subdivide some 410 acres of said land and sell the same in small tracts, at least in the manner it was attempted to be carried out by the parties hereto, proved a failure. No sales were made of any of said lands. The Etcheverrys defaulted in their interest due the bank, and also in their interest due plaintiffs. In fact, only one installment of interest was paid on the indebtedness due the bank and that due plaintiffs.

By reason of this default in the payment of the interest on the indebtedness due the bank, said bank on March 14, 1930, filed in the office of the county recorder of San Diego a notice of breach or default and of election to sell said real property under said declaration of trust. Before said sale could take place, however, and on June 24, 1930, the plaintiffs commenced this action. In the prayer of their complaint they ask, among other things, that the bank be removed as trustee of said trust property and for the appointment of a disinterested trustee to carry out the powers provided in said declaration of trust and in the agreement between said plaintiffs and the officers of said bank; that an accounting be made by said bank of the proceeds of said $75,000 loan; and that the trustee be restrained from making any sale of said trust property under said declaration of trust until said accounting shall be had. A temporary injunction was applied for restraining said sale, but it was denied by the trial court. The bank, as trustee, after notice duly given and proceedings had, sold said trust property on July 28, 1931, to the defendant First Securities Company for the sum of $90,449.82. Thereafter and on December 10, 1930 this action came on for trial and resulted in a judgment in favor of the defendants, wherein it was adjudged that plaintiffs take nothing by reason of this action and that defendants recover their costs. From this judgment said plaintiffs appealed under the alternative method provided for in section 953a of the Code of Civil Procedure. Since taking said appeal the plaintiff Walter Eden has died, and the said E. J. Miller as the executor of the last will of Walter Eden, deceased, has been substituted in his stead as one of the plaintiffs and appellants.

Two main points are made by appellants on this appeal, and to state them in appellants' own language they are:

"First: That we should have been permitted to show the preliminary oral contract between appellants, on the one part, and the bank and the Etcheverrys, on the other part, and it was error in the lower court to strike out all of plaintiffs' evidence in that regard.

"Second: That, aside from the oral contract to immediately subdivide and sell the ranch in small tracts, the bank, as trustee, violated its trust in spending the $26,500 trust fund contrary to the express conditions of the trust instrument."

We will give consideration to these two points in the above order, and then take up some of the minor points relied upon by the appellants in their briefs.

[1] First. In considering the first main point made by appellants, our attention is called to paragraph XIII of plaintiffs' complaint, wherein it is alleged that at the time of the creation of said trust said bank promised plaintiffs "that it would develop water on, and subdivide and make sale of, said land, such development of water if done and performed as agreed, would have greatly enhanced the value of said land and it would have thereupon sold in parcels of 5, 10, and 20 acres each, at a much greater sum of money than needed to pay and discharge said indebtedness to said bank, and to the plaintiffs * * *; but plaintiffs allege that said land has not been subdivided nor sold by said Etcheverrys nor the said bank." This allegation is followed by further allegations to the effect that the land and the improvements thereon have been neglected, with the result that the value of said land has so depreciated that it is impossible to sell the same for an amount sufficient to pay said indebtedness. These allegations of the complaint are denied by the defendants. During the trial the appellants sought to prove that the bank had agreed, in case the Etcheverrys failed to put on a successful selling campaign to dispose of said land after its subdivision in smaller tracts, to put on its own selling agency, subdivide the land and sell the land and liquidate the indebtedness due plaintiffs as well as that due the bank. It is conceded that no such agreement on the part of the bank is contained in any of the written instruments above referred to as having been executed and delivered for the purpose of creating said trust. Plaintiffs sought to prove this agreement on the part of the bank by the introduction of the correspondence which passed between them and the bank, and by the oral testimony of the plaintiffs that the bank had made oral promises to that effect. This evidence was objected to by the defendants, but was tentatively admitted by the court, subject to being stricken out later on motion in case the court should eventually decide that it was incompetent. At the close of the evidence such motion was made by the defendants, and thereupon the court granted said motion, and struck out all of said evidence on the ground that the written instruments, consisting of the grant deed from the Etcheverrys to the bank, the declaration of trust of the bank in favor of the Etcheverrys, and the assignment by the latter to the plaintiffs of their interest in the trust property, constituted the final and complete agreement of the parties, and that, therefore, under section 1625 of the Civil Code, it superseded all prior negotiations and stipulations of the parties thereto.

As noted above, the declaration of trust provides that the bank or trustee reserves the right, in case the sales agency of the Etcheverrys has not produced sufficient sales to satisfy the trustee, to cancel any such agency and to appoint another agent or agencies to sell said property. While the power is reserved to the bank to set up a sales agency of its own to dispose of said lands, as stated before, there is no obligation of that nature imposed on the bank by said declaration of trust. Furthermore, we fail to find in any of the correspondence passing between the bank and the appellants prior to the execution of the trust documents, any statement or promise that could be construed into an agreement on the part of the bank to undertake the sale of said lands in case of the failure of the Etcheverrys to do so. The only evidence supporting any such claim is found in the oral testimony of witnesses produced on behalf of the plaintiffs. In passing, it might be said that there was equally positive testimony on behalf of the defendants that no such promise or agreement, oral or written, had ever been made by the bank or any of its officers or agents. While these considerations may not affect the legal question involving the competency of the evidence which was stricken out by the court, they do have some bearing upon the question as to whether there was an antecedent contract between the plaintiffs and defendants whereby the latter agreed to put on a selling campaign for the purpose of disposing of said land in smaller tracts, in case the Etcheverrys were not successful in selling the same. But returning to the question as to whether the court erred in striking out the evidence of the prior negotiations and conversations of the parties, we think the trial court was correct in striking out said evidence. These prior negotiations and stipulations were all superseded by the written documents of the parties subsequently executed which purported to and did contain in full the agreement of the parties. It will be noted that the appellants expressly and in writing agreed to and approved, ratified, and confirmed not only the assignment by the Etcheverrys to appellants of the interest of the Etcheverrys in the trust but the declaration of trust itself in all particulars. No claim is made that the declaration of trust is in any way uncertain or ambiguous as to the obligations it imposed upon the bank. Neither do the appellants contend that they were not perfectly familiar with the terms of the declaration of trust at the time of their written approval thereof. They were each experienced lawyers, and it must be assumed that they understood perfectly the legal effect of all the documents which they had executed or to which they had given their assent and approval. Under these facts and circumstances the court correctly and properly struck out all evidence of plaintiffs as to any prior or preliminary oral contract between them and the officials of the bank, or between the Etcheverrys and plaintiffs, or defendants, or either of them.

Plaintiffs make the further contention that said evidence was admissible to prove an antecedent contract between plaintiffs and the bank whereby the bank promised to put on a selling campaign to dispose of said land in case of the failure of the Etcheverrys to do so. There is no merit in this contention. The correspondence between the plaintiffs and the officials of the bank, and particularly the letters from the plaintiffs wherein they set forth the conditions upon which the satisfactions of their four judgments against the Etcheverrys were to be delivered, expressly refers to the terms to be incorporated in the declaration of trust, which was later executed in the manner stated above, and this correspondence plainly shows that these satisfactions of judgment were to be delivered only as a part of the plan agreed upon by all the parties hereto and which was to culminate in the execution and delivery of said declaration of trust. There is nothing in the oral evidence, which the court struck out, which would indicate any different intent on plaintiffs' part. Plaintiffs, therefore, have no legal grounds to complain of the action of the court in striking out said evidence. Besides, as we have stated above, this evidence was directly contradicted by the bank officials, and the court found in accordance with the defendants' evidence.

[2] Second. The second main point relied upon by appellants is that the bank as trustee violated its trust in spending the $26,500 contrary to the express conditions of the trust instrument. The trust instrument, as we have seen, provides that after the bank shall have expended some $49,000 in the discharge of liens on said real property and in the payment of certain outstanding notes, leaving $26,000 in its hands, it shall disburse a portion of said amount in surveying 410 acres of said land, in constructing roads and installing a water system for said subdivision, in installing a pipeline and in the erection of an addition upon said property. After paying for these improvements on the property, there would be left $16,500 for the development of two or more wells and equipping the same for the purpose of placing additional acreage under irrigation.

It is obvious to any one that it was contemplated by all the parties to the trust thus created, including the plaintiffs, that portions of the entire tract of land therein embraced would be subdivided into smaller tracts, water developed, and a water system installed for said subdivision, and that these smaller tracts would be sold, at least at the beginning, by and through the Etcheverrys. Accordingly and immediately after the trust was finally completed, the parties thereto undertook the development of the trust property by subdividing the same, laying out roads therein, and the installing of a water system for said subdivision. A selling campaign was put on by the Etcheverrys and a small building was erected upon the property in which to carry on their operations. The expense of these improvements was paid for by the bank from the trust funds remaining in its hands as shown above. At the trial a complete account of all these expenditures was rendered by the bank. Plaintiffs then and now claim that many of these expenditures were unauthorized by the declaration of trust. They make specific objection to the item of $10,097.22 for installing a water system, and to the expenditure of something over $1,000 for a building on the trust property. The declaration of trust provided that there should be spent approximately $5,000 for a water system and an additional $1,000 for a pipeline from the present pumping system and $1,000 for an addition to the present building on the trust property. The item of $10,097.22 spent by the bank for the installation of the water system exceeds the amounts which the bank was authorized to spend by something over $4,000. It is contended by appellants that in making this overexpenditure the bank violated its trust. It will be observed in the first place that the amounts to be expended by the bank for the designated purposes were only "approximately" fixed in the declaration of trust. All the parties understood that it was not practicable to fix definitely the amount to be expended in making the various improvements contemplated by them. This would be particularly true regarding the installation of a water system upon the property. It is quite evident from the evidence in the case that all water which was to supply said lands was to be developed thereon by means of wells drilled upon the property. While an overpayment of $4,000 seems large, and ordinarily would not be held to be within the terms of said trust instrument, under the facts and circumstances shown in the instant case we think it should be sustained. In the first place, as we have seen, the amount to be expended was only approximately stated in the declaration of trust. Then there is no showing that the total amount expended was not paid out in good faith, and that it was not necessary for the development of an adequate water system for the tract. An adequate water system was absolutely essential for the success of the subdivision project. Without it the whole scheme would be a failure. Finally these expenditures, as were all expenditures made by the bank under the trust, were made at the instance, request and approval of the Etcheverrys, the beneficiaries named in the trust. It is true that plaintiffs held an assignment of the beneficiaries' interest in the trust, but this assignment was only as security for the payment of the note held by them against the beneficiaries. Plaintiffs did not assume under their assignment to take charge of the trust property nor to direct the improvements which were being made thereon. They left these matters entirely to the bank and the beneficiaries, and so long as the bank and the beneficiaries were acting in good faith and for the best interest of all those interested in the trust, we think that plaintiffs have no legal or just cause to complain. In this connection it may be stated that in no instance while these improvements were being made did the plaintiffs make any objection to the manner in which the work was being carried on or to the amount of the expenditures incurred therefor, nor did they make any inquiry regarding any of these matters. After the money has been spent and the project has proven a failure, it is rather late for the plaintiffs to raise an objection to that which they seemingly, if they did not actually, acquiesce in. But, disregarding any acquiescence on the part of the plaintiffs in this expenditure by the bank for the installation of said water system, we are of the opinion that as this money was paid out with the consent of the beneficiaries for the purpose of carrying out the express purpose of the trust, its payment was valid and legal, although the amount thereof exceeded substantially the amount approximately fixed by the declaration of trust. What we have said in regard to the water system also applies to the $1,000 or over, paid for the erection of a building on the trust property used as a sales office. Such a building was necessary in order that a selling campaign, which was provided for in the declaration of trust, might be carried on. Instead of expending the sum of $1,000 for an addition to one of the present buildings on the property, it was decided to spend this amount in an office building in which would be conducted said selling campaign. As this building was constructed with the knowledge and consent of both the trustee and the beneficiaries, and for the better administration of the trust, we cannot say that the trustee was guilty of any violation of the trust in expending some of the trust fund in its construction.

Other items of expenditure are objected to by the plaintiffs. They are small in amounts and in the aggregate do not make a formidable sum. They comprise principally expenditures for incidental matters, which perhaps were not foreseen at the time the trust was created, but which were necessary for the proper execution of the trust. They were all incurred by the beneficiaries in their endeavor to improve, subdivide, and sell the trust property. Their payment by the trustee did no violence to the terms of the trust. In concluding this subject, it might be well to call attention to the fact that the whole of said sum of $26,500 was not expended by the bank. In fact, the trustee had only $26,000 in its hands after paying out said sum of $49,000. At the time of its foreclosure of the trust, the amount due on the principal of said promissory note was only $67,909.31. It therefore had on hand the difference between said sum and the sum of $75,000, or over $7,000. But long before the institution of said foreclosure proceedings, it was apparent to all that the subdivision plan originally contemplated by the parties could not be successfully carried out, principally for the reason that there was no demand for property of the kind and character covered by the trust. Practically no sales were made, and it would have been a waste of money to attempt to continue the trust. Only one quarterly installment of interest had been paid on the indebtedness to the bank and on the indebtedness to the plaintiffs. The trust was created and the promissory notes of the bank and of the plaintiffs were executed on January 24, 1927. The bank did not give notice of default until March 14, 1930, almost three years after the first default in the interest payment. Up to that time the bank had advanced from its own funds over $3,000 for the payment of taxes on the trust property and insurance of the buildings thereon. With the trust in this condition there was nothing that the bank could do in order to protect its interest therein, other than to foreclose the trust under the power given it by the declaration of trust.

[3] In addition to the two main points just discussed, the appellants advance additional grounds for the reversal of the judgment. Among these is the claim that the bank had not accounted for all the proceeds of sale received by it on the sale of said trust property at their foreclosure sale. The property was sold on foreclosure for $90,449.82. This question was not raised by the pleadings. It is not covered by any finding of fact, and appellants have not indicated in their briefs any evidence bearing upon the subject. We must, therefore, hold that appellants have failed to sustain this point. When we come to compute the interest on the indebtedness due, the amount paid for taxes and insurance, the trustee's fees, the expenses of foreclosure, and add these items to the principal sum due, the total apparently was not far from the amount for which the property was sold at the foreclosure sale. If there was any difference the plaintiffs have failed to show that fact.

[4] A further claim is made that the bank until it had expended the full amount of said sum of $75,000 for the purposes set forth in said declaration of trust, had no right to "close out its trustors, among whom were the plaintiffs." In support of this contention is cited the case of Savings Bank of Southern California v. Asbury, 117 Cal. 96, 48 P. 1081, 1083. In this case the bank agreed to loan to the defendants $30,000. It loaned them $12,500 and refused to loan them the remaining $17,500. No interest was paid on said sum of $12,500, and the bank sought to foreclose its mortgage, claiming there was a default in the payment of interest. The defendants filed an answer setting up the bank's failure to carry out its agreement to loan the full $30,000. The trial court found the answer to be true and held that "the plaintiff could not enforce the payment of the note against them, or foreclose the mortgage therefor, so long as it retained in its hands a portion of the money so agreed to be advanced, and refused to perform its part of the agreement." It needs but little discussion to show the inapplicability of this authority to the facts in the present case. The plaintiff in that case had refused to comply with its agreement to loan the full sum agreed upon. It was indebted to the defendants instead of the defendants being indebted to it. It could not collect from the defendants because there was nothing due from the defendants. In the present case, while the bank at the time it instituted foreclosure proceedings had in its hands a portion of the original loan, this sum so retained by it was held for a particular purpose. It did not owe this sum to the beneficiaries or to any other person, but had agreed to impound said amount "for the development of two or more wells," etc. We have already seen that the scheme to subdivide the first 410 acres was a failure. No effort was made by the Etcheverrys, or by anybody else, to develop any wells for an additional 400 acres of the trust property. No demand was made on the bank for the expenditure of this money in order to carry on said development, and consequently the bank never refused to pay out said money for that purpose. There was, therefore, no default on the part of the bank which would prevent it from enforcing its rights under the trust.

[5] During the trial the defendants offered in evidence as their Exhibit K, eighty-six vouchers which purported to cover all sums of money paid out by the bank under said trust. All of these, with the possible exception of one or two, were approved by the Etcheverrys. This offer was objected to by the plaintiffs, but their objection was overruled by the court and the vouchers were admitted in evidence. It is now claimed that the court erred to the prejudice of the appellants in admitting in evidence said vouchers. We are unable to perceive how the appellants sustained any injury by the action of the court in admitting this evidence. Witnesses, employees of the bank, had previously testified to the work that had been done on the trust property, and these vouchers were produced by the bank from its regular files and were shown to have been paid in the regular course of business. As they, with the slight exceptions mentioned, had the approval of the Etcheverrys, we think they were competent evidence to prove the expenditures shown therein.

The claims of appellants that they received no consideration for the release of their judgments, and that the bank was guilty of fraud in the procurement of plaintiffs' assent to said trust transaction, and was also guilty of gross negligence in administering said trust, have no foundation in the facts in this case, and we deem it unnecessary to give any detailed discussion to these matters.

We find no error in the record, and are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; THOMPSON, J.; PRESTON, J.; SEAWELL, J.

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219 Cal. 153

BENNETT v. BENNETT et al.

L. A. 13366.

Supreme Court of California.

Oct. 3, 1933.

1. Divorce ⚿236.

Judgment awarding plaintiff wife separate maintenance, in accordance with compromise agreement between spouses entered during pendency of litigation between them, *held* proper, notwithstanding judgment granted cross-complainant husband divorce.

2. Compromise and settlement ⚿6(4).

Agreement entered into on supposition of right or of doubtful right is binding, although it later develops that right was on other side.

3. Divorce ⚿236.

Wife, suing for separate maintenance, could enter property settlement with husband, suing for divorce, giving wife lien on property husband had conveyed to third person in fraud of wife, notwithstanding that in husband's suit against third person, who knew of fraud, court denied husband recovery of property, where court decreed that wife's rights were to be unaffected.

4. Divorce ⚿275(1).

Where husband conveyed property to third person to defraud wife, wife's execution of quitclaim deed to husband's grantee *held* not to estop wife to attack deed from husband to grantee.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Action by Sarah Ellen Bennett against Walton L. Bennett and others, wherein named defendant filed a cross-complaint. From the judgment, defendants Arthur J. Brown and Robert A. Brown appeal.

Affirmed.

Frank G. Tyrrell, of Los Angeles, for appellants.

Knight & Reynolds, Goodwin J. Knight, and Roger S. Page, all of Los Angeles, for respondents.

CURTIS, Justice.

This is an action for separate maintenance instituted on June 20, 1924, by Sarah E. Bennett against her husband, Walton L. Bennett, Robert A. Brown and Arthur J. Brown, his son, were joined as defendants in this action. The complaint, in addition to the allegations, which, if true, entitled the plaintiff to a judgment for separate maintenance, contained allegations to the effect that in March, 1921, her husband, Walton L. Bennett, and the Browns had fraudulently conspired and agreed, each with the others, to deprive plaintiff of her interest and to defeat her rights in and to certain property of the defendant Bennett, located on Ninth avenue in Los Angeles, and that, in furtherance of said conspiracy, her husband, Walton L. Bennett, on March 24, 1921, had executed, acknowledged, and delivered to the defendant, Robert A. Brown, acting as attorney in fact for Arthur J. Brown, his son, a deed to certain property, consisting of a house and lot, together with a bill of sale to all of the furniture and personal property located therein, which property was the separate property of said Walton L. Bennett, thereby conveying legal title to said property to Arthur J. Brown. The complaint further alleges that in September, 1921, plaintiff was forcibly evicted from said residence by the defendants, the Browns, and that Robert A. Brown thereupon entered into possession of said property, and thereafter claimed to be entitled to the possession thereof. An answer was filed to said action by Walton L. Bennett, and likewise a cross-complaint for divorce on the ground of extreme cruelty.

This action is the second chapter in the story of the marital difficulties of the Bennetts which has been before this court. Previous to the institution of this action by Sarah E. Bennett, and in January, 1924, Walton L. Bennett had instituted an action, in which action the same Browns were named as defendants. By that action he sought a judgment declaring that said Browns held the legal title to said real and personal property in trust for him, and prayed for an order requiring them to reconvey to him said real property and household goods and furniture. In that action the Browns claimed as a defense that they had made a bona fide transfer of certain Texas acreage to Bennett in exchange for Bennett's Los Angeles property. In said action Sarah E. Bennett was joined as a party defendant in order that she might be bound by any judgment with respect to the property. Upon the trial of that action, judgment was entered in favor of the defendants Browns. From that judgment Bennett appealed. The decision is reported in Bennett v. Brown, 206 Cal. 424, 274 P. 532, 533. The evidence in the record demonstrated conclusively that Bennett had in fact deeded said property to Arthur J. Brown in order to forestall his wife from asserting any rights in said property and preparatory to his seeking a divorce from her in Reno, Nev. This court in that case reversed the judgment in favor of the Browns, saying: "The judgment in this cause is reversed, with directions to the court below to deny all relief on all issues between the plaintiff and the defendants, but without prejudice to the rights of the cross-defendant Sarah E. Bennett, who alone is entitled to have her costs of appeal herein as against the respondents. This decision is made, and this direction to the court below given, because the record shows without substantial conflict that both plaintiff, Walton L. Bennett, and respondent Robert A. Brown have entered a court of equity with unclean hands."

Briefly stated, the circumstances of the transfer by Bennett of his property to the Browns, as narrated by the court in said decision, are as follows: At the time of the transfer, Walton L. Bennett had been living in discordant relationship with his wife, Sarah E. Bennett, and a state of armed neutrality existed between these parties. She was occupying the residence which was the separate property of her husband, and refused to be ejected therefrom. Bennett sought to dispose of said property so as not to lose the right thereto and to a reconveyance thereof after he should have rid himself by divorce of the burden of his wife. He fell in with Robert A. Brown, a real estate broker, who had offices in connection with Bennett's attorney. Brown, "with the sole intention of defeating the claims of said wife [Sarah E. Bennett] for alimony and maintenance, concocted the scheme of having Bennett deed said residence to Arthur J. Brown, son of Robert A. Brown." The scheme was carried out on March 24, 1921, and thereafter Arthur J. Brown deeded to Bennett a tract of 160 acres of Texas land, uncertain in value, which had never been seen by any of the parties and to which the title was in doubt. At the same time Bennett gave to Arthur J. Brown a bill of sale of all the household effects in said residence. Bennett then went to Reno, Nev., where he filed a suit for divorce against his wife, testifying in said suit that he owned no property, and that no one held any property in trust for him. In the meantime, Brobert A. Brown, in the name of his son, Arthur J. Brown, had brought a suit against Sarah E. Bennett for possession of the property and for the household effects. There is no question that the expense of this litigation was paid by the attorney of Bennett and on his behalf in order to get Mrs. Bennett out of the house. Finally, Mrs. Bennett quitclaimed to Arthur J. Brown and moved out of the property. Upon these facts as disclosed by the record, this court reversed the judgment, based upon findings which exonerated the Browns and confirmed the title in them, denying relief in toto to either Bennett or his wife. The court said: "To the extent that the findings exonerate Brown, Sr., from being particeps criminis in the scheme to defraud the wife, and to the extent that they hold that Brown did not with full knowledge receive the property to aid in that scheme, said findings are without substantial support in the evidence. * * * It is sufficient for our purposes to know that these parties were acting in concert with respect to the transaction to defraud Sarah E. Bennett." In this decision this court was most careful to preserve the rights of Sarah E. Bennett and to hold that as to her rights the conveyance by her husband to Arthur J. Brown was absolutely ineffectual and invalid. It specifically held: "As to Sarah E. Bennett, who has appealed, attacking the transaction as fraudulent, the situation is different. She is entitled to have her claims adjudicated in the light of this palpable fraud against her." It is apparent, since the reversal of the judgment did not of itself affect the possession of the property in dispute, leaving it in the hands of the Browns just as the judgment of the trial court had left it, that the purpose of this decision was to protect the rights of Sarah E. Bennett from being cut off by an adverse judgment against her and to permit her to establish her rights by proper proceedings.

That decision was handed down on February 4, 1929. On May 27, 1930, the action for separate maintenance, theretofore instituted by Sarah E. Bennett, came on for trial. At that time there was presented to the court a memorandum of agreement between Sarah E. Bennett and Walton L. Bennett which had been entered into between these parties for the purpose of settling their property rights. This agreement provided that the superior court might award to Sarah E. Bennett the sum of $7,000 for her permanent support and maintenance, irrespective of whether or not a decree of divorce should be granted to Walton L. Bennett, said sum to be inclusive of all temporary alimony theretofore accrued and inclusive of the sum theretofore awarded to Sarah E. Bennett for attorney's fees and costs. It further provided that such agreement was made upon condition that judgment for said sum should specify that Sarah E. Bennett should have a lien upon the before described real property (being the property theretofore conveyed by Bennett to Arthur J. Brown, the subject of the former suit), and that she should have recourse only to the said real property for the payment of said judgment. In consideration therefor, Sarah E. Bennett agreed to waive and relinquish any and all claims which she might have or might thereafter have against said Walton L. Bennett by reason of the marital relations of the parties, and each of the parties waived and relinquished all rights of inheritance each from the other. An interlocutory decree of divorce was granted to Walton L. Bennett upon his cross-complaint, and in said judgment it was decreed in accordance with said agreement that plaintiff Sarah E. Bennett have judgment against the defendant Walton L. Bennett for the sum of $7,000, and that such judgment should be a specific lien upon the property therein described. The court further decreed that neither of the Browns had any right, title, or interest in said property, and specifically approved the property settlement agreement entered into between Sarah E. Bennett and Walton L. Bennett, and ordered that execution might issue upon said property in order that the judgment for said $7,000 should be paid. In the final decree of divorce, dated October 23, 1931, the provisions of the interlocutory decree with respect to the approval of the property settlement, the judgment for $7,000 in favor of Sarah E. Bennett, and all provisions relating to the property rights of the parties were made binding upon the respective parties. Walton L. Bennett, being satisfied with the judgment, takes no appeal. This appeal, therefore, is by Robert A. Brown and Arthur J. Brown from that portion of the judgment which affects their interest in the real property formerly conveyed to Arthur J. Brown by Bennett, and to which he holds title by reason of the fact that, Bennett having come into equity with unclean hands, equity would not lend its aid to force a reconveyance from Arthur J. Brown to him.

[1-3] This appeal is predicated upon the ground that, by reason of the fact that the divorce was granted to the husband, Walton L. Bennett, necessarily the plaintiff, Sarah E. Bennett, was not entitled to a judgment awarding her separate maintenance and therefore that judgment awarding her $7,000 must be reversed and the lien upon the real property discharged. This contention is wholly untenable. The property settlement between Bennett and his wife was entered into at a time when she had on file a complaint entitling her, if the allegations thereof were true, to separate maintenance, and Bennett had on file a complaint which, if the allegations thereof were true, entitled him to a divorce. At that time the respective rights and obligations of the parties were not determined. It is true that, if the case had proceeded to judgment in the absence of any property settlement, the court would not have been justified in granting alimony to the wife, who was the guilty party. Everett v. Everett, 52 Cal. 383; Ex parte Spencer, 83 Cal. 460, 23 P. 395, 17 Am. St. Rep. 266; Lampson v. Lampson, 171 Cal. 332, 153 P. 238; In re McKenna, 116 Cal. App. 232, 2 P.(2d) 429; Johnson v. Johnson, 104 Cal. App. 283, 285 P. 902, 904; Johnson v. Superior Court (Cal. App.) 17 P.(2d) 1055, 1057. We are not here dealing with such a situation. We are dealing with a situation where a husband made a conveyance to a third person for the specific purpose of defrauding his wife of any rights which she might have in his separate property. Bennett v. Brown, supra. During the pendency of her action for separate maintenance, and while her rights were still finally undetermined, the wife entered into a compromise agreement with her husband. This she clearly had a right to do. Parker v. Parker, 55 Cal. App. 458, 203 P. 420; Johnson v. Johnson, supra. In the Johnson Case the court reversed an order modifying an interlocutory decree of divorce, which had been granted to the husband, upon the ground that a valid property settlement had been entered into by the parties, and it did not appear from the record whether or not a provision for the making of monthly payments to the wife by the husband had been incorporated in said agreement. The court there said: "In this case the decree of divorce was given to the innocent husband, and he was directed to pay one hundred dollars per month to his erring wife. There is no authority of law for such an order (sections 136, 139, Civ. Code), and if supported at all, it must find its strength in a contract between the husband and the wife settling their property rights. There is nothing in the policy of our law prohibiting such a contract. In fact, it is authorized by our statutes (section 158, Civ. Code), and if the contract is fair and just it may be approved by the court." The agreement herein involved was a compromise agreement entered into between Bennett and his wife to settle a disputed claim, and as such is binding upon the parties. "An agreement entered into upon a supposition of a right, or of a doubtful right, though it afterwards comes out that the right was on the other side, is binding, and the right shall not prevail against the agreement of the parties, for the right must always be on the one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation of an agreement." 6 Cal. Jur. p. 176. Thereafter the court in the action which finally settled the rights of the parties was empowered to give effect to this agreement. Appellants urge that Mrs. Bennett was not at liberty to enter into an agreement with her husband because by such agreement he could circumvent the appellants and by indirection prevent them from retaining the property which the court by its prior decision had left in their hands. Unless we hold that Mrs. Bennett was entitled to contract with her husband as if no conveyance had been formerly made by him in fraud of her rights, we will be giving effect to that fraud against

her. We are here only concerned with the rights of Mrs. Bennett, and they cannot be destroyed or jeopardized by the fact that incidentally Bennett may gain the satisfaction of knowing that his partners in the fraud will not be able to retain the fruits thereof. There is nothing to indicate that Bennett will benefit in the slightest degree financially by the agreement. He has secured a final decree of divorce from Sarah E. Bennett, and the fact that she will gain the property heretofore lost by him by his fraud does not inure to his advantage.

[4] Despite the fact that the prior decision expressly held that "her quitclaim deed under these circumstances may not be said by this court at least to foreclose her from relief upon her independent suit against the parties to this transaction or in the issues tendered by her in the present action," the appellants insist that, by the giving of the quitclaim deed to Arthur J. Brown, Sarah E. Bennett has forever waived her right to attack said deed from Bennett to Arthur J. Brown, and is forever foreclosed from asserting any interest in said property. The record clearly shows that the securing of the quitclaim deed from Sarah E. Bennett was one of the steps in the scheme to defraud her of her rights. It was procured at a time when she was being ousted from possession of the property by the suit in unlawful detainer ostensibly prosecuted by the Browns, but in fact instigated and financed by her husband. Unless she was at the time in possession of the true facts of the case, and knowingly made the quitclaim deed with the intent of deliberately waiving her rights and relinquishing her claims, the giving of the quitclaim deed cannot operate as an estoppel. Moreover, it appears from the record that the entire consideration for the quitclaim deed was in fact furnished by her husband, and that no part thereof was in fact furnished by the Browns. It is true that Robert A. Brown testified that, although the money was actually paid by the attorney for Bennett out of Bennett's money, nevertheless, this payment was to be considered as a loan from Bennett to him. Bennett denied that he ever made a loan to Brown, or had ever intended to, and it is admitted by Brown that no part of the purported loan from Bennett to him, applied to the payment to Mrs. Bennett for the quitclaim deed, was ever repaid by him to Bennett. Under these circumstances, we are of the opinion that the quitclaim deed from Mrs. Bennett to Arthur J. Brown furnishes no bar to the enforcement by the plaintiff of her rights in the property.

Although it is immaterial to the decision herein, it should perhaps be noted that the title to the Texas land which had been deeded to Bennett by Arthur J. Brown now stands of record in the name of Arthur J. Brown, by reason of the fact that, prior to the institution of the previous suit by Bennett, Bennett made a reconveyance of said property to Arthur J. Brown and sent the deed to Texas for recordation. As a matter of fact therefore, the Browns have not suffered any loss.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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PATTEN & DAVIES LUMBER CO. v. McCONVILLE et al.

L. A. 12476.

Supreme Court of California.

Oct. 3, 1933.

Rehearing Denied Nov. 2, 1933.

1. Appeal and error ⚿931(1).

After findings for respondent, evidence must be construed most strongly against appellant on appeal.

2. Appeal and error ⚿1011(1).

Reviewing court cannot disturb finding on conflicting evidence.

3. Mechanics' liens ⚿317.

In materialman's action on contractor's bond, evidence *held* to sustain finding that there was no fraud in transaction between owner and contractor which would excuse surety.

> Surety contended that entire transaction was fraudulent in that owner and contractors first entered into cost-plus contract, and, after finding they could not secure labor and material bond for contract of that character, entered contract for construction of building at fixed price, under which they secured bond, and thereafter returned to original cost-plus contract for construction of building.

4. Mechanics' liens ⚿315.

Building contractors' surety *held* not released from liability to materialman by materialman's acceptance from contractors of promissory note and trust deed as security for claim for materials to be furnished (Code Civ. Proc. § 1183).

5. Mechanics' liens ⚿315.

Building contractors' surety *held* not exonerated from liability to materialman because construction contract was changed from contract for definite sum to cost-plus contract (Code Civ. Proc. § 1183).

In Bank.

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by the Patten & Davies Lumber Company against Lawrence McConville and another, doing business under the name and style of McConville & Perryman, and another, to recover upon a contractor's bond for building materials furnished. From an adverse judgment, defendants appeal.

Affirmed.

Prior opinion, 16 P.(2d) 789.

Kidd, Schell & Delamer, of Los Angeles, for appellant Globe Indemnity Co.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellants McConville and Perryman.

Dana R. Weller, of Los Angeles, for respondent.

Holbrook, Taylor, Tarr & Horton, and Joseph K. Horton, all of Los Angeles, amici curiæ, for respondent.

CURTIS, Justice.

The following statement of facts is taken from the opinion rendered in this action by the District Court of Appeal:

"This is an action brought against the contractors and the surety on a bond furnished by them, to recover for materials used in the erection of an apartment house. The complaint alleged that materials of the value of $31,282.61 were furnished between May 1, 1927, and September 27, 1927, in pursuance of a contract between the plaintiff and the defendant contractors; that the defendant contractors agreed to pay for the same; that only the sum of $3,138.37 has been paid; and that the balance unpaid is $28,144.24. It was also alleged that the defendant surety company entered into a bond or undertaking conditioned for the payment of labor and material claims which by its terms was made to inure to the benefit of labor and material claimants. The defendant surety company answered, denying all of the allegations of the complaint which are material here, and setting up several separate defenses, including one to the effect that the bond had been issued in connection with a contract providing for the erection of a building upon certain terms, while the building had been erected under another and different contract, and upon completely changed terms. As another defense, it was alleged that the entire transaction had been fraudulent, that the owner and contractors after entering into one form of agreement had later pretended to enter into another form of agreement for the purpose of obtaining a bond from this defendant, and that, thereafter, they had returned to the original form of agreement and proceeded in accordance therewith, all without the knowledge or consent of this defendant.

"Four findings were made by the trial court. In finding number one it was found that the contractors ordered the materials as alleged in the complaint and agreed to pay for the same; that they were furnished for and used in the construction of the building; that their agreed value was $31,282.61; and that the balance due and unpaid was $28,144.24. In number two it was found that the defendant surety company entered into an undertaking conditioned upon the payment by the defendant contractors for all materials used in the erection of said building, and that this undertaking was by its terms made to inure to the benefit of all persons furnishing such materials. Finding number three is to the effect that while the defendant contractors had delivered to the plaintiff their promissory note in the sum of $37,500, this note was not delivered nor accepted in payment for materials to be delivered and did not estop the plaintiff from recovering in this suit. In finding number four it was found that all of the allegations of the defendant surety company's second, third and fourth separate defenses are untrue. Judgment was entered against the defendant contractors and against the defendant surety company, from which judgment both have appealed."

[1] The findings of the court having been in favor of the plaintiff, the evidence must be construed most strongly against the appellant and in favor of the respondent. All evidence tending to establish the correctness of the findings as made must be accepted as true and the prevailing party must be given the benefit of all inferences which might reasonably have been drawn by the trial court. Every substantial conflict in the evidence must, under the rule which has always prevailed in this court, be resolved in favor of the finding. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 142, 134 P. 1157. Reviewing the evidence in the light of this well-established rule, the facts in this case may be fairly stated as follows: S. E. Bancroft was the owner of a certain piece of real property upon which she desired to erect an apartment house, and throughout this transaction her husband, Dr. Bancroft, acted for her under a written power of attorney. The Bancrofts had previously had dealings with the defendants McConville and Perryman, who were contract builders, and they desired this firm to erect the apartment house which they then had decided to build. Some preliminary negotiations were had between the Bancrofts and these contractors regarding the construction of said apartment house upon a cost-plus basis. While there may have been a vague understanding between the parties that the building might be constructed under such a contract, the trial court found upon evidence, which we think was amply sufficient, that no such contract was at that time entered into between the Bancrofts and said contractors.

While these parties had the matter of constructing said building under consideration, they called upon a Mr. Casebeer, a bond and insurance broker, to inquire regarding a contractor's labor and material bond in connection with the construction of said building, and were informed by Mr. Casebeer that no such bond could be obtained where the building was constructed on a cost-plus basis, and in order to obtain such a bond it would be necessary for them to enter into a contract for the construction of said building at a fixed price. This conference with Casebeer took place on March 5, 1927. A second meeting was held with him on March 7 or 8, at which Dr. Bancroft and Mr. McConville were present. At this meeting, Mr. Casebeer secured for them the information necessary for "the underwriting of the labor and material bond," such as the money available for the construction of the building, the methods of payment, and the incidental expenses. He asked Bancroft and McConville for the contract, but it had not yet been drawn up. Later he was asked by them to prepare such a contract for the construction of the building, which they executed on March 10. This was a straight builder's contract for a specific price of $100,000. Casebeer then took up with the Globe Indemnity Company the application of McConville and Perryman for a labor and material bond, and the bond involved herein was on March 18 issued by the Globe Indemnity Company and delivered by Casebeer to Patten & Davies Lumber Company, the plaintiff herein. Prior, however, to this last-named date, Dr. Bancroft and said contractors had approached the plaintiff regarding the furnishing of lumber and other building material for the construction of said building. The result of their negotiations with the plaintiff was that the plaintiff agreed to furnish said building materials to the extent of $37,500 upon the condition that the contractors would furnish a labor and material bond which would guarantee payment of said materials and that plaintiff would be further secured by a promissory note in the sum of $37,500, executed by McConville and Perryman and Mrs. Bancroft and secured by an assignment of a promissory note for $60,000 executed by Dr. Bancroft and wife to McConville and Perryman and secured by a trust deed on said real property. There was a prior trust deed on said property given to secure the sum of $100,000. These terms were agreed to by the Bancrofts and McConville and Perryman and in accordance with this agreement the labor and material bond, involved herein, was delivered to plaintiff, as stated above, on or about March 18, 1927. Later the $37,500 promissory note in favor of plaintiff was executed by said contractors and Mrs. Bancroft, and one Max Royer, and the $60,000 note in favor of said contractors and said trust deed to secure said last-named note were also executed by Dr. and Mrs. Bancroft in favor of said contractors. These instruments all bore date March 25, 1927, and were subsequently delivered to the plaintiff. Thereafter the plaintiff furnished the lumber and other building material, which are the subject of this action, and which were actually used in the construction of said building. The contractors commenced the construction of said building under the terms of said builder's contract. In excavating for the foundation of said building they encountered quicksand and were fearful regarding the two adjoining apartment houses. To state it in the words of Dr. Bancroft, "We hit quicksand and thought the two apartment houses adjoining were going to cave in." As a result of this discovery of quicksand the contractors became worried and, in the words of Dr. Bancroft, McConville said: "That contract was liable to wreck us." As to what was then done we quote Dr. Bancroft's testimony as follows: "I said I would be glad to help them out if I could, and we sat down and tried to figure it out together. I thought we had a right to sign some other contract. This is the first building experience I ever had, and we drew up another agreement on a cost plus basis." This contract was dated April 29, 1927, and the evidence shows that it was actually executed at about that date and that this was about two weeks after the work on said building had commenced. It is not clear when the plaintiff began delivering material on this job. Evidently some of it was delivered before the cost-plus contract was executed, but it is apparent that by far the larger part of said materials was delivered after April 29, 1927, the date of said last-mentioned contract. The building, though never entirely completed by the contractors, was, to the extent that it was constructed, built in accordance with the original plans of the parties. While the manner and terms of payment for the construction of the building were changed by the contractors and the owner, the plan of the structure remained unchanged and was carried out by the contractors. The land upon which the building was constructed was, as we have already seen, subject to a first deed given to secure a promissory note for $100,000. The money raised by this means was used to pay, at least in part, for the construction of said building. This fact appears to be stressed by neither of the parties hereto, and no particular importance is placed by either of them upon that circumstance. Plaintiff's claim, as stated above, was never paid. Nor did plaintiff, in so far as the records show, take any steps to realize upon the $37,500 note secured by an assignment of the $60,000 note and trust deed. Possibly the first trust deed was foreclosed and the security given plaintiff was wiped out by such foreclosure proceedings. This is only a surmise, however, as the record does not disclose any facts supporting such a conclusion. At any rate this fact is not material.

The present controversy is directly and solely between the plaintiff as a materialman and the contractors and their surety, the Globe Indemnity Company.

[2] The only claim made by the contractors against the demand of the plaintiff is that the $37,500 note, secured as above stated by the assignment of the $60,000 promissory note and trust deed, was given by the contractors and accepted by the plaintiff as payment for the materials covered by plaintiff's claim. While there is direct evidence to support the contractors in this contention, there is equally positive and persuasive evidence to the contrary. This was one of the contested issues at the trial and, as the trial court resolved this conflict in the evidence upon this point in favor of the plaintiff, it is not within the province of this court to disturb that finding, even if we were so inclined. As we read the evidence, however, it appears to us that the great weight thereof is in favor of the plaintiff. It seems unlikely that the officers of plaintiff, who are evidently experienced business men, would accept in payment of plaintiff's claim for materials furnished for the construction of said building, a second lien upon the land upon which said building was being erected. That they did not do so is confirmed by the uncontradicted evidence that they refused to deal with the contractors or with Dr. Bancroft, who represented the owner, and refused to furnish any material for said job unless the parties procured a surety bond which would inure to the benefit of persons furnishing labor and materials for the construction of said building. The question naturally arises, if plaintiff had accepted payment of its claim for materials which it had agreed to furnish to the contractors, why would it concern itself regarding a bond to secure the payment of these same materials? There can be no logical answer to this question. We are satisfied that there is no merit in the appeal by the contractors, McConville and Perryman.

The appellant, the Globe Indemnity Company, also relies upon the claim that the plaintiff in accepting the securities it did accepted them in payment of said materials. No further consideration need be given to this claim in addition to that already stated in connection with the appeal of the contractors.

[3] Said appellant further contends that the evidence is insufficient to sustain the findings of the court as to the defense set up in its answer that the entire transaction between the owner and contractors for the construction of said building was fraudulent in that they first entered into a cost-plus contract, and after finding that they could not procure a labor and material bond for a contract of that character, pretended to enter into a contract for the construction of said building at a fixed price under which they secured the bond from said surety appellant and thereafter they returned to the original cost-plus contract for the construction of said building. The gist of this defense was the alleged fraud of the owner and contractors in procuring said bond from the surety company under the circumstances alleged. This matter was gone into most thoroughly by the trial court. All the parties to the transaction were called as witnesses and examined and cross-examined by counsel for the respective parties hereto, and at the conclusion of the trial the court found that no fraud had been committed against the appellant surety company. As we review the testimony we fail to find any substantial evidence that the parties in the first instance entered into any cost-plus contract. They had discussed such a contract, and were inclined to favor that method of constructing the building. But no contract, written or oral, was ever agreed to by the parties before the bond was executed and delivered that the building would be constructed on a cost-plus basis. After calling upon the plaintiff, and being informed by its officers that plaintiff would not furnish any materials for the building unless a labor and material bond was given, Dr. Bancroft and the contractors then discussed and finally agreed upon a contract for the construction of the building for a fixed price. Under this contract the bond was given and the parties began the erection of the building, or, at least, made preparations therefor by excavating for its foundation. The manner in which they came to change back to a cost-plus contract has already been narrated in the language of Dr. Bancroft in a previous part of this opinion. We are in entire agreement with the trial court in its conclusion that there was no proof of fraud in the transactions between the owner and the contractors. Whether the materialmen may recover from their surety under this state of facts is another question. We are now dealing only with the claim that the parties acted fraudulently, and for that reason the surety was never bound by its undertaking under the bond. The trial court having found against such a claim upon evidence before it which failed to substantiate the allegations of fraud, its findings, of course, must stand.

[4] It is next contended by the surety that it was released by plaintiff when it accepted from the contractors the promissory note for $60,000, and trust deed, as security for its claim for materials to be furnished. This promissory note and trust deed for $60,000 was given by the owner to the contractors in part payment of said sum of $100,000, the contract price of said building. This contract provided that the contract price of said building should be paid in seven payments of $14,285.72 each, payable as the work of construct-

ing said building progressed. The execution and delivery of said promissory note and trust deed to the contractors, it is claimed, was a premature payment by the owner to the contractors and released the surety from its obligations under said bond, and when the plaintiff accepted said note and trust deed as security for its claim, the surety was thereby released from its obligation to the plaintiff. The bond involved herein was given in accordance with the requirements of section 1183, Code of Civil Procedure, which provides, among other things, that: "No change or alteration of the work or modification of any such contract between the owner and his contractor, * * * shall release or exonerate any surety or sureties upon any bond given under this section."

A premature payment is in effect nothing more nor less than a modification of the terms of the contract, and consequently will not avail, in the face of the inhibition contained in said section 1183, Code of Civil Procedure, as against persons furnishing materials under said contract, to defeat the bond. Hubbard v. Jurian, 35 Cal. App. 757, 769, 170 P. 1093. There is some question whether the plaintiff knew, when it accepted said security, of the terms of the contract providing for the payment of the contract price in seven equal installments. There is evidence of the officers and employees of plaintiff, who had charge of this matter for plaintiff, that they never saw the contract and did not know its contents. While the bond was given to the plaintiff, the contract was not. The contract was referred to in the bond, but was not made a part thereof. Assuming that plaintiff had constructive notice of the terms of the contract, and that is the extreme limit to which the evidence will permit us to go, yet its acceptance of this security, if we hold it to be a premature payment, does not necessarily exonerate the surety. In Howe v. Schmidt, 151 Cal. 436, 441, 90 P. 1056, 1058, this court said: "That contract is subject to change and modification in such matters by the parties thereto, the owner and the contractor, without notice to other parties, and the materialman has the right to assume that no fraud is being perpetrated by the contractor upon the owner in the use of the materials ordered." Applying this principle to the facts in the present case, it would seem that the plaintiff, even if it had actual notice of the terms of the original contract regarding the payment of the contract price, had the right to assume that they had been changed so as to permit the giving of said promissory note and trust deed for $60,000. This was especially true when both the owner and contractors were parties to the transaction whereby the plaintiff acquired said securities.

[5] The final contention of the appellant surety company is that it is exonerated from all liability by reason of the fact that the contract for the construction of said building was changed from a contract to construct said building for a definite fixed sum to what is known as a cost-plus contract. That this change was made, there can be no question from the evidence in the case. It is equally clear from the evidence that plaintiff knew nothing of said change but furnished said materials for the building which was constructed as originally contemplated by the parties, though the manner of payment was radically different.

In support of its contention that this change in the terms of the contract between the owner and the contractors released the surety of its obligations under its bond to the plaintiff and other materialmen, the Globe Indemnity Company has cited some sixteen cases. These cases all involve the liability of a surety to a party to the contract on a bond given to secure the payment or performance of said contract, and none of them relates to the liability of a surety to a materialman on a bond given under section 1183 of the Code of Civil Procedure. Among these cases cited by said appellant are County of Glenn v. Jones, 146 Cal. 518, 80 P. 695 (instituted by the county of Glenn to recover on a bond given to secure the faithful performance of a contract between said county and one Jones for the erection of a high school building); Kiessig v. Allspaugh, 91 Cal. 231, 27 P. 655, 13 L. R. A. 418 (an action by the owner against a surety on a bond given to indemnify and save harmless the owner against claims for labor and materials); Tally v. Parsons, 131 Cal. 516, 63 P. 833 (likewise an action by the owner against the sureties on a bond given to secure the faithful performance of a building contract); First Congregational Church of Christ v. Lowrey, 175 Cal. 124, 165 P. 440 (action brought by owner against surety on bond for the faithful performance of building contract). All the other twelve cases are of the same character. The case of Roberts v. Security Trust & Savings Bank, 196 Cal. 557, 564, 238 P. 673, cited and relied upon by appellant in its answer to respondent's petition for a hearing in this court, while involving the rights of materialmen on a builder's bond which inured to the benefit of laborers and materialmen, also involved the rights of the owner against the contractor and his sureties, and the quotation taken from the opinion in that case by the Globe Indemnity Company in said answer was from that portion of said opinion dealing with the controversy between the contractor and his sureties, and had no reference whatever to the rights of the materialmen against the sureties. These authorities, while they correctly define the ordinary liability of a surety, are not applicable to, nor do they in anywise control, the principles of law governing the liability of a surety to a materialman or laborer on a bond given under section 1183 of the Code of Civil Procedure. The authorities cited by said appellant announce the well and long-established principle of law that when the bond or undertaking is to assure the performance of an existing contract, if any change is made in its requirements in matters of substance without the consent of the surety, the surety is exonerated from liability. Roberts v. Security Trust & Savings Bank, supra. But this rule has been radically changed, at least as to the rights of laborers and materialmen, under a builder's bond which inures to their benefit, by the provisions of section 1183, Code of Civil Procedure. It is there declared that no change or alteration of the work or modification of the contract between the owner and the contractor shall release or exonerate any surety upon any bond given under that section. The effect of this section of the Code upon the general rule applicable to the obligation of a surety was pointed out by the District Court of Appeal in the case of Hubbard v. Jurian, 35 Cal. App. 757, 769, 170 P. 1093, 1098, in the following language: "It is the rule generally that a surety has the right to stand upon the terms of his contract of suretyship, and that he will be exonerated to the extent that he has been prejudiced by any violation of the covenants of the contract, but we are forced to the conclusion that this general rule cannot be made to apply to the contract of suretyship in suit here. And this is so, we think, because of the fact that the bond in question was executed pursuant and in obedience to the requirements of a statute which, although it permits such a bond to contain conditions for the performance of the contract, nevertheless also expressly provides that: 'No * * * modification of any * * * contract between the owner and his contractor shall release or exonerate any surety * * * upon any bond given under this section.' Code Civ. Proc. § 1183."

In that case it was held that, although the parties to a builder's contract had departed from its terms by the owner making and the contractor receiving advance or premature payments on the contract, which money the contractor used, not to pay for labor or materials used in the construction of the building, but to pay his own personal debts, the rights of the laborers or materialmen under the bond given under section 1183 of the Code of Civil Procedure were not thereby impaired or affected.

In a later case, Western Brick Co. v. Smith, 94 Cal. App. 370, 377, 271 P. 356, 359, the court held that a cancellation of a contract between the owner and contractor did not release the surety. The court in that case so holds in the following language: "The argument of appellant that the cancellation clause attached to the contract after the building had been partly completed, is not covered by the provision of section 1183, Code of Civil Procedure, which provides that no modification of a building contract shall work a release of the surety, while certainly ingenious, does not impress us as being outside of what was intended by the Legislature. While the word 'modification' in its ordinary use would relate only to a limitation or reduction in degree, it would be unreasonable to hold that the Legislature intended that after a contract had been partly completed, and laborers had performed work and materialmen had furnished materials, that a cancellation clause attached to the contract and signed by the contractor and owner would relieve the surety and leave the laborers and materialmen remediless, and especially so in a case where knowledge of such cancellation has not been brought home either to the materialmen or to the laborers. Under such circumstances we think the clause quoted from section 1183, Code of Civil Procedure, applies." Similar rulings will be found in the cases of Hub Hardware Co. v. Aetna Acc., etc., Co., 178 Cal. 264, 267, 173 P. 81, and Los Angeles Stone Co. v. National Surety Co., 178 Cal. 247, 173 P. 79. In this latter case, the court (page 250 of 178 Cal., 173 P. 79, 80) said: "Hence the question as to whether the contract under which the work is done be a valid one, or whether the contractor fails to perform it according to its terms and specifications, entitling him to an acceptance of the same as completed, is no concern of the persons furnishing materials for the work. Unaffected by irregularities in the procedure of defects which render the contract void, the materialman may look to the covenant of the surety, which, in effect, is an express promise, in case of failure so to do by the principal, to pay any and all debts of the contractor, in so far as they are incurred for labor and materials furnished in performing the work."

These cases clearly hold under the rule as modified by section 1183 of the Code of Civil Procedure that the surety is not released from its obligation to materialmen by a material change in the contract between the owner and the contractor. In this case the materialman undertook to and did furnish building materials for the construction of said building. The surety agreed in case the contractors did not pay for said materials that it, the surety, would pay for them. This obligation on the part of the surety should not be impaired or destroyed by any act on the part of the owner or contractors over which the materialman had no control and for which it was in no way responsible. Section 1183 of the Code of Civil Procedure was no doubt enacted for the very purpose of protecting materialmen and laborers under such conditions. We are therefore of the opinion that the obligation of the surety to the plaintiff was in no way affected by the subsequent change in the terms of the contract whereby the cost of the building was to be paid for, not at a fixed price but on a cost-plus basis.

We do not find it necessary to discuss other matters considered in the briefs of the parties, as those we have considered constitute the main points of controversy between said parties.

The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

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219 Cal. 1

CHOWCHILLA FARMS, Inc., v. MARTIN et al.

Sac. 4392.

Supreme Court of California.
Sept. 16, 1933.

Rehearing Denied Oct. 16, 1933.

1. Waters and water courses 🔑87.

Finding, in suit to enjoin diversion of water, that channel through swamp was not natural water course, *held* finding of fact and conclusive, where supported by evidence.

2. Evidence 🔑10(5).

Court cannot, on basis of early statutes declaring San Joaquin river navigable, take judicial notice of existence of natural water course connecting Kings and San Joaquin rivers.

3. Waters and water courses 🔑38.

Water course originally constructed artificially may, by long-continued use and acquiescence, become natural water course, so as to give riparian owners rights therein.

4. Waters and water courses 🔑87.

Evidence, in suit by owner of land riparian to San Joaquin river, required finding that artificial channel connecting Kings and San Joaquin rivers possessed attributes of natural water course, entitling plaintiff to injunctive relief against subsequent appropriator.

The evidence disclosed that the channel in question was tributary to the San Joaquin river, and that riparian owners on that river used waters of the channel like those of other tributaries of the river, and that the channel had carried waters of the Kings river in this way for sixteen years before defendants, who were not riparian owners, made any claim to waters flowing therein. It further appeared that the channel from its inception was regarded as permanent.

5. Waters and water courses 🔑78.

Waters constituting part of regular flow of stream, including storm or flood waters, cannot be diverted by an upper appropriator to detriment of riparian owner, provided they are put to beneficial use by riparian owner.

6. Waters and water courses 🔑87.

Evidence *held* insufficient to establish existence of unusual, unexpected, or extraordinary waters flowing in river, in suit by owner of land riparian to another river to restrain diversion of waters entering latter river through connecting channel.

7. Waters and water courses 🔑79.

Water flowing in stream in excess of average seasonal flow cannot be considered unusual, extraordinary, or unexpected, so as to permit appropriation thereof to detriment of lower riparian owners.

8. Waters and water courses 🔑87.

Capacity of by-pass carrying water along channel between two rivers *held* immaterial under evidence in determining water rights of riparian owners along river.

Under the evidence, there was no certainty as to amount of water reaching by-pass and there was no finding that any water reached intake thereof in excess of its carrying capacity.

In Bank.

Appeal from Superior Court, Merced County; J. T. B. Warne, Judge.

Suit by the Chowchilla Farms, Incorporated, against Harry Lee Martin and others. From an adverse judgment, plaintiff appeals.

Reversed.

Milton T. Farmer, F. G. Athearn, Philip H. Angell, and Walter Hoffman, all of San Francisco, for appellant.

Finlayson, Bennett & Morrow, of Los Angeles, Hadsell, Sweet & Ingalls and Dan Hadsell, all of San Francisco, and Frank G. Finlayson and James Bennett, both of Los Angeles, for respondents.

CURTIS, Justice.

Plaintiff is the owner of land riparian to the San Joaquin river in Madera and Merced counties. These lands lie some fifteen to twenty miles below the junction of said river and Fresno slough. San Joaquin river rises in the high Sierra Nevada Mountains and flows in a generally westerly direction into the valley of the same name. When it reaches the floor of the valley, at or near where it is joined by Fresno slough, it makes an abrupt turn to the north and flows in a generally northerly direction until it unites with the Sacramento river, and from said point the combined waters of the two rivers flow through certain bays and straits, including San Francisco Bay, into the Pacific Ocean. Kings river is situated some thirty miles southerly of the San Joaquin river and, like the latter, rises in the Sierra Nevada Mountains, and flows in a westerly course substantially parallel to the San Joaquin river, and before any artificial means were constructed for the purpose of diverting it from its original course, its waters to a large extent flowed into Tulare Lake, situated in the upper or southerly end of San Joaquin Valley. If, however, as often happened in seasons of heavy rainfall or periods of melting snow, the rivers to the south of Kings river, emptying into Tulare Lake, had filled said lake to the limits of its capacity, the waters of Kings river, or at least a large portion thereof, would be diverted to the north into Summit Lake, and from Summit Lake they would overflow into Fresno swamp, and from said swamp they would find their way into Fresno slough, and thence into San Joaquin river. Fresno slough from its junction with the San Joaquin river extends in a southeasterly course a distance of about thirteen or fourteen miles into Fresno swamp. Fresno swamp lies between San Joaquin river to the north and Tulare Lake to the south. It was, in its original state, approximately forty to fifty miles in length and from three to eight miles in width. It was overgrown with tules and other vegetation and consisted approximately of 110,000 acres. Not only would waters from Kings river flow into Fresno swamp through Summit Lake, but in seasons of high water Kings river would overflow its banks at points further upstream and, following the course of certain sloughs leading from Kings river, said waters would flow into said swamp. These waters, like those from Summit Lake, after they reached the swamp would eventually find their way into Fresno slough. Fresno slough not only received water from Kings river in the manner just stated, but, during seasons of high water, San Joaquin river spilled waters through a number of channels or sloughs "from the north into Fresno slough, thereby causing the water in Fresno slough to back up" and overflow for several miles the land in Fresno swamp lying above and adjacent to the head of Fresno slough.

Beginning in the year about 1870, and continuing for a number of years, the owners of land in this locality made certain developments for the purpose of bringing their lands under cultivation which materially changed the natural conditions existing in and about Fresno swamp. These developments took place at the upper and lower end of the swamp and eventually extended through its entire length. Landowners in the vicinity of the upper end of the swamp and adjoining Kings river made cuts in its northerly bank and, through channels connected with the river, diverted water from the river onto their lands, for the purpose of irrigating the same. These channels leading from the river increased in size from year to year, partly through human agencies and partly by the action of the waters. One of these channels from Kings river to lands located to the north thereof was known as the Zalda canal. This canal had its beginning at a point on the Kings river a little north of west of Summit Lake and ran in a generally westerly course in the direction of said lake. This channel came to be known as the north fork of the Kings river, and is frequently referred to as the north fork or the Zalda canal. At the same time at the lower end of the swamp a trench was dug about three and one-half miles in length connecting Fresno slough with one of the sloughs in the Fresno swamp called Fish slough. This trench was constructed by Jefferson James and was known as the James trench or channel. This trench acted as an outlet for the waters flowing into Fresno swamp which had been materially augmented by the construction of the Zalda canal. From a period of time beginning soon after the construction of the Zalda canal, as just related, and continuing to about the year 1910, a number of private and independent reclamation projects were commenced and carried on by the owners of land lying within or bordering upon Fresno swamp, having as their object the reclamation of lands within the swamp and the protection of lands bordering the swamp from the overflow by water running through the swamp. The effect of these projects was to gradually narrow the width of the surface of the swamp over which the waters flowing into the swamp from Kings river ran on their way to Fresno slough and then into the San Joaquin river.

Because of the frequent failure of these smaller projects, reclamation works on a large scale were undertaken in 1910, and their construction was continued with large equipment for three or four years. The work was done with a dredge, and extended from the north fork or Zalda canal to the neighborhood of Summit Lake, and thence in a northwesterly direction to Fresno slough. Two heavy levees were built, forming a by-pass eight hundred feet in width, with a capacity of something over five thousand cubic feet of water per second. This by-pass connected the north fork or Zalda canal with Fresno slough. Since the construction of this by-pass, waters which usually flowed from Kings river into said swamp, except those which were taken out and used by the owners of land lying along said canal, ran through the canal until it reached Fresno slough—thence into the San Joaquin river. This by-pass was completed in 1914. In January, 1925, some of the defendants initiated proceedings whereby they planned to divert the waters, or a large portion thereof, from the north fork, at a point above the intake of the by-pass, and thereby prevent them from flowing therein to the San Joaquin river, and to conduct and use the same on nonriparian lands in the vicinity of Tulare Lake. Two applications were filed by said defendants for permits to appropriate said waters before the department of public works of the state of California, division of public water rights. These applications were at the time of the trial of said action still pending before said department. Since the filing of said applications, three of said defendants, Martin, Goodfellow, and Heffner, have constructed a channel beginning fifty feet south of a point on the north fork above the intake of the by-pass, and extending southwesterly to lands in the vicinity of Tulare Lake. This channel has a capacity of five thousand cubic feet per second of water. It is the intention of said defendants to transfer their interest therein to the defendant Tulare Lake Basin Water Storage District, and it is the intention of the district to acquire said channel and by means thereof to divert water from the north fork, to the capacity of said channel, and conduct the same to the lands of Tulare Lake Basin Water Storage District situated in the vicinity of Lake Tulare. It is conceded that the waters which these defendants propose and plan to divert from the north fork or Zalda canal through said channel to the lands of the Tulare Lake Basin Water Storage District would otherwise, "if not taken by them, flow through said Zalda canal and Fresno slough into the San Joaquin river." It was to enjoin and restrain this diversion of water that plaintiff instituted this action against said defendants. Pleadings were filed setting forth the rights of the respective parties, and upon these pleadings the action was tried. Findings of fact were made by the court in favor of the defendants, and from this judgment the plaintiff has appealed.

Three major questions are raised on this appeal. They are:

(1) Was there a natural channel extending through Fresno swamp connecting Kings river with the San Joaquin river, so that in a state of nature the waters from Kings river flowed through said channel into San Joaquin river? This question might also be stated in a different form as follows: Was Kings river, in a state of nature and before any changes were made in the natural conditions existing in Fresno swamp, tributary to San Joaquin river?

(2) Has the artificial channel constructed through Fresno swamp, which channel now connects the two rivers, existed for such a length of time as the natural drainage channel through which the waters of Kings river have flowed into San Joaquin river that its origin is immaterial to this case? An affirmative answer to this question would also answer in the affirmative the related question: Has the plaintiff, as riparian owner of lands on the San Joaquin river below the junction of said artificial channel with the San Joaquin river, acquired the right, as such riparian owner, to the use of waters flowing from Kings river through said artificial channel to the extent that it may enjoin the threatened diversion thereof by the defendants?

(3) Are there unusual, unexpected, and extraordinary waters flowing in Kings river to which plaintiff's riparian right does not attach?

We will consider these questions in the order stated.

First. Was Kings river, in a state of nature and before any artificial changes were made in the condition existing in Fresno swamp, tributary to San Joaquin river? The answer to this question must be determined by the existence or nonexistence of a natural water course through said swamp connecting the two rivers. Upon this question the court found: "That in a state of nature and prior to the artificial changes that are elsewhere described in these findings, the waters of Kings river that found their way into said [Fresno] swamp did not flow through said swamp in a natural watercourse; that said swamp was not a watercourse but was a catchment area for the overflow waters of Kings river and San Joaquin river." The artificial changes referred to in this finding are these changes which we have already noted as having taken place in Fresno swamp and which finally resulted in the construction of the north fork or Zalda canal and the by-pass, connecting Kings river with Fresno slough. We have here a direct finding of the trial court that no natural water course existed through Fresno swamp and that Kings river did not in a state of nature flow through any natural water course into San Joaquin river. While neither of the parties has discussed the question as to whether such a finding is one of fact or law, we think this question is one of substantial importance to the arriving at a correct determination of this controversy. If the question is one of fact, then we are to ascertain only whether there is any substantial evidence in the record to support it, and if there is, then we may not disturb it. Whether a natural water course existed through Fresno swamp, connecting Kings river with the San Joaquin river, was one of the sharply contested questions before the trial court, and many days were spent in the introduction of evidence of the respective parties as to the existence of such natural channel or water course. The testimony of many lay as well as expert witnesses was produced upon this issue. Some of these witnesses went back to the early days before any artificial changes of any consequences had been made in Fresno swamp. Others testified to conditions existing at later dates. Nothing would be gained by a review of the testimony of these witnesses. It is sufficient to say that the evidence was such that it would have justified a finding of the court either way upon the question of the existence of a natural water course through Fresno swamp. Therefore, if that question is one of fact, the finding of the court in this case as to the nonexistence of a natural water course through said swamp must stand and, to the extent that that fact is decisive of any issues in this case, said finding would affect the final determination of this action.

[1] In the recent case of Patterson v. Spring Valley Water Co., 207 Cal. 739, 279 P. 1001, 1002, one of the questions before the court was whether Crandall slough was a natural water course. The trial court found that it was not, as it did not have the physical characteristics of a water course. The court further found that another channel called "The Splits" was an artificial and not a natural channel. In considering these findings this court stated that: "The only questions presented by the appeal with reference to the first two contentions of plaintiffs is whether or not these findings with reference to Crandall slough and The Splits are sustained by the evidence." The opinion in that case then proceeds to state the third contention of plaintiffs, and after that statement resumed consideration of the findings regarding Crandall slough and The Splits. Upon that question it is stated: "We have examined the record for evidence upon which the findings with reference to Crandall slough and The Splits might be based, and we consider the evidence sufficient to support the findings, which concludes the first inquiry raised upon the appeal." It is evident from the reading of the opinion in that case that this court treated the finding that Crandall slough was not a natural water course as a finding of fact, and declined to consider the evidence upon that subject except to determine whether it was sufficient to support said finding of fact. This result is made more apparent when we examine the briefs before this court on said appeal. We there find that the question as to whether said finding was one of law or fact was squarely presented, and authorities were cited in support of the views of the respective parties. Plaintiffs in said action, in support of their contention that such a finding was one of law, cited the cases of Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am. St. Rep. 169, and Gray v. Reclamation District, 174 Cal. 622, 163 P. 1024, while the defendant relied upon Harris v. Harrison, 93 Cal. 676, 29 P. 325, Edgar v. Stevenson, 70 Cal. 286, 11 P. 704, and Wilkins v. McCue, 46 Cal. 656, contending that they held a contrary doctrine. After weighing these authorities, this court in its decision treated the question of the existence of a natural water course as one of fact and predicated its decision upon the law as so construed. In view of this very recent determination of that question by this court, we are constrained to hold that the finding of the trial court in this case that no natural water course existed in Fresno swamp was a finding of fact and, as it is supported by ample evidence in the case, it is conclusive of that issue and this court is without authority to disturb such determination.

[2] Notwithstanding the conclusiveness of the finding of the trial court upon that subject, the plaintiff contends that the court should take judicial notice that a natural water course extended through Fresno swamp, connecting Kings river with Fresno slough and the San Joaquin river. In support of this contention the plaintiff directs the attention of the court to certain early statutes enacted by the Legislature of this state, and also to certain decisions of this court rendered in actions involving the waters of Fresno slough, as well as to certain public documents on file among the records of our state and national governments, in which the waters of Kings river and those of the San Joaquin river were given consideration. The early statutes of this state relied upon by plaintiff declare the San Joaquin river to be navigable from its mouth to Tulare Lake. St. 1851, p. 423; St. 1854, p. 81; St. 1860, p. 168; St. 1861, p. 274; and St. 1869–70, p. 721. The decisions of this court referred to by the plaintiff, in which is to be found language to the effect that Fresno slough is a natural tributary of Kings river, are Miller & Lux v. Enterprise Canal Co., 145 Cal. 652, 655, 657, 79 P. 439; Miller & Lux v. Enterprise Canal Co., 169 Cal. 415, 420, 147 P. 567; Turner v. James Canal Co., 155 Cal. 82, 85, 91, 99 P. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823; and Crescent Canal Co. v. Montgomery, 124 Cal. 134, 136, 56 P. 797. There is nothing in the aforesaid statutes of this state, the opinions of this court, or the public documents, which would compel or even justify the trial court or this court in declaring, upon knowledge derived from said statutes, decisions, or documents, that a natural water course extended through

Fresno swamp. As we have already stated, this question was one of the sharply contested issues before the trial court and many days were spent in the introduction of testimony by the respective parties as to the existence or nonexistence of such a water course. It is apparent that whether a natural water course existed through said swamp was a matter of grave doubt in the mind of the trial court as well as in the minds of the parties themselves. It is true that court will take judicial notice of matters of general knowledge, but it is a power to be exercised with caution. "If there is any doubt whatever, either as to the fact itself or as to its being a matter of common knowledge, evidence should be required." Varcoe v. Lee, 180 Cal. 338, 345, 181 P. 223, 226. We are therefore of the opinion that the issue as to the existence or nonexistence of a natural water course through Fresno swamp was one which was properly decided by the trial court upon the oral and documentary evidence produced in court upon the trial of such issue, and that neither the trial court nor this court should decide said issue upon the knowledge gained by it through reference to the public records above enumerated.

The second contention made by the appellant is that although there originally was no natural water course through Fresno swamp leading from the Kings river to the San Joaquin river, the artificial channel now connecting the two rivers has existed over such a length of time that its origin is immaterial and that it has now all the characteristics of a natural channel, and that the waters diverted by said channel from Kings river into San Joaquin river have acquired the state of natural waters of said last-named river, and the owners of land riparian to San Joaquin river have acquired and now enjoy the same rights in said waters as they possess in the natural waters of said river.

As we have stated above, the present artificial channel connecting the two rivers was completed in 1914, some eleven years before the defendants asserted any right to divert any water therefrom for use on land within the storage district situated within the vicinity of Tulare Lake. But long before the commencement of work on said by-pass in 1910, substantial changes had been made in the territory between Kings and San Joaquin rivers, which materially increased the amount of water naturally flowing from Kings river toward San Joaquin river. The first of these changes, as we have seen, took place in about the year 1870. In that year, or possibly before, a Mr. Cole ran a furrow connecting Kings river with Cole slough. Cole slough was upstream from the point where the north fork or Zalda canal was later constructed. Through this furrow connecting with Cole slough a considerable amount of additional water was caused to flow from Kings river into Fresno swamp. The Zalda canal had its beginning in about the year 1872, when Captain Esrey, with the aid of a number of Indians, cut the banks of the Kings river, and through this cut diverted waters from the river onto lands to the north and west of the river. At first this canal carried water only during periods of high water, but later water was running through it during the whole year, and as early as 1884 it had cut a channel from the river to Summit Lake. In 1909, the bed of the channel was eight feet below the bed of the river. One witness testified that even before 1909 it was carrying all the waters of the river during times of normal high water. It will thus be seen that over forty years before the defendants asserted any right to the water flowing through said channel, a substantial part of the waters of Kings river, by means of the artificial changes above enumerated, had been diverted into the sloughs and waterways within Fresno swamp, including the enlarged James cut into Fresno slough, and for the last sixteen years of said period of time before the defendants set up any claim to the waters of said stream practically all, if not the whole, of the waters of Kings river had been diverted from its original course and into said artificial channel, through which it flowed to Fresno slough and thence into the San Joaquin river along, over, and onto plaintiff's said lands. Under this state of facts can the channel thus formed, and which has been maintained and in use in the manner and for the period of time above stated, be regarded as a natural water course? The decisions of the courts of last resort upon this question are not numerous and are not entirely satisfying. Yet they lay down a rule which we think will enable us to arrive at a correct solution of the problem before us. The case bearing most directly upon this question is that of San Gabriel Valley Country Club v. Los Angeles, 182 Cal. 392, 394, 397, 188 P. 554, 555, 9 A. L. R. 1200. In that case the plaintiff brought suit against the county of Los Angeles to enjoin the flooding of its lands by the waters of Rubio canyon wash and for damages already caused by such overflow. The decision recites that: "In 1913 the defendant county through the instrumentality of two so-called protection districts constructed the drains, two in number, in question here. They really are but a single drain, since the second is but a continuation of the first. They, or rather it, is a concrete box of a capacity to carry all the waters of the Rubio wash, which it picks up by means of an intake dam near the head of the wash and empties into it again about a mile above the plaintiff's land. It follows the general direction of the wash, and for some of the distance is laid in it, but for some of the distance departs from it." In determining the legal status of this channel, after the changes therein made by the county, the court continues and says: "We have referred to the Rubio Cañon wash and the continuation of it through the plaintiff's land as a natural water channel. In one sense it is not that. It did not exist as a definite watercourse, at least as far as the plaintiff's land, before the region was settled up, but was created as the result of settlement. Nevertheless it is natural in the sense that it was originally made by the waters themselves, and not by man, although it is possible that except for the acts of man the waters would not have been kept together so as to make a channel. In any event it has now existed for such a length of time as the channel for the natural drainage of the watershed tributary to it that the manner of its creation is not material, and it has all the attributes of a water channel wholly natural in origin. City of Reading v. Althouse, 93 Pa. 400."

The doctrine enunciated in San Gabriel Country Club v. Los Angeles, supra, has been followed by the Supreme Court of Montana in a recent well-considered case, where that court, citing the California case, approved its statement of the law in the following language: "The main source of supply of all western streams is, primarily, the melting of snow and the fall of rain in our mountains and foothills, collecting each year in their accustomed channels and thence finding their way to the streams; this is a more permanent source than 'mere surface water' diffused over the land by rains and melting snow. Farnham on Waters, 1559. Such waters, thus forming a water course and flowing with regularity from year to year, although the channel may be dry for the major portion of each year, are a proper subject of appropriation (Borman v. Blackmon, 60 Or. 304, 118 P. 848; Los Angeles Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375), and where such waters did not originally collect and flow down the channel, if through the instrumentality of man they have been made to do so and, through years of so flowing have acquired a permanent character as the natural drainage of the watershed, the original manner of the creation of the stream is immaterial; it is a 'water course' with all the attributes of one wholly natural (San Gabriel Valley Country Club v. Los Angeles County, above; City of Reading v. Althouse, 93 Pa. 400)." Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102.

The Supreme Court of Oregon has also approved the same doctrine in the case of Harrington v. Demaris, 46 Or. 111, 77 P. 603, 606, 82 P. 14, 1 L. R. A. (N. S.) 756. In that case the court said: "The water flowing in the outlet from the swamp northward into the old channel never originally reached Spring branch, but when De Haven, Demaris, and Harris, by a concert of action, took out the dam, and let such water, together with that from spring No. 1, into the branch, they thereby made these springs tributary to such stream, and subject to the rules of law applicable to riparian ownership. Cottel v. Berry, 42 Or. 593, 72 P. 584. In that case Mr. Justice Wolverton, in discussing this subject, said: 'It seems to be a rule of law that where owners of different parcels of land conduct water across the same in an artificial channel, and do not define their respective interests in the water, their reciprocal rights thereto are to be measured and determined as if they were riparian owners upon a natural stream.' In Burk v. Simonson, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304, it was held that where a change is made in the flow of a natural water course, either artificially or otherwise, and riparian owners acquiesce in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, and precludes a restoration of the stream and its surroundings to their original condition. In the case at bar, we think the testimony warrants the conclusion that after defendant continued the west ditch north on his premises, so as to conduct the water from spring No. 1 into the old channel, the riparian proprietors removed a part of the old dam, permitting the water issuing from Dorothy's land to flow down Spring branch, thereby making it tributary thereto and entitling them to a reasonable use thereof." That case was later approved by the Supreme Court of that state by a decision in which is found the following statement: "The opening of these channels was acquiesced in by all on the stream, and since the year 1882 the water has naturally run through them in about the proportion indicated. Having flowed in this manner for more than the period prescribed by the statute of limitations, they have become fixed." Hough v. Porter, 51 Or. 318, 95 P. 732, 98 P. 1083, 1101, 102 P. 728.

In the state of Washington the same rule is followed by the courts of that state. In Matheson v. Ward, 24 Wash. 407, 64 P. 520, 521, 85 Am. St. Rep. 955, the Supreme Court of that state held as follows: "Even if the west channel was a natural channel prior to 1865, and was then dammed up, and the water diverted to the East and Hurd's creek channels, where it was confined for 30 years, and this flow was acquiesced in by the riparian owners and others along the channels of said river, this would make the East and Hurd's creek the natural channels; and defendants and others purchasing and improving lands along the old channel, and relying upon the flow continuing in the channels thereby formed, could not now have their lands damaged by reason of the water being turned back by artificial means after that lapse of time. After the lapse of 30 years the channels known as the 'East' and 'Hurd's Creek' became natural channels, and the attempt of riparian or other owners to change the flow at this late day to the injury of persons on the old channel would be unlawful.

According to the evidence it is probably true that in the year 1865 one Le Balister, by means of a dam or embankment, changed the flow of water out of the West channel. Conceding it to be so, the acquiescence by plaintiffs and their grantors and all riparian owners below the point of divergence for a period of 30 years has now lost them the right to change the flow from the new into the old channel." Hollett v. Davis, 54 Wash. 326, 103 P. 423, announces similar principles.

To the same effect is the decision of the Supreme Court of Iowa, where that court said: "A water course is defined as a natural stream of water usually flowing in a definite channel, having a bed and sides, or banks, and discharging itself into some other stream or body of water. It is not necessary that its origin be exclusively the work of nature. It may be aided by the hand of man; but if thereafter it becomes a living flowing stream of water, with all the essential elements of a water course, and has remained in such condition for the prescriptive period, then, as to parties through whose lands it runs, and as to their rights, it becomes a water course, and their right to divert it or control it, to the prejudice of riparian owners, becomes fixed and settled. It seems in this case a great many years ago the water that flowed in this stream subsequently followed this natural course; that the grantors of the plaintiff and defendant made some slight excavation in the ground tending to facilitate the flow of the water over their lands in this natural course. By the action of nature and the laws of gravitation, this water gradually cut a deep and wide channel through the ground, through which the waters had flowed for a great many years, discharging itself into what is known as Indian creek. The original source of the water is not shown in this record; but that they coursed through this channel for more than 20 years prior to the time complained of, is shown by the evidence, and therefore, as to these parties, at that time, it was a natural water course." Falcon v. Boyer, 157 Iowa, 745, 142 N. W. 427, 429.

We find that text-writers whose works have been accepted as authority upon the subject of water rights are in accord with the authorities above cited. Speaking of riparian rights in connection with an artificial water course, Farnham on Water & Water Rights, vol. 3, p. 2428, states the rule as follows: "The question whether or not any riparian rights can attach to an artificial water course depends upon its character. If it is nothing more than an artificial water course there can be no riparian rights upon it, whereas if it is a substitute for a natural water course, so that it can be regarded as a natural water course, riparian rights may attach to it."

In Wiel on Water Rights, vol. 1, § 60, that author states the law as follows: "There is further an established principle that by lapse of time an artificial watercourse may come to be regarded as equivalent to a natural one. These cases do not depend exactly upon prescription, for, as above shown, prescription, properly speaking, cannot run in favor of lower parties upon a flow as against parties higher up. They rest rather upon what some of the cases call ordinary dedication to a class of public which, in the course of time, has established itself upon the basis of the artificial condition. Where the creator of the artificial condition intended it to be *permanent*, and a community of landowners or water users has been allowed to adjust itself to the presence and existence of the artificial watercourse or other artificial condition, acting upon the supposition of its continuance, and this has proceeded for a long time beyond the prescriptive period, the new condition will be regarded as though it were a natural one, its artificial origin being then disregarded by the law as it has been by the community. The creator of the artificial watercourse will be held to have dedicated it to the use of the community that has by long time become adjusted to it."

Kinney on Irrigation and Water Rights, § 473, pp. 803, 804, in a much more extended, but no less apt statement, declares the law upon this subject to be as follows: "As to whether or not any riparian rights can attach to artificial watercourses depends entirely upon their origin and character. If they are clearly artificial channels, such as canals, ditches, conduits or aqueducts, used to convey the water from the stream or other body of water, riparian rights cannot attach. In order to acquire the right to the use of water flowing in artificial channels, they must be based upon other considerations than that of the ownership of the land through which or adjoining which the streams run. It must depend upon some grant or agreement, either proved or presumed, from or with the owner of the ditch, or upon some other legal origin, such, for instance, as prescription. Upon the other hand, however, the authorities hold that a watercourse, although constructed artificially, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to be deemed by prescription natural watercourses. Such is the case where the whole stream is diverted into the new channel, and thereby the artificial channel is substituted for the natural. Where this is done under such circumstances as to indicate that it is to be permanent, riparian rights may attach to the artificial channel. And it is further held that where the artificial watercourse was not created by joint action of the owners, it may become such a one to which riparian right may attach, if the various owners along its course have always treated it as such." In line with the foregoing we cite the following authorities: Hor-

nor v. City of Baxter Springs, 116 Kan. 288, 226 P. 779; Ellis v. Tone, 58 Cal. 289; Paige v. Rocky Ford Canal, etc., Co., 83 Cal. 84, 21 P. 1102, 23 P. 875; Harrington v. Demaris, 46 Or. 111, 77 P. 603, 82 P. 14, 1 L. R. A. (N. S.) 756; Smith v. Youmans, 96 Wis. 103, 70 N. W. 1115, 37 L. R. A. 285, 65 Am. St. Rep. 30; Delaney v. Boston, 2 Har. (Del.) 489; Shepardson v. Perkins, 58 N. H. 354; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344; Rait v. Furrow, 74 Kan. 101, 85 P. 934, 6 L. R. A. (N. S.) 157, 10 Ann. Cas. 1044; City of Reading v. Althouse, 93 Pa. 400.

[3] From the foregoing authorities we feel warranted in holding that a water course, although originally constructed artificially, may from the circumstances under which it originated and by long-continued use and acquiescence by persons interested therein become and be held to be a natural water course, and that riparian owners thereon and those affected thereby may have all the rights to the waters therein as they would have in a natural stream or water course.

[4] Applying these legal principles thus established to the channel now connecting the Kings and San Joaquin rivers, we think that there can be no question that at the time of the trial of this action and for years prior thereto said channel possessed all the attributes of a natural water course; that it was a tributary to the San Joaquin river, and that riparian owners on said river had and have all the rights to the waters of said stream as they have in any other tributary of said river, naturally flowing into the river above their lands. In the first place, while at its inception Captain Esrey made a cut in the banks of Kings river at the upper end, and Jefferson James at the lower end plowed a furrow connecting Fresno slough with Fish slough in the Fresno swamp, the water diverted through said cut in Kings river and flowing through said cut and the James furrow soon made for itself a channel through the entire length of Fresno swamp. The channel extended from Kings river to Fresno slough, and as early as 1884 it was carrying a substantial part of the water of Kings river and emptying it into San Joaquin river through Fresno slough, and by 1909, sixteen years before the respondents made any claim to the waters flowing therein, said channel was carrying practically all of the waters of Kings river. From its inception it was regarded as a permanent channel. Instead of any attempt being made to turn back water from the channel into the old bed of Kings river, every effort was made to facilitate the passage of these waters through the channel until 1910, when the present by-pass was begun, and when completed four years later it was of sufficient capacity and stability to transport all of the normal flow of Kings river at the intake of said canal to the north and west, and finally to discharge them into the San Joaquin river.

Respondents have cited a number of authorities to the effect that the general rule is that riparian rights exist only in natural water courses and in waters naturally flowing therein. With this rule we are in accord. We have seen, however, that a channel for the diversion of water may have existed for such a length of time, and may have been used under such circumstances, that the manner of its creation is not material, and it then has all the attributes of a water channel wholly natural in its origin. When such a channel has attained that state it becomes, in legal contemplation, a natural water course, and lands bordering thereon are riparian thereto in the same manner and to the same extent as are lands bordering on streams natural in their origin.

Respondents cite the following statement from California Jurisprudence: "Riparian rights exist only in natural watercourses and natural bodies of water." 25 Cal. Jur., p. 1097. In support of this twofold statement the author cites Green v. Carotta, 72 Cal. 267, 269, 13 P. 685, and Turner v. James Canal Co., 155 Cal. 82, 87, 88, 99 P. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823. The first of these two cases concerns the rights of users of waste waters of a certain ditch, in which it was held that said users acquired no right to said waters by long and continued user. The second of those two cases involved the right of the James Canal Company to waters in Fresno slough to which the lands of said company were riparian. It was held that the right to use water upon adjoining land applies as well to the waters of a lake, pond, slough, or any natural body of water by whatever name it may be called, as to a running stream. It is manifest that neither of these cases has any direct bearing upon the question in which we are now interested.

Wiel on Water Rights, vol. 1, § 52, is cited by respondents. In the preceding section of said work the author begins a chapter devoted to a general discussion of the subject of "National Watercourses." In section 52 is shown the distinction between natural and artificial water courses, and that the law applicable to these two separate types of property is entirely different. The author in the succeeding sections of the chapter discusses different phases of the general subject until he comes to section 60, portion of which we have quoted above. Immediately following our quotation are found these significant words: "Where the owner of the land has artificially changed the course of the stream so as to affect other riparian proprietors favorably, and acquiesced therein for a sufficient length of time, he cannot claim the right to change the flow of the water to the detriment of such other riparian owners; for such acquiescence on his part is binding like a public dedication. After high-water channels are artificially opened, and after they, together with the cuts dug connecting them with the main stream, have been used by the parties opening them and by their successors in interest, and such use is acquiesced in and recognized as branches of the main creek by others on the main stream and its tributaries and branches for the period prescribed by the statute of limitations, they become as natural channels and owners of land adjacent thereto are in law entitled to the same consideration and to the same rights as are those on the main and unquestioned channel." It would seem that the learned author of this valuable work upon the subject of Water Rights is in thorough accord with the conclusion which we have reached that a water channel, although artificially created, may have existed for such a length of time and used under such circumstances as to attain all the attributes of a natural water course.

E. Clemens Horst Co. v. Tarr Mining Co., 174 Cal. 430, 163 P. 492, is also relied upon by respondents in support of their contention that riparian rights exist only in natural water courses. In that case the court distinguishes between the natural waters flowing in a stream and waters which had been conducted by the defendants into the stream and carried therein to a point down stream, where they were retaken by said defendants. As to those waters the court held that the defendants could retake them at their pleasure. These waters never became a part of the natural flow of the stream for the reason that the defendants never lost their rights therein, and simply used the channel of the stream to transport them from an upper to a lower point in the stream. The other authorities cited by respondents on this phase of the case have but little direct bearing upon the point now under discussion and may be passed by without further comment.

The case of E. Clemens Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 171 P. 417, appears to shed some light upon the question now under consideration. That case, like the case of E. Clemens Horst Co. v. Tarr Mining Co., supra, involved the waters of Bear river and its tributary Wolf creek. The facts of that case show that the sewage from the city of Grass Valley, and the water discharged from mines and mills in said city had for some fifty years prior to said action been discharged into Wolf creek. The water used by the city and by the companies operating said mines and mills was received from a canal which led from Yuba river to the city of Grass Valley and after its use there by the city and by the mine owners in their mines and mills was discharged into Wolf creek and through this creek flowed into Bear river. Plaintiffs were riparian owners of land on Bear river, and as such owners claimed these waters to be a part of the stream and subject to riparian ownership. They sought to enjoin the defendants, whose lands were located below the point where said waters were received into Wolf creek, but above those of the plaintiffs, from diverting the water for use on defendants' land. The court, however, held that although the waters from the city of Grass Valley and the mines had been diverted into Wolf creek for a long period of time, yet the city and the mine owners might at any time discontinue such diversion, and therefore such waters remained "foreign waters" and never became any part of the natural stream. It was accordingly further held that lower riparian owners on the stream, like the plaintiffs in said action, acquired no title nor gained any right to said waters by their long-continued use thereof nor by the continued diversion thereof into said natural stream by the city of Grass Valley and said mine owners. On page 637 of the opinion in 177 Cal., 171 P. 417, 419, the court said: "If, then, the appellant [the plaintiff] can obtain no easement or right by adverse possession or user against the people at Grass Valley who add to the corpus of the stream, how, ask respondents, can plaintiff maintain the present action without first establishing a right to the use of this water? We can find no satisfactory answer to this question that will fit with appellant's contentions. Respondents invoke the rule of property that plaintiff must rely upon the strength of its own title, and not upon the weakness of that of its adversaries—citing Little Sespe Con. Oil Co. v. Bacigalupi, 167 Cal. 381, 139 P. 802. We can see no escape from the logic of the rule so invoked and its application to the conditions here presented for our consideration." There is a marked difference between that case and the present one. There the diversion of the water through long standing might be terminated at any time by those responsible for its diversion. In the present case the diversion is permanent. All the instrumentalities employed to divert the water of Kings river into the San Joaquin river are of a permanent and lasting character, and no attempt has ever been made, in so far as the record shows, by any of those responsible for the changed condition of said channel, or by any other persons, to restore the former condition, or to interfere with the appellant's use of the water thereby diverted into the San Joaquin river.

The element of permanency as an important feature in the formation of a water course of the character of that now under discussion was stressed in the case of Blackburne v. Somers, 5 Law Reports, Ireland, 1. Although this case was decided by a court of distant jurisdiction, the language there used aptly sets forth the doctrine which we hold to be applicable in the instant case. In that case the court said (page 7): "I do not think that in this case it makes any substantial difference whether this stream is natural or artificial. It appears to be settled that riparian rights identical with those attaching to natural streams may be acquired by prescription in artificial watercourses of a permanent character. These rights must depend upon the character of the watercourse, and the purposes for which it was constructed. If the watercourse was of a permanent nature, and constructed for lasting purposes, and especially for the general benefit of the parties in its vicinity, and not merely with the temporary and private object of benefiting the property of those by whom it was constructed, such as draining a mine, or a mining district, or the like, riparian rights may be acquired in its water, just as in a natural stream. In the case of Arkwright v. Gell [5 M. & W. 203], where it was held that no right to the continuance of the flow of water in an artificial watercourse could be acquired, as against the persons who constructed it, by mere user for any length of time, the decision was based on the nature of the watercourse, which showed it was of a temporary character, and constructed merely for the convenience of the owners of certain mines for the purpose of drainage. In Mager v. Chadwick [11 A. & E. 571], where it was sought to set aside a verdict for the plaintiff, on the ground of misdirection in telling the jury that the law of watercourses is the same whether natural or artificial, the Court of Queen's Bench refused the application. Lord Denman, in delivering the judgment of the court, said: 'We think this was no misdirection, but clearly right. The contrary proposition, that a water course of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water if proved to have been originally artificial, seems to us quite indefensible.'" Continuing, the court further said (page 11): "From a long time beyond the memory of living man it appears to have flowed in its present channel, and that channel, so far as it is artificial, bears all the appearances of having been constructed for permanent use. It has not been suggested that there was any temporary purpose for which this watercourse could have been formed, or that there was any person who formed it for private use. I am, therefore, of opinion that if this be an artificial watercourse, it is one of that permanent nature that riparian rights in its waters could have been called into existence of the same nature as those attaching to a natural stream. No right to divert * * * it could be acquired except by grant, actual or presumed, or by prescription."

Respondents concede that the landowners along the channel between Kings river and Fresno slough are estopped from claiming that the artificial channel connecting the two rivers is not a natural channel. In their brief they make this significant admission: "In this case [Paige v. Rocky Ford Canal, etc., Co., 83 Cal. 84, 21 P. 1102, 23 P. 875] the court expressly said that the doctrine that an artificial watercourse may under some circumstances and as to some persons, be treated as of natural origin was not applicable to the facts in that case. What was there said of the doctrine was, therefore, dictum. However, we readily acquiesce in the doctrine as stated by the court in that case. That is to say, we cheerfully concede that the person who changes the course of a stream on his own land may be estopped to claim that the artificial character so brought about by him is not a natural one." In this connection we think the language used in Paige v. Rocky Ford Canal, etc., Co., 83 Cal. 84, 93, 21 P. 1102, 1104, 23 P. 875, well expresses the legal relations of the parties in such a situation, where the court said: "In the case of riparian owners the rule has been held to be that 'when a stream flowing through a person's land is diverted into a new channel, either artificially or by a sudden flow, affecting the rights of other riparian proprietors favorably, and the owner acquiesces in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, like a public dedication, and the stream cannot be lawfully turned [returned] to its former channel.' Gould, Waters, § 159; Woodbury v. Short, 17 Vt. 387 [44 Am. Dec. 344]. So, where the owner of the land has changed the course of the stream so as to affect other riparian proprietors favorably, and acquiesces therein for a sufficient length of time, he cannot claim the right to change the flow of the water to the detriment of such other riparian owners. Ford v. Whitlock, 27 Vt. 265." If, therefore, in any case a person changing the course of a stream may be estopped from claiming that the new channel is not a natural channel, and respondents concede that there are such cases, then we think the facts before us clearly present such a case. We have already given the reason for our conclusion—the permanent nature of the new channel, the long-uninterrupted use thereof as a natural channel, and the complete and consistent acquiescence in such use by all those through whose lands said channel runs or who were instrumental in its construction. Respondents, however, take the position that the rights of the riparian owners to the waters of Kings river above the north fork of Kings river cannot in any way be lost or in the least manner affected by any action taken by lower riparian owners, and that therefore the appellant, as against said upper riparian owners, cannot acquire any rights to the waters of Kings river by the creation of said new channel, or by any other act done or performed by a lower riparian owner or lower appropriator. Conceding this to be true, we cannot see how the respondents are aided by such a situation. They have nothing in common with the upstream riparian owners. It is not necessary for us to decide any controversy between these owners and the appellant, for the reason that no such controversy is before us. Respondents are not riparian owners and they have no riparian rights. If the owners of lands along the new channel, as against the lower riparian owners, are estopped from claiming that said channel is not a natural one, we cannot see that the respondents are in any better position. Respondents are at best but subsequent appropriators on the stream, and as against them the lower riparian owners, at least to the extent of their needs, are entitled to the entire natural flow of the stream. Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 73, 77 P. 767; Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 333, 88 P. 978, 11 L. R. A. (N. S.) 1062; Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391; Herminghaus v. So. Cal. Edison Co., 200 Cal. 81, 252 P. 607; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115, 27 L. R. A. (N. S.) 772.

We conclude, therefore, upon this phase of the case that the channel now connecting Kings river with Fresno slough has all the attributes of a natural channel, and for the purpose of determining the respective rights of the parties hereto to the waters flowing therein, said channel must be regarded and treated as a natural channel. As so regarded, there thus exists a natural channel through which the waters of Kings river flow from their source into San Joaquin river, where they are mingled with the waters of the last-named river, and from that point on the united waters of the two rivers flow on and through the lands of the appellant. Accordingly, the appellant as the owner of lands riparian to the San Joaquin river has all the rights in and to the waters thereof, after being thus augmented, that any riparian owner has in and to the waters of a stream to which his land is by nature riparian.

As we have already indicated, a third question is presented by the record on appeal in this action, and that is the question of the existence of unusual, unexpected, and extraordinary waters in Kings river to which the riparian rights of the plaintiff do not attach. The trial court found: "That in the course of the flow of Kings river, season by season, and according to the historical discharge of the stream, there are occasional times when there are flows of water in the stream that are unusual, unexpected and extraordinary; that such flows are those flows that occur either in considerable quantities at unusual, unexpected and extraordinary times, or at unusual, unexpected and extraordinary rates of flow, or for an unusual, unexpected and extraordinary duration of time; that by the historical performance of the stream the flows of water therein have been and will be unusual, unexpected and extraordinary at all times when at Piedra, where the stream debouches from the mountains, there has been or shall be discharges exceeding and to the extent that they exceed (a) 4000 cubic feet per second in the months of August to March, inclusive, for any period of flow; (b) 14,000 cubic feet per second in the months of April to July, inclusive, for any period of flow; (c) 12,000 cubic feet per second for any period of time beyond ten (10) consecutive days at any time."

Appellant questions the sufficiency of the evidence to sustain this finding. The evidence on this phase of the case shows that there are periods of excessive high water in Kings river, during which time large volumes of water flow down the channel of the river, filling the same to its exterior banks, and in the early days, as noted above, during these periods of high water, the water from the river would flow down to Tulare Lake and into Summit Lake and Fresno swamp. Since the construction of the north fork of the Zalda canal, and the construction of the by-pass, these waters have flowed through said new channel to Fresno slough and thence into the San Joaquin river. These large accretions in the stream, as we have seen, were either caused by heavy rains or from the melting of the snow at the source of said river. In this respect Kings river differs in no respect from the San Joaquin river and other streams in the same vicinity, including those tributary to the San Joaquin river. That this is true is shown by a comparison of the evidence in this case with that in other cases before this court in which the question of unusual, extraordinary, and unexpected waters in such streams was in issue. In fact, as far as the similarity of Kings river and San Joaquin river in this respect is concerned, the respondents have expressly admitted that fact. In their brief, referring to Kings river and San Joaquin river, they state: "Peak flows in the two rivers are substantially synchronous. They are occasioned by the same phenomena. When Kings river waters are overflowing the by-pass, the San Joaquin river waters which are native to the stream and naturally flow therein from its source to its junction with the Sacramento river are flooding and inundating plaintiff's lands."

In the case of Herminghaus v. So. Cal. Edison Co., 200 Cal. 81, 252 P. 607, 610, this court had occasion to consider the rights of the parties thereto to the waters of the San Joaquin river, and the question arose in that case whether certain waters flowing therein during the season of extreme high water were a part of the stream to which the rights of a riparian owner attached, or were unusual, extraordinary, and unexpected. In the determination of that question this court said:

"The trial court found upon sufficient evidence, which was not materially conflicting, that the San Joaquin river was a natural stream of water with well-defined channels and banks which, with its tributaries, took its rise in the Sierra Nevada mountains and descended thence in a generally westerly course to the plains of the San Joaquin valley, and thence in a generally northwesterly direction through the counties of Madera, Fresno, Merced, Stanislaus, and San Joaquin to the San Francisco bay; that the said river in its usual, ordinary, and natural flow passed along and over the lands of the plaintiffs herein; that the natural flow of water in the said San Joaquin river is, and has always been and always will be, if unobstructed, variable in quantity in the course of each and every year; that is to say, the same is, has been, and will be largest and most abundant at times of heavy rainfall over its watershed in said mountains in each winter season, and will also have a larger accretion in the spring and summer seasons by reason of the melting of the snows in said mountains; that these annually occurring accretions in the amount and flow of the waters of said river are natural and regular, and occur in their usual, expected, and accustomed seasons, and result in an increased amount and flow of the waters of said river as they proceed by, along, and across the lands of said plaintiffs, lasting through several months in the annual change of seasons of every year. From these findings of fact, based upon evidence which is indisputable, the conclusion is inevitable that the waters of the San Joaquin river annually flowing therein before and during and after these regularly occurring accretions in the volume thereof constitute the usual and ordinary flow of said river, and are in no sense 'storm' or 'flood' or 'vagrant' or 'enemy' waters as these terms are understood in law. This has in fact been so definitely determined by the decisions of this and other courts having precise reference to the waters of this and of other similar streams taking their sources in the same range of mountains and owing their periodical accretions to the same general causes, as to be no longer a matter susceptible of serious dispute. In the case of Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 22 L. R. A. (N. S.) 391, 99 P. 502, this court was called upon to determine the nature of the annual flow of the waters of the Fresno and also of the San Joaquin rivers, which streams take their rise in the same general region and are subject to the same periodic and climatic conditions. It was in that case contended by the defendant that the waters it proposed to divert did not constitute any part of the ordinary or usual flow of these rivers, but were waters occurring during periods of heavy rains and were storm, freshet, and flood waters as distinguished from the ordinary and usual flow of said rivers, and that as such the defendant was entitled to impound, divert, and use the same. On the other hand, it was claimed by the plaintiff that the rise in the flow of the waters in said rivers was not extraordinary, occurring upon rare occasions, but that such flow and overflow occurred in all years of ordinary rain and snowfall and constituted the regular annual and usual flow of said rivers. The trial court found in that case, as in this case, that the claim of the plaintiff relative to such waters was correct, and this court in sustaining such finding and conclusion used the following language:

"Upon this showing it cannot be said that a flow of water, occurring as these waters are shown to occur, constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary. It appears that they occur practically every year and are reasonably expected to do so, and an extraordinary condition of the seasons is presented when they do not occur; they are practically of annual occurrence and last for several months. They are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which on account of climatic conditions prevailing in the region where the Fresno river has its source are usually expected to occur, do occur, and only fail to do so when ordinary climatic conditions are extraordinary—when a season of drouth prevails.'

"Again, the court says:

"'This is the character of the waters of the Fresno river, the flow of which it is shown the defendant intends to divert. These overflow waters, occasioned through such usually recurring floods and freshets, are not waters which flow beyond the natural channel boundaries of the stream which nature has designed to confine their flow; they are not waters which depart from the stream or are lost or wasted; they flow in a well-defined channel in a continuous body and in a definite course to the San Joaquin river, and while they spread over the bottom lands, or low places bordering on the main channel of the Fresno river as it carries its stream during the dry season, still this is the usual, ordinary, and natural channel in which they flow at all periods of overflow, the waters receding to the main channel as the overflow ceases.'

"And finally the court concluded:

"'In the present case the storm and freshet waters are not something distinct and separate from the ordinary waters of the Fresno river. As a fact, and under the authorities, being annually recurring floods and freshets, flowing in a clearly defined channel, they constitute a part of the ordinary flow of the waters of such river.'

"In the case of Piper v. Hawley, 179 Cal. 10, 17, 175 P. 417, this court expressly approved the doctrine laid down in the foregoing case to the effect that annually recurring floods, even though the flow of their waters made the stream wider during the period thereof so as to include adjoining lands, are yet to be deemed a part of the ordinary flow of the stream. In the case of California Pastoral, etc., Co. v. Enterprise C. & C. Co., 127 F. 741, the Circuit Court of the United States, sitting in and for the Southern District of California, and having under consideration a case wherein the particular lands affected by the present controversy and the riparian rights of the owners and occupants thereof in relation to the San Joaquin river were involved, decided that the waters of the San Joaquin river which the defendant in that case was proposing by means of a canal and dam to divert from their accustomed flow in said river along and over the Herminghaus lands were not storm or freshet waters which any person who can may impound and use, but that such waters constituted the usual and ordinary flow of said river in which the full riparian rights of the owners of said lands inhered. In the case of Lindblom v. Round Valley Water Company, 178 Cal. 450, 173 P. 994, this court said, with relation to the facts of said case: 'The evidence is clear to the effect that the water running into Round Valley (and, except as intercepted by the defendant, down North Canyon) consisted of the runoff from the usual, and annually recurring, fall of rain and snow. Such water, when running in a defined stream, constitutes a watercourse to which the riparian proprietor's rights attach'—citing Miller & Lux v. Madera, etc., Co., supra.

"In the presence of the foregoing consistent rulings of this court and of the federal court, having reference to the precise or similar conditions relative to the annual, usual, ordinary, and regularly recurring outflow of the San Joaquin river during the varying seasons of each and every year, we are constrained to hold that, in so far as the lands of said plaintiffs shall be found to be riparian to said river, they are entitled to the exercise and enjoyment of whatever riparian rights they shall be determined to be invested with, in the entire flow of the waters of said river, considering the same with its seasonal accretions as the usual and ordinary flow of said stream during each and every year."

Similar holdings have been made by this court regarding other streams situated in the same vicinity. The Herminghaus Case referred to and quoted from the case of Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391, in which this court had under consideration the character of the waters of Fresno river situated only a short distance to the north of San Joaquin river. This river has its source in the Sierra Nevada Mountains, like Kings river, and flows in a westerly direction parallel to the San Joaquin river before the last-named river makes an abrupt turn to the north, as hereinbefore stated. It empties into the San Joaquin river a few miles north of the junction of Fresno slough with San Joaquin river. It is not necessary for us to repeat all that this court stated regarding the waters of this river, as such statement appears in detail in the above quotation from the Herminghaus Case. We will, however, repeat the conclusion rendered by the court in that case, which is as follows: "In the present case the storm and freshet waters are not something distinct and separate from the ordinary waters of the Fresno river. As a fact, and under the authorities, being annually recurring floods and freshets, flowing in a clearly defined channel, they constitute a part of the ordinary flow of the waters of such river."

Kern river, situated some miles southerly of Kings river and having its source in the same mountain range, is similar in character to Kings river. It receives its waters from rains during the winter season and from melting snow during the spring and summer. The question arose in the case of Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674, whether during seasons of high water there was any unusual, extraordinary, and unexpected waters in said river. The effect of said decision was that all such waters which were the result of heavy rain or melting snow were a part of the ordinary flow of said stream.

Merced river to the north of Fresno river, which rises in the Sierra Nevada Mountains and flows westerly and empties into the San Joaquin river, is also similar in character to the Fresno, San Joaquin, and Kings rivers. In the recent case of Collier v. Merced Irrigation District, 213 Cal. 554, 558, 2 P.(2d) 790, 791, we held, referring to the Merced river: "Like many other California streams, the run-off of said river varies widely during the different periods of the year and likewise varies widely from year to year. In some seasons it has been known to carry a flow of as much as 3,700 cubic feet per second; at other times it has been known to be as low as 25 cubic feet per second. The average run-off is 1,069,000 acre feet per annum. There are, however, periods of high flow in every year, occurring between the months of April to October, inclusive. They are due in part to rainfall, but more properly to the melting snows in the upper reaches of the stream in the said mountains. These periods of flood are usual and ordinary and constitute a part of the normal flow of the stream. There are in the stream no extraordinary flood, storm, or unusual freshet waters, but all of the water therein is properly classified as part of the usual and normal flow thereof."

[5-7] It will thus be seen that whenever the question of unusual, extraordinary, and unexpected waters in the streams located in the vicinity of Kings river has arisen, and which streams are practically identical in character, in so far as the source from which they receive their waters is concerned, this court has invariably and consistently held that waters flowing during periods of high water were a part of the natural flow of the stream and could not be classed as either unusual, extraordinary, or unexpected. Respondents apparently admit the truth of the statement last made, as they set forth in their brief that "until the trial of the instant case, and the companion cases tried in Fresno county, no litigant, so far as we are aware, ever has attempted to allege and prove the existence of any unusual, extraordinary and unexpected flood waters in either the San Joaquin river or the Kings river." We can hardly agree with this statement. Certainly that issue was before this court in the Herminghaus Case, regarding the waters of the San Joaquin river, as appears from the excerpt from the opinion in that case which we have quoted above. The same may be said regarding the other cases cited on this subject. But waiving for the present the claim that until the trial of this and its companion cases no litigant has attempted to prove the existence of unexpected and unusual waters in these and other rivers in this same locality, let us examine the evidence of the respondents which they claim shows that there are times when there are unusual, extraordinary, and unexpected waters flowing in Kings river. Respondents' witness Charles L. Kaupe gave the testimony upon which they rely to support the finding of the court relating to the existence of unusual, extraordinary, and unexpected waters in Kings river. This witness testified:

"Mr. Hadsell. Q. Now, will you briefly describe the usual flow of Kings river the year around, just in a general way. A. Well, starting in the beginning of the year—January, unless there is a heavy storm, the river runs only a few hundred feet per second. A good part of the time under 500, and sometimes getting as low as 200 or 175—in January; a somewhat higher discharge in February; a little higher in March; reaching the highest flow in May and June. The peak may come some years in one month, and some in the other, and as a rule we expect twelve or fourteen thousand feet. Then it begins to decline, going down as low as 150 to 200 feet before the end of August, and that is about the flow until the first of the year with the exception of the occasional fluctuation of flow due to rainstorms."

This witness continued his testimony as follows:

"Q. Now, you spoke of peak flows in one month or another; what months did you mean by that? A. It will occur in either May or June. That has been the experience during the past thirty years. In a year of more than normal flow the peak as a rule will occur in June, whereas, if it is somewhat subnormal it will occur earlier, coming in May.

"Q. Where did you determine these quantities? A. At Piedra.

"Q. At Piedra above the diversions of the river? A. Yes, it is. It is in the low foothills about 26 miles east of Fresno."

The witness was then asked regarding the historical performances of Kings river, and in answer to the inquiry gave a tabulation of the record of the United States Geological Survey made at Piedra and covering a period of thirty years, beginning with the year 1896 and ending with the year 1925. The witness took the average annual flow of the river during these years and then gave the percentage of this average flow for each of these years. The tabulation showed that in ten of these thirty years the flow of the river was above the annual average flow, and during the balance of said years the flow was below said average annual flow. The most that can be said of this evidence regarding the historical performance of said river is that it shows an excess flow of water therein over the average flow during ten years occurring irregularly over a period of thirty years. During the balance of said years the flow was below the average. But is the existence of water in those several years in excess of the average flow of said river any evidence that such excess water is unusual, extraordinary, and unexpected? We confess that we can see but little connection between the two. It is a common occurrence, of which we think this court may take judicial notice, that a dry year, or a series of dry years, is usually followed by one or more wet years. In fact, the tabulation prepared by Mr. Kaupke shows just this condition regarding the waters of Kings river. In one instance only, and that was during the two years of 1906 and 1907, was the percentage of two consecutive years shown to be above the average. In 1906 the percentage was 206 and in 1907 it was 144. But this period was preceded by a dry year, as the tabulation shows that in 1905 the percentage of flow in the river was 68 and it was followed by a still dryer year when the percentage fell to 54. We know of no rule of law that will permit us to hold that water flowing in a stream to the extent that it exceeds the average seasonal flow thereof is unusual, extraordinary, or unexpected. The average seasonal flow is, in our opinion, a false quantity in determining the question of the existence of unusual, extraordinary, and unexpected water in a stream. We think the witness Kaupke in that part of his testimony, which we have quoted verbatim above, set forth the true situation regarding the waters of Kings river. Beginning with the first of the year, January, the flow in the river is small. It then gradually increases until the month of May or June, when the peak of the flow is reached. Thereafter the waters subside until the summer flow occurs just before the winter rains begin. This is the usual, regular, and common performance of the river. During seasons of heavy rains, and more particularly when the melting of the snow in the Sierra Nevada Mountains is at its height, large volumes of water are flowing in Kings river. That portion thereof which reaches the intake of North fork, or the Zalda canal, has, as we have already noted, been carried northwesterly to the Fresno slough and thence into the San Joaquin river. The quotation which we have hereinbefore set forth from the Herminghaus case, accurately describes waters of this character, and that case holds that such waters "constitute the usual and ordinary flow of said river." To the same effect is the decision of this court in Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 76, 99 P. 502, 508, 22 L. R. A. (N. S.) 391, where it was held that: "Upon this showing it cannot be said that a flow of water, occurring as these waters are shown to occur, constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary. It appears that they occur practically every year, and are reasonably expected to do so, and an extraordinary condition of the seasons is presented when they do not occur. They are practically of annual occurrence and last for several months. They are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which on account of climatic conditions prevailing in the region where the Fresno river has its source are usually expected to occur, do occur, and only fail to do so when ordinary climatic conditions are extraordinary—when a season of drouth prevails." Such waters of the character above described are frequently referred to as storm or flood waters. They are nevertheless a part of the regular flow of the stream and are not subject to appropriation as against riparian owners on the stream so long as they are or can be put to a beneficial use by said riparian owners. As to the use to which the waters which flow from Kings river into San Joaquin river are being put by the plaintiff the court found as follows: "That waters of Kings river that have found their way, as herein described, into San Joaquin river have necessarily commingled with the waters of said river, and by reason of said commingling, and not otherwise, have been beneficially used by plaintiff and its predecessors in interest to assist in irrigating the lands described in plaintiff's complaint, but that neither the plaintiff herein nor any of its predecessors in interest, either before or after the bringing about of said or any of said artificial changes, ever solely relied, or now solely rely, upon the flow of any water from Kings river to the San Joaquin river."

It will thus be seen that the court found that the plaintiff and its predecessors have been, and that plaintiff is now, putting the waters of Kings river, which flow in the San Joaquin river, to a beneficial use. This fact differentiates this case from the case of Gallatin v. Corning Irrigation Co., 163 Cal. 405, 126 P. 864, 866, Ann. Cas. 1914A, 74, and kindred cases cited by respondents in support of their contention that they have the right to divert said waters as appropriators because they are flood or storm waters of the stream. In the Gallatin Case the plaintiffs were riparian owners on the stream. The defendant, Corning Irrigation Company, threatened to divert flood waters flowing in the stream above the lands of the plaintiff and to convey said waters out of and beyond the watershed of said stream. The trial court in that case found that the diversion of the quantity of such unusual flood waters during certain months of the year when the defendant proposed to make such diversion would not in any wise damage the plaintiffs. This was tantamount to a finding that plaintiff could not put said waters to a beneficial use. This court held that: "These facts present the question whether or not flood waters, of the character proposed to be diverted from South Elder creek by the company, may lawfully be taken from the stream for use upon nonriparian lands and outside of the watershed of the stream, without the consent of the riparian owners and without compensating them therefor. In other words, whether the right to have such flood waters flow down the stream in its usual course, under the circumstances here disclosed, is one of the riparian rights attached to lands abutting upon the stream, as parcel thereof, which the owner of such lands may enforce against one who proposes to divert the same to nonriparian lands, where no use is made of such waters on the riparian land and no benefit accrues to riparian land from their passage over the bed of the stream, and no damage is caused to the riparian land from the proposed diversion." The Gallatin Case was followed in the recent case of Gin S. Chow v. City of Santa Barbara et al. (Cal. Sup.) 22 P.(2d) 5. In that case the court found that certain flood waters which the defendants threatened to divert from the stream above the riparian lands of the plaintiff could not be put to any beneficial use by the lower riparian owners, and for that reason refused to enjoin their diversion by the defendants.

Where, however, the waters of a stream, although they may be classed as storm or flood waters, are put to a beneficial use by a riparian owner, they cannot be diverted by an upper appropriator to the detriment of said riparian owner. Miller & Lux v. Enterprise Co., 145 Cal. 652, 79 P. 439; Miller & Lux v. Madera Canal, etc., Co. et al., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115, 27 L. R. A. (N. S.) 772.

These three cases just cited are distinguished from the Gallatin Case, in the opinion of the court in that case, where it is stated (page 411 of 163 Cal., 126 P. 864, 866) that: "The question is not entirely new in this state. In Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115, 27 L. R. A. (N. S.) 772, Miller & Lux v. Madera, etc., Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391, and Miller & Lux v. Enterprise Co., 145 Cal. 652, 79 P. 439, the question of the right to divert flood waters was considered in cases where the trial court had decided that they formed a part of the regularly recurring flow of the stream during a considerable period of each season, or where it appeared that such flood waters were necessary to supply the gravel strata and artesian basins under the lands of a valley, from which water was obtained to supply the overlying lands. These cases are not parallel to the case at bar."

The doctrine enunciated in the cases of Miller v. Bay Cities Water Co., Miller & Lux v. Madera Canal, etc., Co., and Miller & Lux v. Enterprise Co., has never been abrogated or even modified by any later decision or ruling of this court, and they must be accepted as enunciating the controlling principle of law applicable to the appropriation of storm waters by an upper appropriator when such waters are being put to a beneficial use by a lower riparian proprietor. A consideration of the authorities upon this subject leads to the conclusion that flood waters in a stream which can be put to a reasonably beneficial use by riparian owners on the stream are not subject to appropriation by an upstream claimant. On the other hand, if these flood waters are not being used by riparian owners and cannot be put to any beneficial use by them, then, under the doctrine of the Gallatin and Gin Chow Cases, they are, to the extent that the riparian owners cannot put them to any beneficial use, subject to appropriation. Under this doctrine it must be held in the instant case that the respondents are illegally invading the rights of the appellant when they threaten to appropriate and divert the storm waters flowing in the north fork of Kings river, a tributary of the San Joaquin river, which said storm waters are being beneficially used by the appellant on lands riparian to the San Joaquin river. The conclusion of the trial court, and its judgment to the contrary, are therefore erroneous and prejudicial to the rights of appellant.

Respondents, however, contend that the trial court in finding XIII, quoted above, wherein it found "that the waters of Kings river that have found their way * * * into the San Joaquin river * * * had been beneficially used by the appellant," was dealing with and referring to the usual and ordinary flood waters in the Kings river, and not to the unusual, extraordinary, and unexpected flood waters flowing in said river. As we have already held that there are no waters of this latter description in said river, the contention of respondents must fall. But even if we were to concede that there existed unusual, extraordinary, and unexpected waters in said river, we are unable to agree with the claim of respondents, as to the limitation they contend should be placed upon finding XIII. Its language is clear and distinct and its meaning, in our opinion, is unambiguous. It is not necessary to resort to the pleadings in order to determine its meaning. Respondents do not indicate any particular part of the pleadings upon which they rely and we have not been able to find anything in the pleadings which furnishes support for their present contention.

[8] Respondents further contend that they are entitled to appropriate and divert from Kings river at least so much of the flood waters thereof as are not carried by the bypass between the north fork and Fresno slough. The capacity of this by-pass is from 5,000 to 5,500 cubic feet per second. Respondents call attention to the finding of the court (finding X) to the effect that the flow of Kings river at Piedra during certain periods of the year greatly exceeds the capacity of said by-pass, and that, at least to the extent of said excess, they are entitled to appropriate the same for the reason that this excess never reaches the lands of the appellant and therefore is not, and cannot be, put to any beneficial use by appellant. By finding X the trial court found that the flow of the water in Kings river has been and will be unusual, extraordinary and unexpected when at Piedra there has been and will be discharges exceeding, and to the extent that they exceed, "(a) 4000 cubic feet per second in the months of August to March, inclusive, for any period of flow; (b) 14,000 cubic feet per second in the months of April to July, inclusive, for

any period of flow; (c) 12,000 cubic feet per second for any period of time beyond ten (10) consecutive days at any time." From the foregoing facts the respondents argue that: "The by-pass above the head of Fresno slough was constructed to take care of 5000 cubic feet of water per second. All flows above that amount will overflow and inundate the country-side. The capacity of the by-pass, therefore, affords a good index whereby to determine what are the usual, expected and normal floods, and what are the unusual, extraordinary and unexpected floods." There would be considerable merit in respondents' argument if the trial court had found the amount of water flowing in north fork at the intake of the by-pass, instead of at Piedra, and that would be so whether we held said excess waters to be unusual and unexpected waters or simply storm or flood waters. As these excess waters would never reach the lands of the appellant, and therefore had not been, and could not be, put to any beneficial use by the appellant, it could not complain of their diversion by the respondents. Gallatin v. Corning Irrigation Co., supra. But the court did not adopt the intake of the by-pass as the point at which the flow of the water of Kings river might be measured for the purpose of determining whether there was any storm or excess water flowing therein. On the other hand, the point designated for that purpose was Piedra, where the stream debouches from the mountains. The evidence does not disclose the exact distance from Piedra to the intake of the by-pass. It does show, however, that Piedra is twenty-six miles northeasterly from Fresno city. From maps and other data in the record it would appear that Piedra is from forty to fifty miles northeasterly from the intake of the by-pass. Between these two points is a large district of farming country dependent entirely upon the waters of Kings river for irrigation, domestic, and other purposes. There is evidence in the record that nearly 10,000 second feet of water are diverted from Kings river by the landowners and residents along the Kings river and above the intake of the by-pass. There is therefore no certainty as to the amount of water which at any time reaches the by-pass, and no finding whatever that any water of Kings river ever reaches the intake of the by-pass, in excess of its carrying capacity. Under this state of the record it is manifest that the capacity of the by-pass is not in any way determinative of any of the rights of the parties in this litigation.

For the reasons heretofore given the judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; TYLER, Justice pro tem.

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MILLER & LUX INCORPORATION v. TULARE LAKE BASIN WATER STORAGE DIST. et al.

L. A. 12199.

JAMES J. STEVINSON v. SAME.

L. A. 12203.

EAST SIDE CANAL & IRRIGATION CO. v. SAME.

L. A. 12204.

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. SAME.

L. A. 12202.

SAN LUIS CANAL CO. v. SAME.

L. A. 12200.

FIREBAUGH CANAL CO. v. SAME.

L. A. 12201.

Supreme Court of California.
Sept. 16, 1933.

Rehearing Denied Oct. 16, 1933.

1. Waters and water courses ⚷87.

Evidence, in suit by owner of land riparian to San Joaquin river, required finding that artificial channel connecting Kings and San Joaquin rivers possessed attributes of natural water course, entitling plaintiff to injunctive relief against subsequent appropriator.

2. Waters and water courses ⚷87.

Evidence *held* insufficient to establish existence of unusual, unexpected, or extraordinary waters flowing in river, in suit by owners of land riparian to another river, to restrain diversion of waters entering latter river through connecting channel.

3. Waters and water courses ⚷87.

Trial court's failure, in suit by appropriators of waters of river to restrain diversion, to find amounts appropriated by respective plaintiffs, as against subsequent appropriator, *held* error, where that question was put in issue by pleading.

4. Waters and water courses ⚷140.

Appropriator of waters of stream who is first in time is first in right.

In Bank.

Appeals from Superior Court, Fresno County; Chas. K. Barnard, Judge.

Suit by Miller & Lux Incorporation, by James J. Stevinson, a corporation, by the East Side Canal & Irrigation Company, by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, by the San Luis

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Canal Company, and by the Firebaugh Canal Company against the Tulare Lake Basin Water Storage District and others. From an adverse judgment, plaintiffs appeal.

Reversed.

J. E. Woolley, of San Francisco, for appellants Miller & Lux Incorporation, San Luis Canal Co., Firebaugh Canal Co., and San Joaquin & Kings River Canal & Irrigation Co., Inc.

George J. Hatfield, Fred B. Wood, and Hatfield, Wood & Kilkenny, all of San Francisco (Vincent J. McGovern and Norris J. Burke, both of San Francisco, of counsel), for appellants James J. Stevinson and East Side Canal & Irrigation Co.

Hadsell, Sweet & Ingalls, of San Francisco, and Finlayson, Bennett & Morrow, of Los Angeles, for respondents.

CURTIS, Justice.

These six cases were tried together in the superior court of the county of Fresno under a stipulation that any evidence introduced should apply, if material, to each and all of said cases. Judgment was rendered in favor of the defendants therein, and the plaintiffs in said actions have appealed. Miller & Lux Incorporation and James J. Stevinson (a corporation), the respective plaintiffs in two of said actions (L. A. No. 12199 and L. A. No. 12203), are owners of land riparian to the San Joaquin river below the junction of Fresno slough with said river. The remaining plaintiffs in the other four cases are appropriators, who for many years immediately prior to the commencement of said actions and for many years prior to any threatened diversion of water by the defendants in said actions have been diverting water from the San Joaquin river below its junction with Fresno slough, and in two of said last-named four cases the plaintiffs therein, the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, and the East Side Canal & Irrigation Company, a corporation, are public utilities, and have long prior to defendants' threatened diversion, devoted the water so appropriated by them to a public use.

The defendants in each and all of said actions are the same, and are practically the same corporation and the same persons who are the defendants in the case of Chowchilla Farms, Incorporated (a corporation), v. Harry Lee Martin et al. (Sac. No. 4392) this day decided (Cal. Sup.) 25 P.(2d) 435, and the threatened diversions of water complained of in the six cases now before us are the same threatened diversions involved in case Sac. No. 4392. As will appear by a reference to case Sac. No. 4392, the plaintiff therein was an owner of land riparian to the San Joaquin river below its junction with Fresno slough. It will thus be seen that the parties to the two actions Nos. L. A. 12199 and 12203 are in the same relative positions as the parties in the case of Chowchilla Farms, Incorporated, v. Harry Lee Martin et al., 25 P.(2d) 435 this day decided. The Chowchilla Case was tried and decided in the superior court of Madera county, and the six cases under consideration were tried in the county of Fresno before a superior judge other than the judge presiding in the superior court of Madera County at the trial of the Chowchilla Case. Nevertheless, the evidence before the two courts at the trials of the two actions Nos. L. A. 12199 and 12203 and the Chowchilla Case was substantially the same except, of course, the names of the respective plaintiffs and the description of their lands. The findings in the two cases in which the plaintiffs claim to be riparian owners of the waters in controversy follow in all material respects those made by the court in the Chowchilla Case. It is apparent therefore that the same issues are involved in the three cases. Under this state of facts the decision rendered by us in the Chowchilla Case should govern our decision in the two other cases. Therefore under the authority of the case of Chowchilla Farms, Incorporated, v. Harry Lee Martin et al., 25 P.(2d) 435, this day decided, the judgment is reversed in each of the two cases of Miller & Lux Incorporation v. Tulare Lake Basin Water Storage District et al., L. A. No. 12199, and James J. Stevinson v. Tulare Lake Basin Water Storage District et al., L. A. No. 12203.

In the other four actions, the plaintiffs therein in their respective complaints set up their ownership by appropriation of certain specific amounts of the flow of San Joaquin river with the right to divert the same from said river at points below the junction of the river with Fresno slough, and the public utility plaintiffs in addition to such facts alleged that a public use attached to the waters which they as appropriators had diverted from said river in their favor and in favor of those to whom they had supplied said waters for use.

In these four cases the court made findings identical with those made by the court in the two cases of Miller & Lux Incorporation and James J. Stevinson v. Tulare Lake Basin Water Storage District et al., Nos. L. A. 12199 and L. A. 12203, respecting the origin, construction, development, and existence of the channel between the original bed of Kings river and the San Joaquin river. As to the rights of the defendants in and to the waters flowing from Kings river, the court made the same findings as were made in said two cases, L. A. No. 12199 and L. A. No. 12203.

The trial court further found that each of the plaintiffs in all four of said last-named cases, for many years prior to the threatened diversion by the defendants, had installed irrigation works on the San Joaquin river below its junction with Fresno slough, and by means of dams, canals, and ditches had diverted the waters of the San Joaquin river upon lands nonriparian to said river where they were used for irrigation, domestic, and other useful purposes. The court by its said findings, as we understand them, found that the plaintiffs in said four actions were prior appropriators of the waters in dispute as against any right of the defendants if said waters were subject to appropriation by said plaintiffs or their predecessors in interest. The court further found, as it did in the two riparian cases, L. A. No. 12199 and L. A. No. 12203, and in the Chowchilla Farms, Incorporated, Case, that the channel connecting the Kings river with the San Joaquin river was an artificial channel, and as conclusions of law held that the waters flowing therein were by reason of the fact that said channel was an artificial channel, not subject to appropriation by the plaintiffs or any of them. The court failed to find the amount of water which the plaintiffs had diverted and used from the San Joaquin river by means of their respective irrigating canals above referred to, but made a finding in each substantially in the following words: "That evidence in this case does not show the historical diversion of said waters by said canal with sufficient certainty to enable this court to determine the amount of water, if any, which said canal has become entitled to appropriate from said San Joaquin river." The court also found that the said two public utility plaintiffs herein had dedicated the waters of the San Joaquin river so diverted by them respectively, to a public use. As to the existence of unusual, extraordinary and unexpected waters flowing in Kings river the court made the same findings as were made in the case of the Chowchilla Farms, Incorporated, v. Harry Lee Martin et al. The court accordingly in its judgment denied the plaintiffs in said four actions any relief and awarded defendants their costs.

[1, 2] From the foregoing statement it is apparent that the findings and judgment of the trial court in each of said four actions are contrary to the conclusion reached by us in the case of Chowchilla Farms, Incorporated, v. Harry Lee Martin et al. in the following respects:

1. In holding that the channel now connecting the original bed of Kings river with the San Joaquin river is, as it now exists, an artificial channel and that the waters flowing therein are not a part of the San Joaquin river.

2. In finding that there are any unusual, extraordinary, or unexpected waters flowing in Kings river.

[3] The court also erred in failing to find the amount of the appropriation of each of said four plaintiffs who base their right to use the waters of the San Joaquin river as prior appropriators thereof. The trial court evidently proceeded upon the theory that inasmuch as the waters of Kings river, which found their way into the San Joaquin river, were no part of San Joaquin river, but were "foreign waters," and therefore were not subject to appropriation by said plaintiffs, the amount of water diverted by the respective plaintiffs in said four actions was not material.

Granting that upon that theory of the case it was not necessary for the court to concern itself as to the extent of said plaintiffs' diversions, yet, as we have held that the waters flowing from Kings river into San Joaquin river were at the date of the trial and long before the initiation of any rights therein by the defendants, a part of the natural flow of San Joaquin river, it follows that said waters were subject to appropriation by the plaintiffs after they reached the San Joaquin river, and the amounts so appropriated by the respective plaintiffs, as against any appropriator, subsequent in time, became and were a material issue which the court was in duty bound to decide. The extent of said plaintiffs' respective appropriations was expressly put in issue by the pleadings, and as it was a material issue in the case for the reasons above stated, it was error for the court to refuse to make a finding thereon. It is not necessary to cite authority in support of this proposition of law. But if authority is desired it may be found in the following quotation from California Jurisprudence and the cases cited thereunder: "Under the system of express findings now provided for, full findings, unless expressly waived, are required on all material issues raised by the pleadings and evidence." 24 Cal. Jur., p. 935.

[4] The court impliedly, if not expressly, found that the appropriations of the said plaintiffs were prior in time to the attempted appropriations of the defendants. The rule as between appropriators is, the first in time is the first in right. 26 Cal. Jur. 104. The trial court should, therefore, have determined the rights of these four plaintiffs by fixing the several amounts of water so diverted and appropriated by them respectively, and by its judgment decreed that their rights to said waters were prior and superior to any right of the defendants therein.

In view of what we have said it does not become necessary for us to give any special consideration to the rights of the two public utility plaintiffs herein. No question as to their peculiar rights as such public utilities is involved in these cases under the record now before us.

For the reasons expressed herein the judgment in each of said six cases, shown in the caption hereof, is reversed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.

PEABODY et al. v. CITY OF VALLEJO.*

Sac. 4526.

Supreme Court of California.
Oct. 2, 1933.

Rehearing Granted Oct. 30, 1933.

1. **Estoppel 🔑93(3).**

Prior appropriators owning riparian lands *held* not estopped to object to diversion of water, by having postponed suit until after completion of defendant's dam, where they had repeatedly warned defendant and had filed protests.

2. **Waters and water courses 🔑130.**

Flood waters regularly occurring are not subject to appropriation where riparian or overlying owners are making reasonable beneficial use thereof.

3. **Waters and water courses 🔑87.**

Evidence sustained finding, in suit by lower riparian owners to enjoin water diversion, that creek waters, including increased flow occurring during and immediately after heavy rainstorms, were necessary for reasonable, beneficial purposes of plaintiffs (Const. art. 14, § 3).

> The evidence disclosed that the stream bed of the creek and soil in the valley were of such character as to permit circulation of water into gravel streams underlying the valley, thereby maintaining underground water supply at such an elevation that roots of trees and vines were kept supplied with water, and that underground water could be pumped for surface application at reasonable expense. It further appeared that impounding of some of the waters of the creek would deprive roots of trees and vines, growing in the valley lands, of water, and that underground water supply would be so far diminished as to impair surface irrigation.

4. **Waters and water courses 🔑152(6).**

Appropriator of water has burden to show that no present or prospective reasonable beneficial use thereof by riparian or overlying owners will be substantially damaged by appropriation (Const. art. 14, § 3).

5. **Waters and water courses 🔑79.**

As respects diversion, use of entire volume and weight of stream by riparian or overlying owners to replenish underground water supply for purpose of subirrigating orchards and vineyards constitutes reasonable, beneficial use as against appropriator (Const. art. 14, § 3).

6. **Waters and water courses 🔑79.**

Court must consider reasonable, beneficial, prospective needs of riparian and overlying owners in determining whether they are substantially injured by diverting waters of stream.

7. **Waters and water courses 🔑85.**

Town owning land overlying underground water table to which it drilled well for pumping water for domestic purposes could, with other appropriators, enjoin diversion of waters of stream by subsequent appropriator.

In Bank.

Appeal from Superior Court, Napa County; Pat R. Parker, Judge.

Suit by George L. Peabody and others against the City of Vallejo. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Robert Duncan, of San Francisco, Russell F. O'Hara, of Vallejo, and Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, for appellant.

Theodore W. Chester, of Sacramento, Dan Hadsell, of San Francisco, Jos. M. Raines and W. U. Goodman, both of Fairfield, and Hadsell, Sweet & Ingalls, of San Francisco, for respondent.

PER CURIAM.

Defendant appeals from a judgment enjoining it from impounding as an appropriator any of the waters of Gordon Valley creek in Napa county. The operation of this injunction was stayed pending the outcome of this appeal. On the trial, which occurred in December of 1927 and January of 1928, it was defendant's main contention that there are certain extraordinary and unusual flood waters in Gordon Valley creek which are subject to appropriation. After the decision of this court in Gin S. Chow v. City of Santa Barbara, 22 P.(2d) 5, decided in April, 1933, defendant further contends that even if all the water in the creek at all times is part of the normal flow of the stream, the evidence shows that the impounding of the peak flows will not interfere with any present or prospective reasonable beneficial use of the plaintiffs.

Gordon Valley creek is one branch of Suisun creek. The other branch of Suisun creek is Wooden Valley creek. After the two streams join, the resulting stream is Suisun creek. The two tributaries have their sources in Napa county and flow in a southerly direction until they unite in the southerly portion of Napa county, near the Solano county boundary. Suisun creek flows southerly through Suisun Valley in Solano county and empties into certain sloughs, the waters ultimately reaching Suisun Bay. Plaintiffs, with the exception of plaintiff town of Suisun, are riparian owners along Suisun creek in Solano county, and all of the plaintiffs' lands overlie the underground water table of Suisun creek. There are many other riparian and over-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 46 P.2d 486.

lying owners in this area who are not parties to this action.

Defendant is a riparian owner on Gordon Valley creek. In 1920 it applied to the state division of water rights for a permit to store water in Gordon valley for the benefit of the inhabitants of the city of Vallejo. The original application was for a permit to store 37,000 acre feet, but the permit was subsequently amended so as to limit the storage to 10,000 acre feet. A permit was ultimately granted to the city to store the waters of Gordon Valley creek not in excess of 10,000 acre feet in any one year, and to divert to Vallejo not in excess of 5058.9 acre feet annually. Subsequently, the defendant started the construction of a dam and reservoir in Gordon Valley creek about three miles above where that creek joins Wooden Valley creek. The project was completed in December of 1925, and has since been in operation. The capacity of the dam is 10,000 acre feet.

Plaintiffs brought the present action in 1926. The complaint describes the riparian nature of the respective plaintiffs' lands and the orchards, vineyards, and products grown on said lands. It is then alleged that Suisun Valley is a detritus cone formed in bygone years by Suisun creek; that the water in this cone is constantly replenished by the flow and overflow of Suisun creek; that plaintiffs use the water for irrigation and other specified beneficial purposes; that all of the water is needed for these purposes and that defendant's project will permanently injure plaintiffs' water supply. Subsequent to the filing of the complaint, by stipulation, the action was dismissed as to plaintiffs Charles Williams and Stoneman Reams. The answer of the defendant, with certain exceptions, denies practically all of the allegations of the complaint. As a part of its special defense, defendant alleged that on Gordon Valley creek above the dam of defendant there occur at irregular times and intervals unusual and heavy rainstorms; that no one can tell when such rainstorms will occur, nor the extent thereof, nor how long such storms will last; that when said rainstorms occur the waters of Gordon Valley creek rise very rapidly within a few hours and become storm and freshet waters of great volume; that such waters flow down into Suisun creek and from there into San Francisco Bay with great rapidity and are forever lost; that these storm and freshet waters are of no benefit whatever to the lands of plaintiffs; that the usual, ordinary and normal flow of Suisun creek is three second feet from December to February and one second foot in March and April; that defendant desires to impound only the waters in excess of this alleged normal flow.

[1] It should be noted that defendant did not see fit to insert in its answer the necessary allegations to convert the action into an inverse condemnation suit under the rule of Collier v. Merced Irrigation District, 213 Cal. 554, 2 P.(2d) 790, nor did defendant allege by way of special defense that a public use had attached to the appropriated waters. However, after all the main briefs were in, defendant, in reply to a supplemental brief of plaintiffs, for the first time contended that a public use had attached, and that the injunction should, therefore, have been denied. Defendant, in this connection, admits: "We frankly state that this point is presented for the first time in this brief," which brief was filed over five years after the trial of this action. Defendant also admits that its answer "contains no special defense regarding the intervention of public use." Defendant points out that the complaint in the present case was not filed until October, 1926, and that defendant's dam was completed in December, 1925. We think that defendant is not entitled to urge the point at this time. The complaint of plaintiffs alleged that prior to the commencement of the construction of the dam and many times afterwards plaintiffs warned defendant against the construction thereof and against any interference with the waters here involved, and against any impounding and diverting of the waters of Gordon Valley creek, and advised defendant that plaintiffs would not permit any interference with the flow of the stream or any diversion thereof and would institute and maintain all necessary actions to prevent the diversion of the waters, and demanded that construction of the dam and any interference with the flow of the stream should not be begun and should not be continued and should be stopped. Although defendant denied most of the allegations of the complaint, it did not deny this allegation, and by its failure so to do, of course, admitted its truth. The trial court properly made a finding in accordance with this allegation. Moreover, the trial court also found that when defendant filed its application with the state division of water rights, plaintiffs and others filed protests. A reading of the record herein convinces us that defendant at no time urged this point before the trial court and introduced no evidence whatsoever upon which the trial court could have found an estoppel against plaintiffs. Moreover, it appears that plaintiffs herein instituted an action in Solano county in 1924 against defendant to enjoin the diversion, and defendant admits that in that action a stipulation was made protecting plaintiffs against any application of the principle that a public use had attached. That case came on for trial in 1925 and plaintiffs moved for judgment on the pleadings, which motion was denied. Plaintiffs elected to rely on the pleadings and declined to offer any evidence. The trial court in that action entered judg-

ment for defendant. Plaintiffs in that action appealed, and that appeal, according to plaintiffs herein, is still pending. The fact that defendant was willing to stipulate in this other action involving these same plaintiffs that no public use had attached raises at least a presumption that such use in fact had not attached. Under such circumstances, it would be unfair to plaintiffs, who undoubtedly would have introduced evidence to rebut any contention of estoppel, to permit defendant now to urge the point. Moreover, in the various cases where the doctrine has been invoked, the defendant appropriator pleaded and proved the facts giving rise to the estoppel. In every such case this court emphasized the fact that the plaintiffs therein had permitted the work to proceed and, in most cases, to be completed, without protest. See Collier v. Merced Irr. Dist., supra; Conaway v. Yolo Water & Power Co., 204 Cal. 125, 266 P. 944, 58 A. L. R. 674, and cases therein referred to. The record in this case shows no such set of facts.

We turn now to a discussion of the other points involved on this appeal. The three streams here involved are relatively short and quite precipitous. Gordon Valley creek is about eight miles in length, five miles of the stream being above the dam of defendant. Suisun creek, from its origin at the confluence of its two tributaries to its mouth, is about eight miles long. Wooden Valley creek is shorter than Gordon Valley creek. The watersheds of the respective streams cover relatively a small area. The watershed of Gordon Valley creek above the dam of defendant is seventeen square miles; the combined watersheds of Wooden Valley creek and Gordon Valley creek below the dam of defendant are twenty-two square miles, while the watershed of Suisun creek proper is seventeen square miles. Another stream located in Suisun Valley, not connected with Suisun creek but running parallel thereto, is Ledgewood creek. The watershed of this stream has an area of twenty-seven square miles. All of these streams are flashy streams, and are replenished yearly entirely from rainfall, there being no snow in the area in question. During the trial it was stipulated that the following figures as to rainfall in the respective areas were approximately correct up to 1921:

Gordon valley, thirty-one inches; Wooden valley, thirty inches; Ledgewood creek, twenty-eight inches; Rockville hills (an area in Suisun valley), twenty-seven inches.

As already stated, the case went to trial on the issue as to whether there were any extraordinary flood waters in Gordon Valley creek, and whether any of the waters flowing in that stream during periods of high flow were being put to a beneficial use by plaintiffs. After a lengthy trial, judgment was entered in favor of plaintiffs. By this judgment, it was decreed that all of the waters of Gordon Valley creek are part of the usual, ordinary, and expected flow, and are beneficially useful to plaintiffs herein; that if at any time any unusual, unexpected, or extraordinary waters do flow in Gordon Valley creek, all thereof will be and are beneficially useful to plaintiffs; that plaintiffs are entitled to have all of the waters that run off Gordon Valley watershed accumulate in Gordon Valley creek as in the course of nature, without interference by defendant; that the city of Vallejo is not entitled to impound or divert any water from the creek; and that the city be enjoined from impounding or diverting any of said water. As already indicated, the trial court, subject to certain conditions, suspended the operation of this injunction pending this appeal. To sustain its judgment, the trial court filed voluminous findings of fact.

On sufficient evidence, the trial court found that Suisun creek is a rather narrow and winding stream with a considerable gradient; that during certain periods of the year large quantities of water flow therein with considerable velocity; that rainfall in the watersheds of Suisun creek begins usually in October and continues to almost the first of May of the next year; that the water begins to flow earlier and continues to flow later in Gordon Valley creek than in Wooden Valley creek; that the flows in the three streams vary from a few second feet to hundreds of second feet, depending upon the rainfall; that during the months when rainfall usually occurs, there are usually from three to five heavy rainstorms on the watersheds of Suisun creek and its tributaries; that when these heavy rains will occur is not known with exactness, nor is it known with exactness how long they will endure or how much run-off they will produce, but it is the usual, ordinary, and expected thing for these rainstorms to occur during these months; that it would be and is unusual, extraordinary, and unexpected if such rainstorms and accompanying flood, freshet, and storm waters in Suisun creek do not occur; that the watersheds of Suisun creek and its tributaries are comparatively small and that the streams are comparatively short; that, in consequence thereof, the rainfall in said watersheds runs off with considerable rapidity, and that it is usual, ordinary, and expected that the rainfall in said watersheds runs off and will run off with considerable rapidity; that the run-off in Suisun creek and its tributaries in considerable quantities always occurs during the rainstorms and for some days to several weeks thereafter. The trial court also found that all of the waters in Suisun creek, including the waters flowing in the stream during peak flows, were being put to a beneficial use by plaintiffs, and that the impounding of any portion of these waters by defendant would result in material and substantial damage to plaintiffs. This finding will be hereafter referred to.

[2] Defendant, on this appeal, contends that certain of the fundamental findings of fact are not supported by the evidence. For the most part the findings complained of are those to the effect that all of the waters of Gordon Valley creek are part of the usual and ordinary flow thereof and are necessary for beneficial uses on plaintiffs' lands. The first point urged by defendant is that all of the flood waters that regularly occur every year after heavy rainstorms in Gordon Valley creek are extraordinary or unusual waters and, as such, subject to appropriation. It is to be noted that the court found that the waters here involved are not unusual waters occurring at irregular intervals, but are the normal flood waters occurring regularly every year after each substantial rainstorm. The contention of defendant that such ordinary, usual, and expected flood waters are subject to appropriation, is tantamount to contending that the increased flow of every stream resulting from normally heavy rains or the melting of snow is subject to appropriation, no matter how often or regular, or expected, such increased flow may be. Flood waters regularly and usually occurring in a stream are as much a part of the normal flow of the stream as waters flowing therein during periods of low flow. As we read the many decisions on this subject, the most that can be said is that some of said cases seem to indicate that flood waters may be appropriated, whether regularly or irregularly occurring, only when the riparian or overlying owners do not or cannot use them for reasonable beneficial purposes. We have been cited to no case that holds that flood waters regularly occurring in a stream are subject to appropriation where said waters are being or can be put to reasonable beneficial uses by riparian or overlying owners. All of the cases, without exception, are the other way. The law is well settled that when such flood waters are the usual and ordinary and expected waters regularly occurring, and are of substantial benefit to the riparian or overlying owners, they are not subject to appropriation. We have so recently reviewed the many cases dealing with the right to appropriate flood waters that no useful purpose would be served in again reviewing them here. In Gin S. Chow v. City of Santa Barbara, supra, this court, as one ground of its decision, affirmed a judgment of the trial court permitting the appropriation of certain ordinary and extraordinary flood waters. In so doing, it was pointed out that the waters involved were not put to any reasonable beneficial use by the riparians. In Chowchilla Farms, Inc., v. Martin, 25 P.(2d) 435, filed September 16, 1933, this court, after an exhaustive review of all the authorities cited by the parties in the present case, reversed a judgment based on a finding that extraordinary flood waters subject to appropriation existed in the Kings river, for the reason that the trial court also found that those waters were being put to a reasonable beneficial use by the riparians. Reference is made to these two recent cases for a complete and exhaustive discussion of the subject.

Defendant strongly relies on the case of Hilbert v. City of Vallejo (C. C. A.) 19 F. (2d) 510, as indicating that there are extraordinary flood waters subject to appropriation in Gordon Valley creek. In that case, the Circuit Court of Appeals affirmed an order of the District Court refusing to grant a temporary injunction pendente lite growing out of the same controversy as is involved in the instant case. It should be mentioned that Hilbert is not a plaintiff in the present action. All that that case decided was that on the showing then made Hilbert had not made a sufficient showing to warrant the Circuit Court in interfering with the discretionary power of the lower court. No attempt was made to decide the merits of the controversy.

[3, 4] This brings us to the real question in this case, and that is whether the evidence sustains the trial court's findings that all of the waters of Gordon Valley creek, including the increased flow occurring during and immediately after heavy rainstorms, are necessary for the reasonable beneficial purposes of plaintiffs. Since the recent decision of this court in Gin S. Chow v. City of Santa Barbara, supra, interpreting section 3 of article 14 of the state Constitution, it must be remembered that a riparian or overlying owner as against an appropriator is now limited to a reasonable beneficial use, even of the normal flow of the stream. This is, of course, contrary to the rule formerly prevailing in this state, and was the result of action by the people in amending the fundamental law of this state. Under the principles set forth in article 14, § 3, of the Constitution, as interpreted in the Gin S. Chow Case, it is now the law that all waters in a stream in excess of the amount which can be or are put to a reasonable beneficial use, either presently or prospectively, by riparian or overlying owners are subject to appropriation for use on nonriparian lands. We also think that in a controversy between a riparian or overlying owner on one side and an appropriator on the other, the presumption is and should be that the riparian or overlying lands require all of the waters of the stream, and that the burden is on the appropriator to show that no present or prospective reasonable beneficial use of the riparian or overlying owner will be substantially damaged by the appropriation. Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P.

115, 27 L. R. A. (N. S.) 772. Under existing law, in a controversy between an appropriator and a riparian or overlying owner, the important question is whether the diversion will presently or prospectively interfere to a substantial degree with any reasonable beneficial use of the riparian or overlying owner. If it will so interfere, the riparian owner will be protected; if not, the appropriator may divert the water. It should be pointed out that the question is not one of balancing uses. The appropriator will not be permitted to prevail on the ground that his intended use is more beneficial than the present or prospective beneficial riparian use. The purpose of the constitutional amendment was not to interfere with existing or prospective reasonable beneficial uses on the part of the riparian or overlying owner, but to render available for beneficial use that portion of the waters of our streams which was of no substantial benefit to any one and which, under the former rules, was wasted or lost. See Gin S. Chow v. City of Santa Barbara, supra.

In fairness to defendant, it should be added that the trial court in this case did not have the benefit of the 1928 constitutional amendment, nor the benefit of the observations of this court in interpreting it in the Gin S. Chow Case, when it decided the present controversy. If these matters had been before it, a different weight might have been accorded the evidence. A reading of the record indicates that in the opinion of the trial court a riparian could enjoin an appropriator regardless of whether the riparian was using or could beneficially use the water. That was the law when this case was decided. But the trial judge did not rest his judgment on that ground alone. He also found that the waters here involved were being put to a beneficial use by plaintiffs. If this beneficial use be a reasonable one and if these findings find support in the record, then, as already pointed out, even under the existing law, plaintiffs are entitled to their injunction. We are not permitted to engage in surmise or conjecture as to what the trial court might have done had these other factors been before it. In the present case we are limited in our review to ascertaining whether there is substantial evidence to support the findings and whether the use shown be a reasonable one.

It is plaintiffs' contention that the evidence shows that the stream beds of Gordon Valley and Suisun creeks, and the soil in Suisun Valley, are of such a character as to permit the percolation of water into the gravel streams underlying Suisun Valley, thereby maintaining the underground water supply at such an elevation that the roots of trees and vines on lands located in the valley are kept supplied with water by capillarity, and so that the underground water may be pumped for surface application at a reasonable expense. It is also their contention that the evidence shows that the entire flow of Gordon Valley creek, including peak flows, is necessary to accomplish this result. In this connection, the trial court found that the lands in Suisun Valley are composed of gravel, rock, sand, and soil which have been formed during many centuries past by the waters flowing seaward from the watersheds of Wooden and Gordon Valleys; that during the course of the formation of said lands the course of said waters has changed from time to time in various directions through said valley as the water was flowing to the sea; that said waters flowing as aforesaid carried from the hills into Suisun Valley the great quantities of gravel, rock, sand, and other porous material and soil which now form Suisun Valley and which make the subsurface thereof a reservoir of water. It should be here added that all the experts called in this case were agreed that during the course of time, as Suisun creek changed its course from side to side in the valley, and as the valley was gradually filled up by silt, soil and sand washed down from the upper watersheds, there were left underlying the valley long arteries of gravel and rock where the stream had formerly run. All of the experts also were agreed that these arteries of gravel were connected with the present Suisun creek in the upper portion of Suisun Valley. The experts disagreed as to the number and water-carrying capacity of these arteries of gravel. The trial court also found that the total acreage in Suisun Valley is about 8,000 acres; that the waters falling on the watersheds of Gordon and Wooden Valleys and accumulating in rivulets and streams in said valleys and running thence into the channels of Suisun creek down through Suisun Valley, press, seep, and otherwise flow through the bottoms and sides of Suisun creek throughout the length thereof into the water-bearing strata of sand, gravel, and other porous materials which underlie the lands herein described; that thereby, year by year, said water-bearing strata is constantly replenished with large water supplies, and thereby said water-bearing strata of sand, gravel, and other porous material becomes a large underground reservoir of water from which the lands of plaintiffs and other lands in Suisun Valley are able to derive and have derived and do derive waters for surface and subsurface irrigation and other purposes herein described; that there is throughout Suisun Valley, under all the lands of plaintiffs herein, a water-bearing strata near the natural ground surface; that said waters in their natural state by capillary attraction reach sufficiently near to the surface of the ground to produce fairly healthy trees, vines, and crops, but that to produce very healthy trees and crops surface irrigation is also necessary, and has been practiced for many years in the valley; that plaintiffs herein relied upon the existence and availability of the percolating waters under their lands when said lands were planted to orchards and vineyards; that about 4,500 acres of the 8,000 acres in the valley are now under cultivation; that the banks and bed of Suisun creek are composed of sand, gravel, silt, and other forms of material, and that large quantities of water of Suisun creek at all stages of flow thereof, and particularly at the highest stages of the flow thereof, percolate and seep into the lands on each side of said creek and thereby subirrigate said lands and orchards and vineyards growing thereon; that, in addition to the annual rainfall in Suisun Valley, the plaintiffs' lands reasonably require not less than one acre foot per annum for the irrigation thereof; that plaintiffs have no other adequate means of irrigating said lands than by the waters which originate in Gordon and Wooden Valleys and flow into Suisun creek, as aforesaid; that if defendant shall impound waters in the Gordon Valley reservoir and shall thus take away some of the waters of Suisun creek, the underground waters under the lands in Suisun Valley will not be as fully replenished as otherwise they would be, and thereby the roots of trees and vines growing upon the lands in said valley will be deprived of water and the underground water supply will be so far diminished that there will not be a sufficient underground water supply available for surface irrigation of the lands of plaintiffs and others in the valley and for the other uses herein specified; that the entire annual and natural run-off of the watersheds of both Wooden and Gordon Valleys is necessary in order to replenish year by year the water-bearing strata underlying plaintiffs' lands; that from 40 to 50 per cent. of the water which replenishes the underground water supply comes from the Gordon Valley watershed (defendant admits that the evidence shows at least 35 per cent.); that the percolating waters which find their way into and are stored within the water-bearing strata of sand, gravel, and other porous material underlying the lands in the valley are even now hardly sufficient to supply water for domestic purposes and for trees, vines, or crops growing upon the lands in the valley; that the volume of water flowing from time to time in said Suisun creek, according and in proportion to the weight and duration of the flow thereof, aids to compel and does compel the waters of Suisun creek to press, seep, and otherwise flow into the water-bearing strata of sand, gravel, and other porous materials which underlie the lands in the valley; that any diminution in the volume of water flowing from time to time in Suisun creek will bring about the result that a smaller portion of the waters of said creek will press, seep, and otherwise flow into the water-bearing strata; that if the waters are impounded in defendant's reservoir and diverted away from Suisun creek, there will be an annual decline of the water plane and the zone of saturation of said underground reservoir under the lands of plaintiffs, and, as a result thereof, there will not be sufficient moisture to supply the roots of said trees and vines and said trees and vines will immediately become less productive and will not make their normal growth and eventually may die, and the water in the wells on the lands of plaintiffs will be lowered from year to year and said wells gradually will be rendered less productive and useful; that said remaining waters eventually will be insufficient in quantity to supply the orchards and vineyards upon said lands in Suisun Valley and other crops grown thereon, and to satisfy the other purposes and uses herein mentioned. Although some of these findings are challenged as unsupported, we are satisfied that by both lay and expert testimony they find sufficient support in the record.

[5] There can be no doubt that the use of the entire volume and weight of a stream to press a substantial portion of the waters into the underground strata, when such volume and weight is needed to accomplish that result, and when such underground waters are used for reasonably beneficial purposes, is, in itself, a reasonable beneficial use. The leading case so holding, and directly in point, is Miller v. Bay Cities Water Co., supra. The factual situation there involved and the physical characteristics of the area there under consideration were remarkably similar to those in the instant case. One of the main contentions of the appropriator in that case, just as it is one of the main contentions of the defendant in the present case, was that large quantities of water flowed down the stream there involved at periods of high flow and that this water was wasted. In the present case, there can be no doubt that during periods of high flow large quantities of water flow from Gordon Valley creek into Suisun creek and ultimately into San Francisco Bay. The court held in the Bay Cities Water Company Case that from the mere fact that these waters ultimately flowed into San Francisco Bay, it did not necessarily follow that these waters did not serve a useful and beneficial purpose before they reached the bay. The same reasoning is applicable to the present case. Defendant, while conceding that the Bay Cities Water Company Case is in point, strenuously attacks that decision and contends that since the decision in the Gin S. Chow Case it is no longer the law of this state that the entire volume of a stream, including the peak flow, may be used as against an appropriator to press a substantial portion of the water into the under-

ground reservoir. It further contends that the use of the entire volume of the stream for this purpose constitutes such a wasteful use of water that it should not be countenanced and that such a use is not a reasonable beneficial use. In our opinion, the Gin S. Chow Case does not affect the rule of the Bay Cities Water Company Case. The Gin S. Chow Case limits the riparian or overlying owner as against an appropriator to a reasonable beneficial use, but it does not permit the courts to balance uses. We think that it cannot be disputed that the use of water to subirrigate orchards and vineyards is a reasonable beneficial use and that, if it is necessary to use the entire volume and pressure of a stream to replenish the underground supply to accomplish this result, then the entire flow of the stream is being put to a reasonable beneficial use as against an appropriator. It is obvious that if the plaintiffs were deprived of this water supply, which the evidence shows exists underneath their lands, they would suffer substantial and irreparable injury.

In many different places in its briefs, defendant points out that the evidence shows that during the seasons of 1925–1926 and 1926–1927 (the action was tried in December of 1927 and January of 1928) it was impounding some of the waters of Gordon Valley creek in its reservoir, and that the evidence likewise shows that the water table in 1927 was about at the same height as it was before the diversion. Defendant implies that this fact conclusively indicates that the impounding of that water in those years did not injure plaintiffs and that, therefore, the future impounding will not injure plaintiffs. There are several answers to this contention.

[6] In the first place, the evidence clearly shows that there is a reservoir of water underlying the lands in Suisun Valley and that said reservoir is replenished year by year by the waters of Gordon Valley and Wooden Valley and Ledgewood creeks. The evidence further shows that the underground water table is at such a height that the roots of trees and vines are now moistened by capillary attraction; that of the 8,000 acres in Suisun Valley only 4,500 are under cultivation; that of the area under cultivation many acres are planted to young trees which do not now require surface irrigation, but will later so require it; that more and more irrigation wells are being drilled in the valley. From these facts, it is reasonable to suppose that the water needs of plaintiffs and the others in the valley will steadily increase. In determining whether the appropriation of these waters will substantially injure plaintiffs, we are compelled not only to consider present uses, but also must consider the reasonable beneficial prospective needs of these landowners. A prospective as well as a present reasonable use is a beneficial use by a riparian or overlying owner, sufficient to warrant the enjoining of an appropriator who seeks to interfere therewith. Gin S. Chow v. City of Santa Barbara, supra.

However, we do not think that the evidence does show that the present uses of plaintiffs will not be interfered with by the diversion. The evidence shows that the 1926–1927 season was not typical, for the reason that during that season the rain fell at such times and in such quantities that surface irrigation, which is normally necessary, was not required to any great extent in that year. In other words, the normal drain on the underground supply by pumping for surface irrigation did not exist in that season.

The trial court also found that the lands of certain of the plaintiffs were flooded on peak flows, thus irrigating said lands and spreading silt over them. Respondents contend that this also constitutes a reasonable beneficial use of the waters. Inasmuch as we are of the opinion that all the plaintiffs are putting the water to the reasonable beneficial use already discussed, we do not find it necessary to decide now whether the use of the entire volume of a stream to flood riparian lands and to deposit silt thereon is a reasonable beneficial use, within the meaning of the constitutional amendment.

[7] Defendant also contends that the injunction should not have been issued in favor of the town of Suisun. This plaintiff owns one acre of land in Suisun Valley, not riparian to Suisun, Gordon Valley or Wooden Valley creeks, but overlying the underground water table. It has several wells on this land from which in the past it has pumped water for domestic purposes to the town of Suisun. These wells, at the time of trial, were not active. It is apparent that this plaintiff is an appropriator. It is elementary, of course, that the first appropriator can enjoin a second appropriator, if the second appropriation will materially damage the first. It is obvious that the lowering of the water table will result in the same damage to this plaintiff as would be suffered by the other plaintiffs as far as the increased cost of pumping and the necessity of lowering its wells is concerned.

The other points raised by defendant do not require discussion.

In the final analysis, this appeal presents questions of fact upon which there was conflicting evidence, and, since the trial court found thereon in favor of plaintiffs, and since the questions of law presented on the appeal have been resolved in their favor, the judgment must be affirmed.

It is so ordered.

PRESTON, J., deeming himself disqualified, does not participate herein.

219 Cal. 93

HUNTOON et al. v. SOUTHERN TRUST & COMMERCE BANK et al.

L. A. 13231.

Supreme Court of California.
Sept. 28, 1933.

1. Trusts 🔑60.

Trust with power of sale *held* not to expire because of lapse of over six years and death of settlor between its creation and time of sale.

2. Trusts 🔑124.

Deed conveying property in trust for sale for prices "net to me" *held* not to make settlor sole recipient of proceeds, in view of directions therein for payment to others.

In Bank.

Appeal from Superior Court, San Diego County; Benjamin F. Warmer, Judge.

Action by Clara E. Huntoon and another against the Southern Trust & Commerce Bank and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Carl E. Croson, of Seattle, Wash., and F. L. Richardson, of San Diego, for appellants.

Wright & McKee and C. M. Monroe, all of San Diego, for respondents.

PER CURIAM.

This is an action for an accounting and to compel a conveyance. Mary Moser, deceased, was the mother of defendant E. L. Head and plaintiff Clara E. Huntoon. On May 21, 1920, the mother made a deed of several pieces of real estate to defendant Southern Trust & Commerce Bank, as trustee, with power to sell and convey the same, and delivered said trust deed to the grantee, together with a letter of instructions, directing that the property should be sold for certain prices "net to me," and continuing as follows: "In the event of sale, I hereby authorize you to deduct the expense of sale and to remit one-half the proceeds to me or to my son, Mr. E. L. Head of Sacramento, California, and the remaining half to Wright & McKee, attorneys at law, San Diego, California." The bank thereupon executed a declaration of trust, stating that it held the property in trust for E. L. Head and Wright & McKee, "hereinafter called the beneficiaries, in the proportion of one-half each." Mrs. Moser died in November, 1926. Shortly thereafter the bank sold the most valuable property and remitted the proceeds to Head and to Wright & McKee in equal parts. Plaintiff and other heirs at law, legatees and devisees of Mrs. Moser, brought this action to recover the money and the remaining property for the estate.

The lower court found that a valid trust had been created in favor of the above-named beneficiaries; that each had given valuable consideration for the same, Head having cared for his mother, and the attorneys having rendered services in procuring property and family allowance from the estate of her deceased husband; that the trustee had accepted the trust; and that Mary Moser had lost all interest in the property. These findings were based on uncontradicted evidence. Judgment was given for defendants.

[1, 2] In their appeal plaintiffs contend that the trust expired by reason of the period which elapsed between its creation and the time of sale; and also by reason of the death of Mrs. Moser prior to the sale. No authority is cited which tends in any way to support this proposition; the cases dealing with agent's authority being wholly irrelevant. It is further contended that the words "net to me" in the letter of instructions indicated that Mrs. Moser alone was to receive the proceeds. A glance at the rest of the instrument, and a consideration of the whole transaction, shows how narrow is this construction. We are satisfied that the trial court correctly interpreted the instruments, and this disposes of the appellants' case.

The judgment is affirmed.

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219 Cal. 111

MASON v. MASON.

L. A. 12929.

Supreme Court of California.
Sept. 29, 1933.

1. Husband and wife 🔑264.

Evidence in husband's divorce action *held* sufficient to support finding as to community character of property.

2. Appeal and error 🔑1011(1).

Reviewing court may not disagree with trial court's conclusion resolving conflict in evidence.

3. Divorce 🔑249(6).

Court denying divorce to either party had jurisdiction to vacate homestead and award undivided one-half interest in property to each spouse, where title to property was put in issue by pleadings (Civ. Code, §§ 136, 137).

In Bank.

Appeal from Superior Court, Los Angeles County; O. K. Morton, Judge.

Action by James N. Mason against Henrietta C. Mason, in which defendant cross-complained for a divorce. From the judgment, defendant appeals.

Affirmed.

Mervyn R. Dowd, James S. McKnight, and McKnight & Dowd, all of Los Angeles, for appellant.

W. E. Dillon, of West Los Angeles, for respondent.

WASTE, Chief Justice.

This is an action for divorce. Among other things, the complaint alleges that certain real property standing in the names of both parties is the community property of the spouses, and that a homestead theretofore declared upon the same by the defendant, without the plaintiff's consent, should be vacated and set aside, the property sold, and the proceeds distributed to them. The defendant wife answered and cross-complained for a divorce. It is alleged in the cross-complaint that the real property was acquired from defendant's separate funds and represents her separate property; that plaintiff's name was inadvertently incorporated in the deed by reason of a mistake of the scrivener; that the deed should be reformed and plaintiff's name stricken therefrom, and title quieted in the defendant as her separate property. Upon submission of the cause to the court, sitting without a jury, defendant requested that her prayer for a divorce be disregarded in order to preclude the disallowance to her of one-half of plaintiff's pension as a Civil War veteran.

The court denied a divorce to either party, decreed the real property to be community in character, awarded an undivided one-half interest therein to each spouse, vacated and set aside the declaration of homestead thereon, awarded defendant one-half of plaintiff's pension, and directed plaintiff to pay defendant, in addition thereto, $50 a month payable from the income derived from plaintiff's undivided one-half interest in the property. Defendant appealed.

[1, 2] Defendant first contends that the evidence fails to support the finding as to the community character of the property. Inasmuch as the evidence is conflicting, little need be said on the point. While the testimony of the defendant and her witnesses tends to indicate that the property was acquired out of her separate funds, the plaintiff testified that the property was purchased with the proceeds derived from the sale of certain other real property theretofore acquired by the parties out of community funds. It was for the trial court to resolve this conflict in the evidence. With its conclusion we may not disagree.

[3] It is next urged that the court below, having denied a divorce to either party, was without jurisdiction to vacate the homestead and award an undivided one-half interest in the property to each spouse. The failure to decree a divorce did not oust the court of jurisdiction to adjudicate the title to the property, where such title was put in issue by the pleadings. Furthermore, although judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance of the wife by the husband (Civil Code, § 136), and in doing so may make the same disposition of the community property and of the homestead as would have been made if the marriage had been dissolved (Civil Code, § 137).

The judgment is affirmed.

We concur: CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

In re SCHNUR'S ESTATE.*

CLARK v. McDANIELS et al.

Civ. 9099.

District Court of Appeal, Second District, Division 1, California.

Sept. 30, 1933.

Hearing Granted by Supreme Court Nov. 27, 1933.

1. Trusts ⚷272(3).

Where extraordinary dividends are declared and paid on corporate shares left in trust, they are distributed by giving corpus sufficient to keep intact value of shares as they were when trust began, and by giving rest to those entitled to income.

2. Trusts ⚷272(3).

Stock subscription right issued to holder of shares left in trust may be given in whole or part to life tenant, so long as distribution comes from earnings and does not decrease intact value of corpus (Civ. Code, § 748; Code Civ. Proc. § 1963, subd. 12; Civ. Code, § 297, as added by St. 1931, p. 1763, § 2).

3. Executors and administrators ⚷253.

Where no evidence was offered by either party at hearing of contested claim against decedent's estate, it became court's duty, on admission by contestants that all facts stated in claim were true, to determine question as matter of law.

4. Evidence ⚷86.

Presumption of law that is disputable, when not changed by evidence, becomes to court rule indisputable for case and court must apply it.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 32 P.2d 970.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

In the matter of the estate of William Schnur, deceased. Claim by John H. McDaniels and others, opposed by Mrs. Perry D. Clark. From a judgment sustaining contest to the allowance of claim against estate, claimants appeal.

Affirmed.

Manley C. Davidson, of Los Angeles, and John H. McDaniels, of San Francisco, for appellants.

Lawrence L. Larrabee, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This is an appeal from a judgment of the superior court sustaining a contest to allowance of a claim against the estate of William Schnur, who died October 7, 1930. Decedent by his will left three fourths of the residue of his estate to his sister, Mrs. Perry D. Clark, respondent here, and the other fourth to Ellowene Delahoyde, a sister of his wife Vilona, who had died February 14, 1925. Mrs. Delahoyde, her sister Mary H. Boorman and her nephew John H. McDaniels appear in this action as appellants, contending that their claim filed against William Schnur's estate should have been recognized as valid by the superior court. This claim was for the sum of $8,172.09, proceeds derived by decedent from the sale in 1929 of certain stock subscription rights issued by Columbia Gas & Electric Corporation. Vilona Schnur had died intestate, leaving as her heirs at law the three appellants, each entitled to one-sixth of her estate (which was entirely separate property) and her husband entitled to one-half thereof. While the estate of Vilona Schnur was pending, the heirs entered into a written agreement by which all participation by the appellants in the property which she left was postponed until after the death of her husband, he being granted $4,000 in cash and a life interest in the real property, also certain rights in the personal property consisting of shares of stock in several corporations, some Liberty bonds and approximately $20,000 cash in bank. As to these items of personal property the agreement provided that William Schnur was to have the income thereof during his lifetime, with the additional right to draw upon the "property itself" if at any time the income should prove insufficient to support and maintain him "with the necessary and proper comforts and conveniences." As to the corporate stocks the agreement provided that the certificates representing the same should be issued to William Schnur, to be by him endorsed and assigned in blank and held in trust by Mrs. Delahoyde and himself, and by them deposited in a safe deposit box to which both should have access. The Liberty bonds were to be held in trust in the same way. Upon the death of William Schnur the trust was to terminate and the property be distributed in equal shares by Mrs. Delahoyde "as surviving trustee" to herself, Mrs. Boorman, and Mr. McDaniels. One block of stock so held in trust consisted of 1,519 shares of Ohio Fuel Corporation. About a year after this agreement was signed that corporation merged with Columbia Gas & Electric Company to form a new corporation named Columbia Gas & Electric Corporation and as a result of the merger and exchange of stocks, the item 1,519 shares of Ohio Fuel Corporation became 532 shares of the common and 237 shares of the preferred stock of Columbia Gas & Electric Corporation. This corporation in April, 1929, increased its common stock from 4,000,000 to 10,000,000 shares and issued to its stockholders 2½ new shares of common stock for each share of common previously held. In this way the original 1,519 shares of Ohio Fuel Corporation were transmuted into 237 shares of preferred and 1330 shares of common stock of Columbia Gas & Electric Corporation. In May of 1929 this last-named corporation announced an issue of rights to subscribe for additional shares of its common stock, the documents evidencing those rights being known as warrants. These warrants were sold by decedent for $8,172.09, the proceeds being deposited by him in his personal account instead of in the joint account where, under the terms of the above-mentioned agreement, he and the other trustee, Mrs. Delahoyde, kept the cash of the Vilona Schnur estate. The question is whether the warrants or subscription rights which William Schnur sold constituted income to which deceased was entitled under the agreement of the parties, or an item of capital which should have been credited by him to the corpus of the trust estate.

The appellants contend that the decedent was not entitled to the warrants or the proceeds thereof, a contention which they have asserted heretofore by filing the above-mentioned claim against decedent's estate for the full amount thereof. This claim was allowed by the executor of William Schnur's estate and approved by the probate commissioner and the judge in probate. Later, a motion to vacate the order allowing the claim was denied but permission given to file objection within three weeks thereafter and prior to final distribution. This objection took the form of a contest which was sustained and which, as stated above, is brought before us on this appeal.

So far as counsel have been able to ascertain, the courts of this state have never been called upon heretofore to determine whether stock subscription rights issued during a life tenancy belong to the life tenant or to the remainderman. In approaching the solution of that question on the facts in the present case we note that the agreement between the parties stated that it was the desire of all that in addition to a life estate in the real property of Vilona Schnur and the sum of $4,000 cash, the surviving husband, William Schnur, "shall also have *all of the income* from the remaining property of the estate from the time of the death of said Vilona McD. Schnur, and during his lifetime." The arrangement to which we have referred calling for issuance of stock certificates directly to William Schnur and assignment in blank by him was made "in order to provide for the payment of the *income* from said personalty to William Schnur during his lifetime *and for the distribution of said personalty upon his death.*" It was provided further that interest on the bonds "and also the *dividends* on said stock during the lifetime of said William Schnur shall be collected by, paid to, and belong to the said William Schnur individually." (Italics in the foregoing excerpts added.)

In their very able and exhaustive briefs counsel for the respective parties have reviewed thoroughly the cases in which courts of this country have been called upon to determine the ownership as between life tenant and remainderman of dividends declared during the life period, calling attention to the three rules that have been adopted in various jurisdictions and which are summarized as to their operation on stock dividends in Re Joy's Estate (1929) 247 Mich. 418, 225 N. W. 878, 883, 72 A. L. R. 973, 980, as follows: "Under the Massachusetts rule, a stock dividend, declared during the life interest, whether earned partly before or partly during such life interest, goes in its entirety to the corpus of the estate; under the Kentucky rule, it is treated as income and goes to the life beneficiary; and under the Pennsylvania rule, it is apportioned between the corpus and the life beneficiary in such a way as to prevent loss to the corpus by a reduction of the actual intrinsic value of the shares as of the date when the life interest accrued. These rules are also applicable to extraordinary cash dividends."

The Massachusetts rule is one of convenience, as appears from the following language in Lyman v. Pratt (1903) 183 Mass. 58, 66 N. E. 423: "In Minot v. Paine, 99 Mass. 101–108, 96 Am. Dec. 705, it is said that in such cases 'a simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital.' This general rule has been followed by this court ever since. [Cases.] In determining what is a cash dividend and what is a stock dividend, substance, and not form, is regarded. * * * In dealing with investments of this kind, *it is impracticable for courts to ascertain what has been earned by the corporation* after the time of an investment by a trustee, *so as to determine accurately the income* upon the investment *for the purpose of an exact adjustment of the rights and interests of tenants for life and remaindermen.* It is necessary to resort to some simple, arbitrary rule, and this which has been adopted works in most cases, although not always, with substantial equity." (Italics ours.)

The rule under which stock dividends belong to the remainderman has been extended in Massachusetts to include stock subscription rights. See Chase v. Union National Bank (1931) 275 Mass. 503, 176 N. E. 508, 510, where the court says: "The right to subscribe for an increase of stock to be issued by a corporation must be treated as property capitalized by the corporation. It is in the nature of a stock dividend. Hyde v. Holmes, 198 Mass. 287, 293, 84 N. E. 318. * * * In Atkins v. Albree, 12 Allen [Mass.] 359, the life tenant was entitled to income by the terms of the will, and the court held that the proceeds of the sale of rights to subscribe to new stock constituted capital and did not belong to the life tenant," etc.

In this cited case of Atkins v. Albree, decided in 1866, the character of a stockholder's preemptive stock subscription right is analyzed as follows: "The right or privilege to take new shares in a corporation upon an increase of the capital stock within the limits fixed by the charter is a benefit or interest which attaches to stock, not as profit or income derived from the prosecution of the corporate business, but as inherent in the shares in their very creation. Gray v. Portland Bank, 3 Mass. 364 [3 Am. Dec. 156]. It is true that the value of this right must always depend essentially on the success with which the operations of the corporation have been conducted, and on the prospect of future income and profits which the condition of the business of a corporation holds out to its stockholders. But this does not change the nature of the right or interest. It is still an original incident or attribute appertaining to each share; *a right to a larger participation or ownership in the capacity of the corporation to earn profits;* and not the gain or income itself, actually earned by the corporation. In this view, the value of the right must be regarded as a part of the *corpus* of the property devised in trust." (Italics added.)

It may be pertinent to quote at this point from the article "Corporations," 6A Cal. Jur. 759, § 427:

"The rule is generally established that upon increase of stock the existing shareholders are entitled to subscribe to or purchase it in ratable proportions, in order to preserve their relative strength in the corporation. Such is the rule in the absence of statute, but by statute the rule is reversed in California.

" 'Unless otherwise provided in the articles, the board of directors may issue shares, option rights or securities having conversion or option rights, without first offering the same to shareholders of any class or classes.' (Gen.

Corp. Law, sec. 297, Civ. Code.)" The quoted section 297 was added to the Civil Code in 1931.

Alluding to the terms of Albree's will by which he left the income from twenty shares of stock to his widow the court in Atkins v. Albree, supra, uses the following language: "This gives her no property in the shares, or in money derived from the sale of an interest which formed a part of the original right appertaining to the shares, but only to receive the entire income to be derived therefrom, whether it continues to be represented by the number of shares held by the testator at his decease, or a portion of it becomes converted into money by the sale of the right to take new shares in the capital stock of the corporation. * * * The original shares and the money received from the sale of rights to take new shares in the capital stock of the corporation constitute the body of the trust property, which is to be treated as the capital or principal fund, the income of which is to be paid to the widow as directed by the will, and the whole is to go to the nephew on the happening of either of the events therein designated [i. e., remarriage or death of the widow]. Hill on Trustees, 386, 446. Paris v. Paris, 10 Ves. 185. Witts v. Steere, 13 Ves. 363."

A review of the Massachusetts cases from Atkins v. Albree (1866) to Chase v. Union Nat. Bank (1931) shows that where the matter under consideration is the determination of conflicting claims by life tenant and remainderman to stock rights there has been no departure in that commonwealth during a period of almost seventy years from the principles laid down by Chief Justice Bigelow in the first of these two cases.

However, since "income" is a flexible word, and, as pointed out by Mr. Justice Cardozo in Equitable Trust Co. v. Prentice (1928) 250 N. Y. 1, 164 N. E. 723, 725, 63 A. L. R. 263, "what is income in one relation may at times be principal in another," we find that the Massachusetts court in Tax Commissioner v. Putnam (1917) 227 Mass. 522, 116 N. E. 904, 910, L. R. A. 1917F, 806, decided that gains derived from the sale of rights to subscribe for new stock to be issued by a corporation may be taxed as "income" on the theory that such rights may properly be classed as intangibles. In that case the court took occasion to remark that: "It is manifest that there is no inherent necessary and immutable reason why stock dividends should always be treated as capital. * * * The same is true of our rule * * * [cases] to the effect that rights to subscribe for new stock which have a market value are to be attributed to principal and not to income. Some other states hold the value of such rights to be income and not principal."

In Rhode Island Hospital Trust Co. v. Tucker (1931) 51 R. I. 507, 155 A. 661, 662, 83 A. L. R. 1253, we find the following:

"The Massachusetts rule, as applied to so-called stock dividends, although probably not approved by a majority of courts, is followed in many jurisdictions, including the United States Supreme Court. See Gibbons v. Mahon, 136 U. S. 549, 10 S. Ct. 1057, 34 L. Ed. 525; Towne v. Eisner, 245 U. S. 418, 38 S. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254; Eisner v. Macomber, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; Hayes v. St. Louis Union Trust Co., 317 Mo. 1028, 298 S. W. 91, 56 A. L. R. 1276; Lamb v. Lehmann, 110 Ohio St. 59, 143 N. E. 276, 42 A. L. R. 437; Green v. Bissell, 79 Conn. 547, 65 A. 1056, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287; Humphrey v. Lang, 169 N. C. 601, 86 S. E. 526, L. R. A. 1916B, 626; Security Trust Co. v. Rammelsburg, 82 W. Va. 701, 97 S. E. 122.

"The same principle applies to rights to subscribe for stock and to rights to subscribe for debentures and bonds convertible into stock of the issuing company. In each instance a portion of corporate surplus has been permanently capitalized. See Greene v. Smith, 17 R. I. 28, 19 A. 1081; In re Brown, 14 R. I. 371, 51 Am. Rep. 397."

On this point, see, also, In re Merrill's Estate (1928) 196 Wis. 351, 220 N. W. 215, 216. 59 A. L. R. 1528, where it is said: "It is a well-nigh universal rule that the benefit of a right given by a corporation to its stockholders to subscribe at par, or other fixed amount less than the intrinsic value, for a new issue of stock, whether sold or exercised by taking new stock, is awarded to corpus and not to income, to the remainderman and not to the life tenant. 5 Fletcher on Corporations, § 3463; 2 Cook on Corporations, § 559; 24 A. L. R. 84; 42 A. L. R. 458. The note to the citation in Cook on Corporations and the note to be found in 24 A. L. R. 84 contain copious references to the authorities upon this question and an extensive review of them here will serve no good purpose. Lauman v. Foster, 157 Iowa, 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14, is a recent case upon this subject, containing a rather extensive review of the authorities, wherein it is said that Holbrook v. Holbrook, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 A. 124, is the only case coming to the attention of the Iowa court holding to the contrary, and even in that case 'the difficulties in the way of treating such option or right to subscribe for additional stock as income are suggested.'"

Here it may be noted that the case of Lauman v. Foster was decided in 1912 and since then, as will appear hereafter, the views of the New Hampshire court as expressed in 1907 in Holbrook v. Holbrook, supra, in regard to ownership of stock rights have been accepted by the supreme court of Pennsylvania in Nirdlinger's Estate (1927) 290 Pa. 457, 139 A. 200, 203, 56 A. L. R. 1303, and Jones v. Integrity Trust Co. (1928) 292 Pa. 149, 140 A. 862, 863. The difficulties in the application of the rule as to value of stock rights are the same as those noted in respect to stock dividends in Lyman v. Pratt, supra (see italics), but have not been considered insuperable by the courts of New Hampshire and Pennsylvania. See, also, Weston v. Second Orthodox Congregational Society (1919) 79 N. H. 245, 110 A. 137, and Weston v. Second Orthodox Congregational Soc. (1915) 77 N. H. 576, 95 A. 146, 147.

While the courts of Massachusetts say a stock subscription right is in the nature of a stock dividend (Chase v. Union Nat. Bank, supra), the courts that established what is known as the Kentucky rule long ago decided in Hite's Devisees v. Hite's Ex'r (1891) 93 Ky. 257, 20 S. W. 778, 780, 19 L. R. A. 173, 40 Am. St. Rep. 189, that "this right stands upon a different footing from the claim to a stock dividend," harking back to the case of Atkins v. Albree, supra, as will be seen from the almost identical language used in the two decisions.

Since, under the Massachusetts rule, stock rights, like stock dividends, belong to capital it is but natural for the courts employing that rule to announce that the two interests are of a similar nature. And it is not surprising that the Kentucky court, awarding stock rights to capital and stock dividends to the life tenant (Hite's Devisees v. Hite's Ex'r, supra), finds them dissimilar.

[1] Our Supreme Court has adopted neither the Massachusetts rule nor the Kentucky rule in determining the ownership of stock dividends, preferring, in the two cases where that question has been presented (Estate of Duffill [1919] 180 Cal. 748, 183 P. 337, and Estate of Gartenlaub [1921] 185 Cal. 375, 197 P. 90, 24 A. L. R. 1), to apply the reasoning developed under the American or Pennsylvania rule as to which Simpson, J., in Re Dickinson's Estate (1926) 285 Pa. 449, 132 A. 352, makes the following comment: "From Earp's Appeal, 28 Pa. 368, to Harkness' Estate, 283 Pa. 464, 129 A. 458, we have uniformly held that—'Where extraordinary dividends, whether of cash, scrip or stock, are declared and paid on shares of corporate stock left by a decedent in trust, they are to be distributed by giving to the corpus sufficient to keep intact the value of the shares as they were at the time the trust began, and by giving the rest of the dividend to those entitled to the income of the estate.' Following our lead, this has become the rule in nearly all the states of the Union."

In Re Harkness' Estate, supra, may be found an interesting refutation of the claim that because the Supreme Court of the United States has said in cases there referred to (notably Gibbons v. Mahon, 136 U. S. 549, 10 S. Ct. 1057, 34 L. Ed. 525, a case arising in the District of Columbia), that a stock dividend is capital, the courts of every state must say so. The opinion reads as follows, on that point: "The decisions of that eminent tribunal are entitled to the greatest consideration; but since, so far as concerns the present question, no construction of the 'Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made * * * under the authority of the United States,' entered into the determination of those cases, we are at liberty, under the facts above set forth, to follow the rules of property long established in our own state; and, in principle, that court has frequently so decided."

In Re Dickinson's Estate, supra, holding that stock dividends should be equitably apportioned between life tenant and remainderman, we find the Pennsylvania court, as late as 1926, following the rule early declared in that state (Biddle's Appeal [1882] 99 Pa. 278). and awarding the proceeds derived from the sale of stock subscription rights to the corpus of the trust. In the following year, however, the same court, in Nirdlinger's Estate, supra, after an exhaustive and able review by Mr. Justice Kephart of the adoption and operation of the three rules as to dividends, cash and stock, in the various jurisdictions of the country, has this to say of stock subscription rights:

"There is another situation where a corporation, for its own purposes, issues new stock for which rights to subscribe are given shareholders. They are commonly called 'rights,' and as such have a value. The benefit of these rights, whether sold by the trustee or exercised by taking new stock, is in other states generally awarded to the remainderman. [Citing cases.] In jurisdictions following the Massachusetts rule, this result follows as a logical consequence. In other jurisdictions it would seem the life tenant should receive the benefit of the right so far as it is attributable to earnings that have accumulated during the life interest, provided the intact value of the corpus be maintained. This was the decision in Holbrook v. Holbrook, 74 N. H. 201, 12 L. R. A. (N. S.) 768, 66 A. 124. As noted, however, in Lauman v. Foster [157 Iowa, 275, 50 L. R. A. (N. S.) 531, 135 N. W. 14], supra, the decision in the Holbrook Case is contrary to the great weight of authorities.

"There is some conflict in the Pennsylvania cases on this point. See Wiltbank's Appeal, 64 Pa. 256, 3 Am. Rep. 585, and Moss' Appeal, 83 Pa. 264, 24 Am. Rep. 164, where Wiltbank's Appeal, supra, was distinguished upon the ground that the rule there stated applied only where there was an actual profit, whereas in the case then before the court the issue of the new shares reduced the value of the original shares held by the trust estate. [Citing cases.]"

Such conflict as had previously existed in Pennsylvania on the pertinent question was terminated in the following year by the decision in Jones v. Integrity Trust Co., supra, as will be noted more particularly hereafter.

In Holbrook v. Holbrook, supra, the court, after reciting conditions peculiar to the case, said: "If this interpretation of the case is correct, it is difficult to see why the giving of the rights to stockholders should not be considered a distribution of income, the same as the giving of stock is in the case of a stock dividend, provided it is shown that the rights represent net earnings that have accrued during the term of the life tenant. And, when the distribution is in the form of stock rights, the argument that it may be difficult to ascertain whether they in fact represent income or capital is of no greater weight than when the distribution is in the form of a stock dividend. The object of the inquiry in each case is to do justice by the parties and effectuate the intention of the creator of the trust. If this interpretation of the case is incorrect, and upon a further hearing it should be made to appear that some part of the value of the rights was due to surplus earnings that accrued prior to the creation of the trust, or to natural growth and increase in the value of the corporate plant and business, then the trustee should be directed to make such disposition of the stocks or their proceeds as will repay the life tenant for the sums advanced by him in purchasing the stock and such further sums as any value in the rights is due to surplus earnings that accrued between 1900 and 1903, and the balance should be held by him as a part of the corpus."

Then follows a commentary upon the attitude of the Pennsylvania court in various cases, including Biddle's Appeal, supra; Moss' Appeal, 83 Pa. 268, 24 Am. Rep. 164; Earp's Appeal, supra, and Wiltbank's Appeal, 64 Pa. 256, 3 Am. Rep. 585, some of which gave rise to the remark in the Nirdlinger Case, supra, that there was some conflict in the Pennsylvania cases on the point involved. The reasoning of Holbrook v. Holbrook, favorably referred to in Nirdlinger's Estate, was followed in Jones v. Integrity Trust Co., supra, where we find the following: "So far as concerns the 10 per cent. stock rights, the case stated shows that some of the stockholders took the new shares, but it does not disclose what was done by the estate. This is important in determining who should receive the benefit of those rights. We stated in Nirdlinger's Estate, 290 Pa. 457, 466, 139 A. 200 [56 A. L. R. 1303], that there was some conflict in the authorities with respect to the proper disposition of such rights. We now definitely decide that, where a corporation gives to the trustees of an estate the right to subscribe for new stock, and they avail themselves of such offer, the benefit resulting therefrom must be apportioned in the same manner as an extraordinary stock dividend would be; that is, there should be allotted to the corpus of the trust sufficient thereof to maintain unimpaired the intact value of the stock held by it, and the life tenant should receive the balance, because it represents corporate earnings which accumulated after he became entitled to all dividends at any time thereafter payable out of such accumulations."

As we have stated, the Supreme Court of California has accepted the rule of apportionment of stock dividends between life tenant and remainderman as developed by the Pennsylvania courts, Mr. Justice Melvin saying in Estate of Duffill, supra, at page 758 of 180 Cal., 183 P. 337, 340: "That we adopt the American or Pennsylvania rule is evident from the foregoing discussion and the cases cited. In re Osborne, 209 N. Y. 450–477, Ann. Cas. 1915A, 298, 50 L. R. A. (N. S.) 510, 103 N. E. 723, 823, is an excellent example of the application of the rule which there was stated as follows: '(1) Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. (2) Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they intrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund.'"

[2] The decision in Estate of Gartenlaub, supra, holding that the remainderman is entitled to the value of the stock as it existed at the date of the creation of the trust and that the accumulations beyond that date are distributable to the life tenant as income or profits confirms the policy declared in the Duffill Case. Since this policy in Pennsylvania and California rests upon the view that stock dividends may be given in whole or in part to the life tenant, so long as such distribution comes from earnings and so long also as it does not decrease what the Pennsylvania court calls the "intact value" of the corpus, we see no logical reason why California should not take the further step along with Pennsylvania and following the lead of New Hampshire adopt the same view as to a stock subscription right.

The objection may be urged that such a view ignores the right of a shareholder to maintain his original proportionate interest in the corporation by the purchase of new stock at each increase, an argument advanced in support of the Massachusetts rule in jurisdictions where that rule has been adopted, e. g. Hayes v. St. Louis Union Trust Co. (1927) 317 Mo. 1028, 298 S. W. 91, 56 A. L. R. 1276. But as we have seen by reference to section 297, Civil Code, this argument has little or no weight to-day in California. Recent comment on this subject by Professor Ballantine appears in his work on California Corporation Laws (1932 Ed., pp. 98–101) where under the caption "Abrogation of Preemptive Rights," discussing the objections to and departure from the old rule, he says: "The idea of the committee which drafted the present provision (referring to section 297, Civ. Code) was that justice and convenience could be served more effectually by holding directors to high standards of good faith and fairness in the exercise of their power to issue shares rather than by any positive rule conferring preemptive rights. The so-called preemptive right is in effect simply a remedy or device to enforce fair dealing as to existing shareholders. Stock structures have become so complex in recent years that it has become impracticable to find any fair basis of apportionment of new issues between different classes of shares. The practical solution is to issue the shares for their reasonable market value without favoritism toward the insiders. Even when a new issue of shares is offered to existing shareholders pro rata, it will often work injustice, because many of the shareholders may be unable to take their allotment and may thus lose their relative interest and influence. In many cases the directors may exercise their discretion to make a first offering to existing shareholders in order to avoid any suspicion or charge of favoritism on their part." See, also, article on "Conflicting Claims of Life Tenant and Remainderman to 'All stock—No Cash' Dividends," 46 Harvard Law Rev. 298, p. 303, n. 34 (Dec., 1932). That our courts have not been greatly impressed with the so-called preemptive right as related to the intricate stock structures of recent years was evidenced more than a decade ago by their refusal to accept the Massachusetts rule, and their holding, on the contrary, that the shareholder's right is fully protected if the intact value of the stock which belongs to him in remainder is not impaired when it reaches him.

Counsel for appellants argue that since the respondent rested on the claim as submitted, with agreement attached, and his first ground of contest thereto, no oral evidence being offered, that the contest should have been dismissed because of a presumption declared in other states, and particularly in Re Waterhouse's Estate (1932) 308 Pa. 422, 162 A. 295, that proceeds from the sale of stock rights are capital assets. As we have pointed out, the Pennsylvania courts, as early as 1882 (Biddle's Appeal, supra), held generally that stock subscription rights or the proceeds thereof belong in their entirety to capital, In re Dickinson's Estate, supra, decided in 1926, being the latest definite pronouncement to that effect. We have no such tradition behind us, and it seems clear that no such presumption should govern in this, the first case in California where the question has come to the attention of the courts. Especially so, since a gradual change favorable to the life tenant's position has been taking place, as noted even in the Massachusetts decisions. Especially so, also, in view of the provisions of section 748, Civil Code, upon which respondent relied in his first ground of contest, and which defines "Income of Property" in the closing phrases as "the interest of money, dividends upon stock, and other produce of personal property." It will be noted that we are not dealing here with a claim for the shares of stock covered by the agreement, or any portion of them, and it may be assumed that by virtue of the assignment in blank endorsed thereon they have passed to the appellants. The trial court evidently took the view that under the California cases to which we have referred that is all they are entitled to by the terms of their agreement.

In the absence of an assertion in the claim as filed, or elsewhere in these proceedings, that the stock as delivered to the appellants at the end of the life term was impaired in its intact value we are not prepared to say that error was committed in sustaining the contest to the claim. In this connection we have in mind, not as the sole reason for our conclusion, but as an interesting subject of consideration, the presumption mentioned in subdivision 12 of section 1963, Code of Civil Procedure, that a person is the owner of property from exercising acts of ownership over it. We think it may fairly be said that when, as here appears from the claim itself, the decedent, maintaining a personal account and a trustee's account at the same bank, deposited the proceeds of the rights which he sold in his personal account he thereby exercised an act of ownership in his own behalf as to the entire fund. No evidence was offered to controvert the presumption of his ownership arising from this act. The claim contains no statement that decedent's act was wrongful or unjustifiable toward appellants or their rights, nor is there any direct assertion therein that appellants are entitled to the fund or any part of it. It appears to be merely a recital of facts showing how decedent came into possession of the fund, how he deposited it and, no part of it having been paid to appellants, they formally claim it in its entirety, attaching to their claim a copy of the agreement between the parties.

[3, 4] No evidence being offered by either party at the hearing of the contest it became

the duty of the court, on the admission by respondent that all facts stated in the claim were true, to determine as a matter of law and on those facts the question as to whom the fund belonged. In the light of the presumption which we have mentioned and under the terms of the agreement it seems that the court was bound to find in favor of respondent. As was said in Kidder v. Stevens, 60 Cal. 414, 419: "Presumptions of law are rules of law, whether disputable or the contrary. If the disputable presumption is not contradicted or removed by evidence, it is a rule of law to be applied as inflexibly as a presumption that is indisputable or conclusive; in other words, a presumption of law that is disputable, when not changed by evidence, becomes to the Court a rule indisputable for the case, and the Court is bound to apply it." See, also, Bickerdike v. State, 144 Cal. 698, 701, 78 P. 277.

We have not overlooked the contention of appellants that after a claim is approved, the burden of proof required for setting aside the allowance rests upon the contestant. In this case, and upon the facts to which we have called attention, we believe the burden was met by this respondent, when she submitted her case on the pleadings, no oral evidence being offered by either party.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

VITIMIN MILLING CORPORATION v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 9142.

District Court of Appeal, Second District, Division 1, California.

Sept. 26, 1933.

Rehearing Denied Oct. 26, 1933.

Hearing Granted by Supreme Court Nov. 24, 1933.

Judgment ⚿197.

Where court granted one defendant's motion for directed verdict, and jury, unable to agree concerning issues submitted, dispersed by agreement of counsel in judge's absence, court had power to enter judgment subsequently, though jury had not returned verdict directed.

YORK, J., dissenting.

Application by Vitimin Milling Corporation for a writ of prohibition to be directed to the Superior Court of the state of California in and for the County of Los Angeles, Hon. William J. Palmer, as judge thereof.

Peremptory writ granted.

Fitzpatrick & Dickey, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Fred M. Cross, Deputy Co. Counsel, and Mathes & Sheppard, all of Los Angeles, for respondents.

CONREY, Presiding Justice.

On the 12th day of January, 1933, and on consecutive days to and including January 18, 1933, the action of Schumacher v. Allison et al. was heard by the superior court of Los Angeles county, sitting with a jury. On January 18th, when both sides had rested, a motion for a directed verdict was made on behalf of defendant Vitimin Milling Corporation, petitioner herein, which said motion was granted. At approximately the same time a motion for a directed verdict made on behalf of defendants E. M. Allison and Fidelity & Deposit Company was denied. The jury, having failed to agree, was dismissed by consent of counsel, whereupon the following minute order was made by the clerk:

"Motion of defendant Vitimin Milling Corporation, a corporation, for an instructed verdict is granted. * * *

"It appearing to all counsel that the jury was unable to reach a verdict the jurors are discharged from the case and a mistrial is ordered." At the time of these last-mentioned proceedings the trial judge was at his home, and there was no judge present in court.

On January 20, 1933, a purported order granting motion for a directed verdict as to Vitimin Milling Corporation, petitioner here, was signed and filed; however, no verdict was ever returned at any time by any jury in accordance with the said order granting a directed verdict, or at all. On May 4, 1933, Judge Baird signed a judgment, based upon the order granting the motion for instructed verdict, which judgment was thereafter entered. On May 10, 1933, Judge Baird signed a nunc pro tunc order purporting to correct the above-quoted minute entry of January 18th by adding thereto the words "as to all defendants except Vitimin Milling Corporation, a corporation." On May 3, 1933, the case again went to trial before William J. Palmer, judge of said superior court, apparently without a jury, whereupon counsel for petitioner objected to the introduction of further testimony on the ground that the principle of res judicata barred any further proceedings in the matter, which objection was overruled on the ground, as stated by the judge, that the clerk's minute order of January 18, 1933, indicated that a mistrial was had as to all defendants. It was then ar-

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 33 P.2d 1016.

gued by counsel for petitioner that if such was the case, the minute order was erroneously prepared for the reason that upon granting the motion for a directed verdict for said Vitimin Milling Corporation, the action in so far as it affected said corporation having been taken out of the hands of the jurors by Judge Baird, the minute order should have shown a mistrial as to defendants Allison and the Fidelity & Deposit Company of Maryland, the other defendants, and not the Vitimin Milling Corporation. Thereafter, on May 4, 1933, the trial judge of the first trial signed a judgment in favor of the Vitimin Milling Corporation, which judgment thereupon was filed. Upon that day when trial was resumed in Judge Palmer's court, counsel for petitioner again objected to the introduction of further evidence, on the ground that the principle of res judicata barred any further proceedings in the matter, after which authorities were presented for the consideration of Judge Palmer in favor of said motion. Thereupon, counsel for plaintiff Schumacher moved the court to set aside the judgment and that the same be stricken from the record, on the ground that it was void upon the face of the record and filed without any trial having been had on the merits in so far as it affected Vitimin Milling Corporation. The motion to set aside said judgment and strike the same from the file was granted, and the objection to the introduction of any further evidence was overruled. Upon stipulation, the case was continued to May 22, 1933.

Petitioner now seeks a writ prohibiting the superior court of Los Angeles county from taking any further steps or proceedings in connection with, or based upon, the allegations or prayer of the complaint of J. J. Schumacher in so far as it affects said petitioner.

It is obvious that by operation of law, if not by any valid order of court, there was a mistrial as to the defendants other than Vitimin Milling Corporation. The question is whether or not, by virtue of the described proceedings, the case of the plaintiff against said last-named corporation had been completely determined without actual return of verdict by the jury.

In the ordinary case where disputed facts are in issue, and where the evidence is conflicting, the right of decision upon those issues of fact rests with the jury, but that is the limit of their power. "The jury can decide facts alone. They are bound by the directions of the court as to the law and must follow those directions. A verdict is directed by the court because the evidence is such that the court can say, as a matter of law, that no other verdict is reasonably possible. The direction to render a verdict in favor of one party is the decision by the courts upon a question of law. Such decisions are within the exclusive province of the court. In giving a verdict upon such an order the jurors do not exercise discretion, but act ministerially as the instrument by which the court prepares the record which will support the only judgment that can lawfully be given. They are no more at liberty to refuse obedience than is the clerk when he is directed to do the ministerial act of entering an order or judgment of the court. The verdict so signed by one of the jurors who is appointed as foreman by the court and who signs in obedience to the order, though in form the act of the jury, is really and in law the act of the court." Estate of Sharon, 179 Cal. 447, 460, 177 P. 283. In Moffitt v. Ford Motor Co., 212 Cal. 73, 297 P. 553, 554, the Supreme Court had under consideration the meaning and effect of the phrase "tried by jury," as used in section 963, subdivision 2, of the Code of Civil Procedure. The court said: "For the purposes of the problem before us, the same effect must be given a judgment of nonsuit as a judgment entered upon a directed verdict. A judgment upon a directed verdict, no less than a judgment of nonsuit, is the decision of the court rather than of the jury. Estate of Sharon, 179 Cal. 447, 177 P. 283; Gaskill v. Pacific Electric Ry. Co., 30 Cal. App. 593, 159 P. 200; Umsted v. Scofield Engineering Const. Co., 203 Cal. 224, 263 P. 799; Engelberg v. Sebastiani, 207 Cal. 727, 279 P. 795. In interpreting the meaning of section 963 no reasons exist for distinguishing the cases disposed of by the court through the procedure of a directed verdict from those determined by nonsuit."

In the case at bar if the court had granted a nonsuit there is no doubt that under the provisions of section 581, Code of Civil Procedure, entry upon the minutes of the order granting the motion for nonsuit would have had the full force and effect of a judgment. And if pursuant to the order granting motion for directed verdict, a verdict in favor of said Vitimin Milling Corporation had been signed by the foreman and received by the court, entry of judgment by the clerk would have followed as of course, notwithstanding that the case remained open for trial as against the other defendants. In determining a question such as that now before us, substance should prevail over form. The granting by the court of the motion for directed verdict completed the judicial process of the court upon the merits of the case. The ensuing act required of the jury was not in its nature different from the ministerial act of the clerk in entering judgment upon a duly received return of verdict of a jury.

We conclude that, notwithstanding the dispersal of the jury which had occurred in the manner hereinbefore described, the court was not without power to enter the judgment which it subsequently entered pursuant to the order which had been made granting the motion for directed verdict. If there was any error in entering the judgment in that manner it was an error of form only, not affecting the jurisdiction of the court. In view of these principles and their application to the facts of this case, we think that the trial court is now without jurisdiction to proceed with another trial of said action as against petitioner Vitimin Milling Corporation.

Let the peremptory writ issue.

I concur: HOUSER, J.

I dissent: YORK, J.

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134 Cal.App. 453

CHASE et al. v. SKEPNER et al.
(SHAPIRO, Intervener).
Civ. 8586.

District Court of Appeal, Second District,
Division 2, California.
Sept. 29, 1933.

1. Eminent domain 🔑155.

Lessor could not recover condemnation award to lessee for leasehold deposited with clerk of court pursuant to interlocutory decree which had become final on ground that lessee had abandoned leased premises, where it was not alleged that award was excessive or that it had been modified or set aside.

2. Eminent domain 🔑155.

Trial court properly released award to lessee for condemnation of property, held by clerk of court, after suit by lessor to declare trust on award was dismissed.

3. Eminent domain 🔑247(4).

Interest *held* not recoverable on disputed award for condemnation of property, deposited with clerk of court for time deposited.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Ralph A. Chase and another against George Skepner and another, in which Chaim Shapiro intervened. From a judgment entered pursuant to an order sustaining a demurrer to the complaint, plaintiffs appeal.

Modified and affirmed.

Harley E. Riggins and Raoul Francoeur, both of Los Angeles, for appellants.

George Skepner and H. Y. Romayne and Aaron Shapiro, both of Los Angeles, for respondents.

CRAIG, Justice.

In a suit to declare a trust as to certain moneys held pursuant to an order of court after condemnation and to restrain their payment as theretofore directed, a demurrer to the amended complaint was sustained without leave to amend; the respondent municipality having filed its answer therein. The plaintiffs appealed from the judgment entered pursuant to said order. The recent decision of Orton v. Daigler (Cal. App.) 23 P.(2d) 831, has determined the issues here presented adversely to the appellants.

[1] The respondent Skepner was a lessee in possession from December, 1926, to May, 1930, of certain real property of the appellants, on which latter date the board of trade took possession under assignment from him of all his business and assets. Following appropriate proceedings in a condemnation suit, an interlocutory decree was entered in September, 1927, by which the value of said property was adjudged, a portion of the amount was awarded to said lessee, and the balance to his lessors, appellants herein. The latter were at no time deprived of their property, but continued to receive the rentals therefor from the respondent and his successors, during and after its occupancy by him. The appellants alleged that said lessee abandoned with their consent all his right, title, and interest in the leased premises in May, 1930, and upon this they predicate their claim to the award to the respondent for his leasehold. But it is not alleged nor contended that such award was excessive, or that it was modified or set aside. The complaint does contain the allegation that said interlocutory decree was entered on or about September 27, 1927, "and that there has been no appeal from said interlocutory judgment; and that the time for appeal has expired." Hence it cannot be conceded upon any authority cited or known to us that the award held by the clerk pending a determination of the issues herein came to his hands through a violation of any rule of equity, or through accident, fraud, or mistake. Hidden v. Jordan, 21 Cal. 93; First National Bank v. Wakefield, 148 Cal. 558, 83 P. 1076. It is not shown how the appellants may by such a proceeding test the validity of a judgment from which there is no longer a right of appeal.

[2, 3] Complaint is made of release by the trial court of the moneys so held. It is contended that they were released to the defendant Skepner, upon a motion of his assignee. From what has been said it is apparent that upon dismissal of the action no alternative than to release said award remained. Such being the case, the appellants must be held to have had no interest therein. The same was directed to be paid to the respondent with interest during the period of

its custody by the clerk, which it is contended was erroneous and without foundation. "It has very generally been held that where a fund in litigation or the amount of a disputed claim is deposited in court, or subject to its order, interest is not recoverable thereon during the time it remains so deposited." 33 C. J., p. 245, § 154.

The judgment is affirmed, but it is ordered that the portion thereof which directs that the appellants pay interest upon said award be stricken therefrom.

We concur: WORKS, P. J.; STEPHENS, J.

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134 Cal.App. 467

BYBEE v. RICHARDS, County Auditor.

Civ. 5012.

District Court of Appeal, Third District, California.

Sept. 29, 1933.

1. Counties ⚷61.

Amendment to charter of Butte county providing that welfare officer should be ex officio probation officer *held* void, where welfare office was never created with which to combine probation office (St. 1923, pp. 1554, 1558, art. 3, § 6).

2. Officers ⚷100(2).

Salary of probation officer of Butte county could not be reduced during his term of office under charter providing that compensation of elective or appointive county officer shall not be increased or decreased during term for which he was elected (St. 1923, pp. 1554, 1558, art. 3, § 6; Gen. Laws 1931, Act 3966, § 18).

3. Mandamus ⚷102(2).

Probation officer *held* entitled to mandamus compelling auditor to draw warrant for salary, where attempted abolishing or combining of probation office with welfare office was void (St. 1923, pp. 1554, 1558, art. 3, § 6; Gen. Laws 1931, Act 3966, § 18).

Application for mandamus by Eugene S. Bybee against Lucy A. Richards, as Auditor of Butte County.

Writ granted.

Coyle E. Bybee and J. Oscar Goldstein, both of Chico, for petitioner.

Bond & Price, of Chico, and George F. Jones, of Oroville, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a petition for a writ of mandamus to compel the auditor of Butte county to draw a warrant in payment of the salary allowed by law for the services of the probation officer of that county for the month of August, 1933.

The petitioner, Bybee, was duly appointed probation officer of Butte county by the judge of that county pursuant to the provisions of the Juvenile Court Act of the state of California, November 23, 1932. St. 1915, p. 1225 and amendments thereto, 2 Deering's Gen. Laws of 1931, pp. 2074, 2093, § 18, Act 3966. This act contains the proviso that "in counties having charters providing a method of appointment and tenure of office for probation officers, * * * such charter provision shall control." The petitioner qualified as such probation officer, and has performed the duties of that office since the time of his appointment. His salary was fixed by an amendment to the freeholder's charter of Butte county in 1923 at $1,500 a year. St. 1923, pp. 1554, 1558, art. 3, § 6. Article 4, section 1, of the Butte county charter, specifically includes in the designation of county officers that of "a probation officer." Neither the office of probation officer nor the method of providing by law for his appointment has ever been modified or changed by the charter of Butte county or otherwise. The petitioner demanded of the respondent, as auditor of Butte county, a warrant to compensate him for his services for the month of August, 1933, which was refused. This petition for a writ of mandate was then filed.

The respondent contends that the office of probation officer was abolished or at least combined with that of welfare officer which was created by an amendment to the Butte county charter which was adopted in June, 1933.

The respondent is in error regarding the effect of the amendments to the charter of Butte county which were adopted in 1933. The office of welfare officer was not thereby or otherwise created, nor does any amendment to the charter combine the office of probation officer with that of welfare officer. The only amendments to the charter with relation thereto are as follows: The amendment to article 3, § 3, provides in part: "The board of supervisors shall fix the salaries and wages of all employees of the county not otherwise fixed by this charter, * * * (1) The welfare and exofficio probation officer shall be allowed the sum of $1,200 per annum for an assistant's salary." Article 4, § 2, provides in part: "The following offices are hereby consolidated: * * * (e) The welfare officer shall be exofficio probation officer." Article 12, § 2, provides: "The compensation of any elective and appointive county or township officer shall not be increased or decreased during the term for which he was elected or appointed."

The only attempt to create the office of welfare officer, or combine that office with that of probation officer, was designated article 4-a. This proposed amendment to the charter which was submitted to the voters as "Proposition No. 9" was defeated. Subdivision (1) of article 3, section 3, which provides that: "The welfare and exofficio probation officer shall be allowed the sum of $1,200 per annum for an assistant's salary," is ineffectual and void for the reason that the proposition to combine these offices was defeated, and therefore no such combination of offices exists. Moreover, it clearly appears that the salary of $1,200 which was allowed in the section last above quoted is in compensation of neither a purported welfare officer nor that of the probation officer, but, upon the contrary, is for "an assistant's salary." It is not contended Butte county has an assistant to the "welfare and exofficio probation officer," or that the probation officer of that county has an assistant. The petitioner in this proceeding is the principal occupying the office of probation officer. The salary of neither an assistant to the alleged combination of offices nor an assistant to the probation officer is involved in the matter.

[1] The amendment to article 4, section 2, of the charter, which was adopted in 1933, to the effect that "The following offices are hereby consolidated: * * * (e) The welfare officer shall be exofficio probation officer," is ineffectual and void for the reason that no such office as "welfare officer" was created or exists in Butte county with which to combine the office of probation officer.

[2] Moreover, any attempt to reduce the salary of the probation officer of Butte county, during his term of office, is in direct violation of article 12, section 2, of the charter, which has been in effect ever since the amendment to the charter in 1923. That section provides: "The compensation of any elective or appointive county or township officer, shall not be increased or decreased during the term for which he was elected." This inhibition clearly applies to appointive as well as elective officers. By the provisions of article 4, section 1, of the charter, the probation officer is made a county officer. Section 5 of the last-mentioned article fixes his term at four years beginning with the first Monday after the 1st day of January succeeding his appointment.

[3] It follows that the petitioner, as the duly appointed and acting probation officer of Butte county, is entitled to compensation for his services for the month of August, 1933, in the sum of $125.

It is ordered that a writ of mandate issue directing the respondent, as auditor of Butte county, to draw a warrant in favor of petitioner for the sum of $125 as compensation for his services as probation officer for the month of August, 1933.

We concur: PULLEN, P. J.; PLUMMER, J.

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134 Cal.App. 398

INGA v. BLUM.

Civ. 1056.

District Court of Appeal, Fourth District, California.

Sept. 28, 1933.

Rehearing Denied Oct. 27, 1933.
Hearing Denied by Supreme Court Nov. 27, 1933.

1. Justices of the peace 🔑40.

Action for balance due for merchandise sold *held* properly brought in justice's court of township wherein merchandise was ordered and delivered, rather than county of plaintiff's domicile or that of defendant's residence; obligation being incurred in such township (Code Civ. Proc. § 832, subd. 7).

2. Courts 🔑11.

Court's jurisdiction of parties to action is as necessary as jurisdiction of subject-matter.

3. Justices of the peace 🔑81(1).

Summons in action, brought in justice's court of township wherein contractual obligation on which based, was incurred, may be served in another county wherein defendant is found after leaving such township (Code Civ. Proc. § 848, subd. 4).

4. Appeal and error 🔑1071(1).

When trial court's findings of material facts are at variance and irreconcilable, judgment must be reversed as not supported by facts found.

5. Appeal and error 🔑1071(1).

Superior court's findings in claim and delivery for truck, taken by defendant constable under execution from justice's court of township in another county, that allegations of complaint and amended answer were untrue, being inconsistent and irreconcilable as to disputed fact of service of summons on plaintiff as defendant in justice's court action, judgment for plaintiff must be reversed.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Jose I. Inga against Caspar F.

Blum. Judgment for plaintiff, and defendant appeals.

Reversed.

See, also, (Cal. App.) 22 P.(2d) 34.

Drumm, Tucker, Martell & Drumm, of Santa Ana, for appellant.

A. L. Hubbell, of Escondido, for respondent.

JENNINGS, Justice.

Plaintiff instituted this action in claim and delivery to recover from defendant the possession of a certain automobile truck or the value of said truck and damages for its detention in case delivery could not be had. The defendant filed an amended answer in which it was alleged that defendant was the regularly elected and duly qualified constable of Escondido township in the county of San Diego; that an action was brought against plaintiff in the justice's court of Temescal township, Riverside county, for the recovery of a sum less than $300; that a judgment was rendered against the defendant in said action by the justice of the peace for the sum of $178.10 and costs; that the defendant in said action, plaintiff herein, was a resident of the county of Riverside at the time when the obligation therein sued on was incurred and thereafter departed from Riverside county. The amended answer further contained denials that the truck was of the value alleged in the complaint and that the value of its use was as therein alleged and that the detention of the truck was wrongful. Further allegations contained in the pleadings show that possession of the truck was taken by defendant by virtue of a writ of execution issued by the justice's court of Temescal township in Riverside county, in the aforesaid action. Trial of the present action resulted in the rendition of a judgment in plaintiff's favor for the value of the truck, which the court found was $50, and for the value of its use, which the court found was $25 per month. From the judgment thus rendered defendant appeals.

The chief problem presented to the trial court related to the jurisdiction of the justice's court of Temescal township over the subject-matter and person of respondent in the action brought against respondent in said court. The court found that the execution under which appellant sought to justify the seizure of the truck was issued on a judgment of the aforesaid justice's court in Riverside county in the above-mentioned suit brought against respondent in said justice's court; that the cause of action therein was for a debt contracted in Orange county and at the time the action was commenced respondent was a resident of San Diego county and that respondent had made no agreement in writing to pay the obligation; and that the justice's court in Riverside county had no jurisdiction over the action and its judgment rendered in said action was therefore null and void.

[1] The court's finding that the cause of action in the suit brought against respondent in the justice's court in Riverside county was for a debt contracted in Orange county is not supported by the evidence. It was shown that respondent resided at Prado, in Riverside county, in the years 1924, 1925, and 1926; that he operated a store at Prado during the months of July, August, September, October, November, and December in the year 1924; that during the aforesaid months at Prado he ordered merchandise from salesmen of Booth & Co., a wholesale grocery establishment at Santa Ana, Orange county; that the merchandise thus ordered by him was delivered at the store in Prado; that the action in the justice's court in Riverside county in which respondent was the defendant was for the balance claimed to be due for the merchandise bought from Booth & Co.

The above-mentioned facts indicate that the action for the recovery of the purchase price of the merchandise was properly brought in the justice's court in Riverside county and that the said justice's court had jurisdiction of the subject-matter of the suit, in accordance with the provisions of subdivision 7 of section 832 of the Code of Civil Procedure, as this section read when the action was instituted. This section then provided as follows:

"Actions in justices' courts must be commenced, and, subject to the right to change the place of trial, as in this chapter provided, must be tried: * * *

"7. *When a person has contracted to perform an obligation* at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred is deemed to be the township or city in which it is to be performed, unless there is a special contract in writing to the contrary."

The evidence which was submitted to the court showed that when the justice court action was instituted respondent was a resident of San Diego county and that the obligation was incurred in Temescal township, Riverside county. The record shows that no evidence of a written contract for purchase of the merchandise was presented. Since the obligation was incurred in Temescal township this township is deemed to be the township in which the obligation was to be performed and the action was properly brought in the justice's court of Temescal township, which had jurisdiction of the action. Roberts v. Superior Court, 30 Cal. App. 714, 159 P. 465.

[2, 3] As to whether the justice's court acquired jurisdiction of the person of respondent, the evidence was conflicting. Respond-

ent testified that process in the action was never served upon him. Appellant, on the other hand, testified that he made service of process upon respondent. Furthermore, the original summons, having attached thereto an affidavit of service of process on respondent, was admitted in evidence.

The trial court made no specific finding with respect to the fact of service of process in the justice court action. The court did, however, make the following finding: "That the allegations of the plaintiff's complaint, except allegations of value, and the allegations of defendant's amended answer are untrue." Among the allegations of the complaint which is not an allegation of value is the following: "That the complaint and summons in said action [the action instituted in the justice's court of Temescal township] were never served on this plaintiff and this plaintiff made no appearance in said action * * * that the summons and complaint in said action was served on one Jose Inga, a cousin of this plaintiff." The court's blanket finding that the allegations of the complaint are untrue covers the above-quoted allegation and indicates that the court found that service of process in the justice court action had been made upon respondent. However, among the allegations of the amended answer we find the following: "That the summons duly filed in said action [the justice court action] shows due and legal service thereof on the defendant, Jose I. Inga, and is among the files in said action." There is also a general denial of each and every allegation contained in paragraph III of the complaint. Paragraph III of the complaint contains the hereinabove quoted allegations to the effect that summons and complaint in the action brought in the justice's court of Temescal township were never served upon respondent but were served on Jose Inga, a cousin of respondent. The effect of the court's blanket finding that the allegations of the amended answer are untrue amounts, therefore, to a finding that process in the justice court action was never served upon respondent. It thus appears that with respect to the fact of service of process in the action filed in the justice's court of Temescal township, the trial court has made inconsistent and conflicting findings.

It is obvious that the trial court should have made a definite finding with respect to the fact of service of process. Jurisdiction by a court of the parties to an action is as necessary as jurisdiction of the subject-matter of the action. 7 Cal. Juris. p. 597. It may be urged that the fact of service of process in the action in the justice's court is immaterial for the reason that in said action service of process outside the county wherein the justice's court was located was not permitted. Such a contention may not be sustained. Subdivision 4 of section 848 of the Code of Civil Procedure, as this section read when, according to appellant's evidence, the process was served on respondent, specifically permitted service of summons in all cases brought in justices' courts "where the defendant was a resident of the county when the action was brought, *or when the obligation was incurred* [italics ours], and thereafter departs therefrom, in which event he may be served wherever he may be found." The uncontradicted evidence showed and respondent's counsel stipulated that respondent lived at Prado, Riverside county, through the years 1924, 1925, and 1926, and that he thereafter departed therefrom. The evidence further showed that respondent ordered the merchandise at Prado during the year 1924. There can be no doubt that the obligation which formed the basis for the action instituted in the justice's court of Temescal township was incurred in Riverside county. Service of summons in the action was therefore specifically permitted by the aforesaid provisions of section 848 of the Code of Civil Procedure. Roberts v. Superior Court, supra.

[4] It is the rule that when findings of material facts are at variance and irreconcilable there is no showing that the facts found support the judgment rendered and a reversal of the judgment is required. Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11; Estep v. Armstrong, 91 Cal. 659, 27 P. 1091; Los Angeles, etc., Land Co. v. Marr, 187 Cal. 126, 200 P. 1051; Hollywood Cleaning & Pressing Company v. Hollywood Laundry Service, Inc. (Cal. Sup.) 17 P.(2d) 712; Clavey v. Loney, 80 Cal. App. 20, 251 P. 232; Meyer v. White, 54 Cal. App. 293, 201 P. 801.

[5] We have heretofore pointed out that the court's findings with respect to the fact of service of process in the action instituted in the justice's court of Temescal township upon respondent are inconsistent and irreconcilable and that the fact of such service upon which the evidence was conflicting was a fact which was material to the trial.

It follows, therefore, that the judgment from which this appeal has been taken must be, and the same is hereby, reversed.

We concur: BARNARD, P. J.; MARKS, J.

134 Cal.App. 381

PEOPLE v. BARNETT.

Cr. 2414.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1933.

1. Criminal law ⚷1129(3).

Assignments that court erred in rulings and statements as shown on specified pages in transcript, without pointing out particular errors relied on and law invoked, *held* insufficient.

2. Burglary ⚷41(6).

Evidence sustained conviction of burglary as against claim that defendant was not sufficiently identified.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Ray Barnett was convicted of burglary, and he appeals.

Affirmed.

John Hyland, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendant was charged in an information filed by the district attorney with the crime of burglary. From a judgment of conviction entered upon the verdict of the jury finding him guilty of burglary in the second degree, and from the order denying his motion for a new trial, he has appealed.

Appellant urges: (1) That the evidence of his identification is insufficient to warrant the verdict, and (2) that "the court erred in many rulings against defendant, as shown on pages 25, 26, 34, 35, 36, 37, 39, 40, 42, 44, 47, 48, 51 and 52, and further by statements made by the court, in the presence of the jury, and admitting testimony, pages 56 and 57, against defendant, and all rulings as shown by pages 61 and 62."

[1] (2) Under this contention we have printed verbatim all that appellant's brief says on the various subjects, except that under the heading "Argument" we find the following: "also all the rulings and conduct and statements by the court were prejudicial to defendant." "We are not called upon, under such circumstances, to assume the burden of searching the record to determine whether there has been a miscarriage of justice. * * * Where counsel will not take the time to point out the particular errors upon which he relies and the law which he invokes, we will not." People v. Schlosser, 99 Cal. App. 593, 278 P. 898.

[2] (1) The witness H. C. Seller testified that as he was leaving the apartment house in which he resided, at about 1 o'clock a. m., his attention was attracted by the breaking of glass; that he turned to look and saw a man about three feet from the door of the cleaning establishment across the street, "with his arm loaded with suits," going away from it; that the man "turned around the corner," and the witness followed him on the opposite side of the street and saw him throw the suits away; that the man had on a medium light suit with a hat which very well matched, and was "walking as one when they had about two drinks too many"; that he had a good look at the man's face and that he was in sight of him at all times until he was captured, except for two or three minutes when he went into his apartment house to telephone the police; that when the police came he directed them toward where the man was when he last saw him. The witness identified the man positively as the man whom he saw about an hour before at the door of the store fumbling at the lock, but testified that he thought nothing of it at the time.

There was sufficient evidence from which the jury could find that appellant was the man who entered the store. The credibility of the witness testifying was passed upon by the jury and again by the trial judge, who observed him while on the stand, and we cannot say they were wrong in their conclusion.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

McNEIL v. EAST BAY STREET RAILWAYS, Limited, et al.*

Civ. 8817, 8818.

District Court of Appeal, First District, Division 2, California.

Sept. 28, 1933.

Rehearing Denied Oct. 28, 1933.

Hearing Granted by Supreme Court Nov. 27, 1933.

1. Railroads ⚷288.

Railroad fireman exercising due care had right to assume that street car motorman would not attempt to cross track ahead of oncoming train.

2. Railroads ⚷297(6).

In action for injuries to passenger in street car which collided with train, evidence of railroad's negligence *held* insufficient for jury.

3. Carriers ⚷280(3).

Motorman owed passenger utmost care.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 32 P.2d 598.

4. Carriers ⚷320(21).

In action by street car passenger against street car company for injuries sustained in crossing collision between train and street car, evidence of street railroad's negligence *held* for jury.

5. Appeal and error ⚷837(2).

In determining whether verdict was excessive, reviewing court should consider rulings in similar cases involving equally serious injuries, and also earning power of money and its increased purchasing power.

6. Damages ⚷132(3).

$35,761 for injuries, including broken back, causing much pain and suffering, *held* not excessive.

> Plaintiff was compelled to lie on his back in hospital from 8 to 10 weeks, with a cast extending from the nipple line to the knee on the left side and to the groin on the right side; the bones did not knit, so that, when the cast was removed, it was replaced by a steel spinal brace, without which plaintiff could not walk; the break of the vertebra lighted up a chronic arthritic condition which had been dormant and painless, and attendant consequences included a sacroiliac slip, inflammation of the sciatic nerve, and an enlargement of one leg; plaintiff testified that he suffered excruciating pain and insomnia, and that he was becoming neurotic; and special damages in the sum of $4,000 were proved.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by John D. McNeil against the East Bay Street Railways, Limited, and others. Judgment for plaintiff, and defendants the Western Pacific Railroad Company and others and defendant the Key System Transit Company bring separate appeals.

Reversed as to the Western Pacific Railroad Company and others, and affirmed as to the Key System Transit Company.

C. W. Dooling, of San Francisco, and Brown, Ledwich & Rosson, of Oakland, for appellants Western Pacific R. R. Co., H. L. Davis, and A. W. Fuller.

Brobeck, Phleger & Harrison, of San Francisco, and Chapman, Trefethen, Richards & Chapman, of Oakland, for appellant Key System Transit Co.

Myron Harris, Leo A. Sullivan, William H. Older, and John Jewett Earle, all of Oakland, for respondent.

STURTEVANT, Justice.

While riding as a passenger on a street car operated by the defendant Key System Transit Company, hereinafter called "Transit Company," the plaintiff was injured when the car was struck by the engine of the train operated by the Western Pacific Railroad Company, hereinafter called "Railroad Company." He sued for damages. He named as defendants both companies and their trainmen who were in charge. The jury returned a verdict in the sum of $35,761 and costs in the sum of $651.68. The defendants have appealed, and have brought up one transcript but two sets of briefs.

Appeal by Western Pacific Railroad Company and Its Agents.

The accident occurred at the intersection of Twenty-Third avenue and East Twelfth street, which intersect each other at approximately right angles, in the city of Oakland, at about 7:25 or 7:30 a. m. (daylight) on May 12, 1930. Twenty-Third avenue runs in a general northerly and southerly direction and East Twelfth street in a general easterly and westerly direction. The Transit Company operated its street cars from Oakland to Alameda and vice versa, on a set of double tracks on Twenty-Third avenue which crossed East Twelfth street. The easterly set of said street car tracks was used for Oakland, or north-bound traffic, and the westerly set for Alameda, or south-bound traffic. Twenty-Third avenue was approximately 38 feet wide from curb to curb. These street car tracks were laid approximately in the center of Twenty-Third avenue, were each of standard gauge width, namely 4 feet 7 inches, were 6 feet 3 inches apart, and the most easterly rail of the easterly set of tracks was approximately 12 feet westerly of the easterly curb of Twenty-Third avenue and approximately 21½ feet westerly of the easterly property line of Twenty-Third avenue.

Defendant Railroad Company operated both freight and passenger trains, with steam as the motive power, in an easterly and westerly direction on a single set of standard gauge railroad tracks on East Twelfth street; said railroad tracks being a part of its main line of railroad from Oakland to Salt Lake City. The railroad tracks were not laid in the center of East Twelfth street, but to the south thereof; the southerly rail thereof being 16.60 feet north of the southerly curb of East Twelfth street, and the northerly rail being 30.65 feet south of the northerly curb of East Twelfth street.

The street car involved in the collision out of which this case grows was north-bound on Twenty-Third avenue, proceeding on the easterly set of tracks from Alameda toward Oakland, and was operated by defendant C. R. Jones, an extra man, who was acting as motorman and conductor. He was discharged immediately after the accident. The train was a regular passenger train from Salt Lake City, west-bound on East Twelfth street to the Oakland Mole, and consisted of an engine, tender, and ten cars.

At the time of the accident, and for some months prior thereto, there was in operation at the intersection of Twenty-Third avenue and East Twelfth street a system of traffic signals installed by the city of Oakland to control vehicular and pedestrian traffic in all directions at the intersection. These traffic signals were lights operated in conjunction with bells, there being such a signal located at each of the four corners of the intersection. The signal on the north side of East Twelfth street immediately west of the property line of Twenty-Third avenue showed its signal to west-bound traffic on East Twelfth street (the direction in which the train was proceeding). The signal on the northeast corner showed its signal for north-bound traffic on Twenty-Third avenue (the direction in which the street car was proceeding). Each traffic lantern had a red, amber, and green light in it, the red signaling for traffic to stop, the amber that pedestrians might proceed, and the green that all traffic might proceed. The traffic lights were synchronized to the extent that, while the amber and green were showing at the northeast corner for north-bound traffic on Twenty-Third avenue, a red light would be showing for east and west bound traffic on East Twelfth street and vice versa. The green light for traffic on Twenty-Third avenue showed for twelve seconds, during which time, and for four additional seconds, while the amber preceding this green was showing, a red light would show for traffic on East Twelfth street, making a total showing of the red light for traffic on East Twelfth street of sixteen seconds in all, provided no train passed over the contact point (hereinafter described) during said sixteen seconds. The normal period for the red signal for traffic on Twenty-Third avenue was twenty-nine and a half seconds, during which time the amber showed three and one-half seconds for traffic on East Twelfth street and the green twenty-six seconds for traffic on East Twelfth street.

After the traffic signals were installed, an additional device, operated by trains on said railroad track, was added thereto, so that, when the pony, or front wheels of an engine of a west-bound train reached a point on said railroad tracks two hundred and twenty feet east of the most easterly rail of the street car tracks, the train was given control over all traffic signals at the intersection. At this point, two hundred and twenty feet distant as aforesaid, there was installed on the railroad tracks a contact point, or insulated joint, frequently referred to in the testimony as a "tripper," which operated on these traffic signals, so that, when the pony wheels of the engine passed over the railroad tracks at this point, this contact caused the traffic signals at the intersection to instantly show a green light, or proceed signal, to the engineer on the train and for all east and west bound traffic on East Twelfth street, and at the same time caused the traffic signals for Twenty-Third avenue traffic to instantly show a red light, or stop signal, for all traffic on Twenty-Third avenue, regardless of what the signals were prior thereto, and also caused all bells in the light signals to start ringing. The only delay that could occur would be by the operation of the insulated joint, which took only a fraction of a second to operate. Under the signal system, the light remained green for the train and red for Twenty-Third avenue traffic, and all bells in the traffic signals rang until the rear wheels of the last car of the train crossed the intersection. In other words, in addition to any other warning given by the train to north and south bound traffic on Twenty-Third avenue, when the pony wheels of the engine reached this insulated joint, the traffic signals turned red for Twenty-Third avenue traffic and the bells therein began to ring. The obvious purpose of this signaling system was to give the train the right of way over all traffic at the intersection, and to give warning of its approach.

Prior to the installation and location of this contact point, a field inspection was made by the engineers of the Railroad Commission, the electrical and police departments of the city of Oakland, and the Western Pacific Railroad Company, and its location fixed after such field inspection. After its installation, another field inspection was made to see how the signals operated, and the location and installation of the contact point, and its control over the traffic signals at Twenty-Third avenue was approved by the Railroad Commission and the city of Oakland several months prior to this accident.

The aforesaid distance of 220 feet was fixed so that a train could stop, if necessary, between the contact point and Twenty-Third avenue, and it was decided that this was a safe distance for traffic on Twenty-Third avenue to clear the railroad tracks. A maximum speed of fifteen miles an hour for trains between this contact point and the street car tracks was determined upon at the time of installation.

The street car stopped south of the east curb of Twenty-Third avenue, or in the normal place for it to stop. Estimates of the witnesses of the distance that the front of the street car stopped from the nearest rail of the railroad tracks varied from about 20 feet, fixed by the fireman, to 30 to 35 feet, fixed by the motorman and other witnesses. The street car remained stopped at this place from something over half a minute to a minute. It was about a minute ahead of time, during which time the motorman waited until it was time for him to start. The signal for Twenty-Third avenue traffic was green for the street car while it was stopped, but, being about a minute ahead of time, the motorman waited until the signal again turned to green (the time from one green signal to another for him was twenty-nine and one-half seconds). He then proceeded "very slowly," and estimated his speed from the time he started until he saw the train at "something like two miles an hour."

Defendant A. W. Fuller, who was the locomotive fireman, was riding in the cab on the left side of the engine. His deposition was taken and read in evidence. He testified on his deposition that, when he was about 200 or 250 feet east of the easterly rail of the street car tracks, he first saw the street car, standing still, slightly back of the curb line on East Twelfth street—three or four feet. At that time he could see about two-thirds of the intersection from the southerly curb toward the north. At that time there was "plenty of traffic on East Twelfth street," and from that time until the time of the collision there was no north-bound or south-bound traffic on Twenty-Third avenue, either pedestrian or vehicular. After seeing the street car stopped, as aforesaid, the fireman did not continue to observe it at all times, but looked directly ahead, watching for automobile traffic, and he next saw the street car "just after it started to move." He estimated the front of the engine was then about 75 to 100 feet east of the square formed by the crossing of the railroad tracks and the street car tracks, and that the street car had then moved about 4 feet, or was about even with the southerly curb line of East Twelfth street, and was just barely in motion. He continued to observe the street car from that time until it was hit by the locomotive. He could also see the motorman, who did not look toward the fireman up to the time of the collision. His best judgment was that the street car did not average more than 3 or 4 miles per hour from the time he first saw it moving until the collision. When he noticed the street car moving out into his line of travel and that the motorman was not looking in the direction of the approaching train, he immediately called to the engineer to "plug her," and the instant he did so the emergency brakes were applied.

The fireman stated in his deposition that, when he first saw the street car moving, he waited "for a little time" before he called to the engineer to "plug her." On his deposition, he also testified that, after he noticed the street car moving, he noticed the motorman in "a matter of a second," and, as soon as he observed that the motorman was not looking, he hollered to the engineer "plug her." He estimated that, from the time he first saw the street car moving until he called "plug her," the train traveled "probably 25 feet or less." Although the fireman knew the street car was moving, he did not believe it was going to cross the track in front of the train.

On the trial the fireman estimated that the street car traveled from 4 to 6 feet during the second's time that he observed the motorman looking away from the train before he called to the engineer to "plug her"; but he also testified on the trial: "How far the car traveled is just guess work on my part." He also testified on the trial that the best he could fix the location of the front of the street car when he called to the engineer to "plug her" was that it was somewhere between the curb and a distance of from 4 to 6 feet from the railroad tracks. He stressed that it was almost impossible for him to do other than guess at distances, and in this connection gave this answer: "It is almost impossible to measure distance sitting in the cab of a locomotive going along a street that is full of traffic which is liable to come in contact with the train at any time." He also testified on the trial that from the time he observed the motorman until he called to the engineer to "plug her" was like the time that it takes for the snapping of fingers, saying in this regard: "The little time that I noticed the motorman was not looking was like that (snapping fingers). I never came to the conclusion that he was going to cross the track."

Although the engineer immediately applied the emergency brakes upon receiving the call from the fireman to "plug her," it was then impossible to stop the train before the engine reached the street car tracks; so the engine struck the street car approximately in the middle thereof, and shoved the rear end of it off its track a distance of somewhere between 25 and 35 feet.

From the time the emergency brakes were applied, the train traveled 80 or 85 feet, which was a "very good stop" for a train going twelve miles an hour.

The street car was 45½ feet long, not including the fender. The fireman estimated the time that the street car was standing still from the time he first saw it until he saw it moving as about seven seconds. The street car at no time increased its speed.

[1, 2] These defendants claim they were not negligent. We think there is no evidence that they were. It is not claimed that there was any act of negligence unless the engineer or the fireman was negligent. As to the engineer, it is clear that he was at his post of duty and duly attentive. There is not a particle of evidence that any stop signal or sign of danger was seen or could have been seen by him or that he could have seen the street car. As to the fireman, he was at his post of duty and duly attentive. It is true he saw the street car and saw its movements. Considering all of the facts as recited above, nothing shows, or tends to show, that he was negligent. He was not called upon to stop the train nor to notify the engineer until he became aware that the street car was actually going to attempt to cross the track in front of the on-coming train. When the fireman was exercising due care regarding the agency

which he was helping to operate, he had the right to assume that the motorman in charge of the street car would exercise due care and would not actually attempt to cross the track. Young v. Southern Pacific Co., 189 Cal. 746, 754, 210 P. 259; Green v. Los Angeles, etc., Ry. Co., 143 Cal. 31, 76 P. 719, 101 Am. St. Rep. 68. When, thereafter, he came to a realization that the motorman was going to make said attempt, the fireman acted promptly. But it was then too late. Be that as it may, such facts do not show negligence on the part of any one of these defendants.

By reason of our conclusions on the point just discussed it is unnecessary to discuss other points presented by these defendants.

The judgment as to these defendants is reversed.

Appeal by the Key System Transit Company.

[3, 4] This defendant contends it was not negligent. It called C. R. Jones, who was acting as motorman of the defendant's car at the time of the accident. He testified that shortly prior to the accident he had come to a stop on the south side of the steam railroad track. He was ahead of time, and paused for a short time. He was operating a one-man car, and the front door was standing open. He was seated and was looking up the track in the direction from which the train later appeared. He saw no train, and he heard no bell or whistle. When it was time to go, he waited for the corner automatic signal. When it showed green, he closed the door, started to move forward, and turned his head to the left, and continued looking in that direction because high buildings on that side narrowed the scope of his vision. With his eyes turned to the left, he continued to advance until he was on the track. He then looked to his right. The train was nearly on top of him. He advanced the spark and attempted to speed across. The uncontradicted facts are that, from the point where his car was when the motorman was looking east up the track of the Western Pacific, the track is visible for 730 feet, and that the whistle was blown just before the train came on to East Twelfth street—two blocks distant. Thereafter the automatic bell on the engine was ringing continuously. After the engine crossed "the tripper," the bells in the automatic street signals rang continuously. For the safety of the plaintiff (a passenger in his car), the motorman was bound to exercise the utmost care. We cannot say the evidence showed that he did so.

It is also claimed that the cause of the accident was the negligence of the Western Pacific Railroad Company. In view of what we have stated above, it is not necessary to dwell further on that claim.

[5, 6] Finally, it is claimed that the damages are excessive. The point is presented under three headings. It is said "that when viewed in the light of similar cases involving equally serious injuries, the earning power of money, and the tremendously increased purchasing power of money, the damages are so excessive as to necessitate the conclusion that they were the result of passion or prejudice on the part of the jury." That this court should consider the rulings in similar cases involving equally serious injuries has been held. Maede v. Oakland High School Dist., 212 Cal. 419, 425, 298 P. 987. No doubt it should also consider the earning power of money and its increased purchasing power. But, when we come to apply said rules to this case, we are stopped by the facts developed at the trial. The accident occurred May 12, 1930. The plaintiff's back was broken. He was taken to a hospital. A cast was placed on his body extending from the nipple line to the knee on the left side and to the groin on the right side. The plaintiff was compelled to lie on his back from eight to ten weeks. The bones did not knit. When the cast was removed, it was replaced by a steel spinal brace which he was wearing at the time of the trial and without which he could not walk at that time. The break of the vertebra lighted up a chronic arthritic condition which had been dormant and painless. Attendant consequences included a sacroiliac slip, inflammation of the sciatic nerve, and an enlargement on one leg. The plaintiff testified that from the date of the accident to the date of the trial he suffered excruciating pain, that he suffered insomnia, was becoming neurotic, and that since the accident he had not had anything like a good sound night's sleep. Special damages in the sum of $4,000 were proved. The trial was held nineteen months after the accident. It thus appears that the evidence before the jury was such that it was within its rights in making a most substantial award. The defendant argues that, if this verdict is not excessive, then, if it had been rendered in 1927, the amount should have been $61,000 and more. Perhaps so. On the other hand, the plaintiff may argue that, if it had been rendered in 1911, it would not have been excessive (Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513), and that it is not now. We think we are not entitled to say the verdict, under the facts as shown by the evidence, was excessive.

The judgment as to this defendant is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

134 Cal.App. 437

PEOPLE v. ENTERANTE et al.

Cr. 2429.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1933.

1. Robbery 🔑24(1).

Evidence sustained conviction of robbery (Pen. Code, § 31).

2. Robbery 🔑23(1).

In robbery prosecution, evidence showing defendant's participation in disposition of stolen property *held* admissible (Pen. Code, § 31).

3. Criminal law 🔑369(2).

That evidence otherwise admissible might tend to show commission of other offense would not render it inadmissible.

4. Criminal law 🔑507½.

Testimony of witness, at whose residence defendants lived, *held* not required to be treated by instructions as that of principal in robbery because of evidence that witness assisted defendants after robbery, where witness declined to loan defendants automobile, and learned of their purpose by overhearing their conversations (Pen. Code, § 31).

Appeal from Superior Court, Los Angeles County; Robert E. Scott, Judge.

Joe Enterante, Fred Hayes, and Earl Bucher, also known as Earl Brewer, were charged with robbery. From a judgment of conviction, Earl Bucher, also known as Earl Brewer, appeals.

Affirmed.

A. H. McConnell, of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, Justice.

By separate informations the appellant was charged with robbery, and with receiving stolen property, and, having been found guilty of the former, he appealed.

[1] Said information alleged that Joe Enterante, Fred Hayes, and Earl Bucher, willfully, unlawfully, and feloniously robbed one Mary Lewis of jewelry of the value of $5,100, in the county of Los Angeles. It is contended that the evidence fell short of that required to bring his case within the provisions of section 31 of the Penal Code. Said section reads: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed." The direct testimony of the people's witnesses revealed that three strange men entered the home of Mrs. Lewis after she had retired; that they were armed, and one was disguised; that a companion of the complaining witness was struck down, after which two entered the bedroom of the latter and pointing a revolver at her, stated, "We happen to know that you have diamonds * * * we will find the rings"; that if she made a noise they would "fill her full of lead"; and that through fear of bodily harm she revealed the whereabouts of her diamond rings, which Enterante took. Shortly before the robbery occurred, Hayes and Enterante were called on the telephone by Bucher, at their home, and they left immediately; upon their return on the same evening they had the rings in question, Bucher again telephoned, joined them at said house, received said jewelry, and removed the stones therefrom. When so doing appellant remarked, the rings "are too strong evidence; we can't help it; we will have to throw them away." On the following day appellant stated that he had borrowed $50 on one and had given Enterante $30 thereof. At the time of the robbery one of the men stated to Mrs. Lewis that they had been misinformed as to the amount and value of her jewelry, and when they were together he again accused the appellant of having given him misinformation regarding its value, and stated, "I thought they had some money, and diamonds worth some money," to which the appellant replied that he had previously inquired and had been informed that the same "was worth $4,000 or $5,000." Bucher thereafter stated that he had realized $400 on the diamonds. It appeared that the appellant had theretofore asked the Lewises as to the value of their jewelry, and had stated that they might be robbed some night; that he denied to them any knowledge of the robbery, after having discussed it with the attendant of an oil station. As previously observed, the complaining witness had not previously to the time of their nocturnal call known either of the invaders. Yet the appellant some time thereafter informed her that he might recover her diamonds for $500. It seems unnecessary to recite extensively from the evidence in order to show its sufficiency, since its weight and value became the controlling factor. "It is declared by the Penal Code that the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated, and that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, *not being*

present, have advised and encouraged its commission, are principals in any crime so committed. Sections 31 and 971." People v. Nolan, 144 Cal. 75, 77 P. 774, 775. (Italics ours.) The jury may well have drawn from all of the evidence before them a conclusion that the appellant, though not conclusively shown to have been present, made the acquaintance and ascertained the property of his intended victims, directed and paid confederates to obtain the same, and disposed thereof. If the jury believed the evidence, they were warranted in finding that the appellant used said information for the purpose of procuring the commission of the crime of robbery for the profit of himself and his companions, and that he was actively engaged in advising and encouraging its commission. People v. Nolan, supra.

[2, 3] The appellant bases additional assignments for reversal upon asserted insufficiency of the evidence to establish more than a receiving of stolen property, and contends that upon charges of robbery it was error to admit proof tending to show participation in the disposition of the stolen jewelry. Such evidence consisted of his inquiry of a Mrs. Proctor, with whom he resided, concerning a magnifying glass with which he examined the stones, and the act of removing them from said rings. It is insisted that this constituted proof of an offense other than that with which he had been charged, and was calculated to divert the minds of the jury from the real issue and to persuade them to believe that the appellant was likely to have committed robbery. As heretofore mentioned, its object was obviously to show acts and conversations from which the jury might conclude as to whether or not the appellant was a principal offender and from which they may well have concluded in the affirmative. It was not contended by the defendant during trial that he telephoned and met his codefendants for a legitimate purpose involving said jewelry, but it is insisted that he made no call and that he did not visit any of the parties named or know of the robbery. The delivery to and sale by the defendant of its fruits became a part of its consummation if designed as contended by the people. Were it true that such evidence might tend to show the commission of some other offense, this alone would not render inadmissible evidence otherwise admissible. People v. Stoerkel, 87 Cal. App. 336, 262 P. 825.

[4] From evidence of assistance rendered to the defendants by Mrs. Proctor upon their arrival after the robbery, it is contended that her testimony should have been treated as that of a principal in the robbery, and so defined by instructions to the jury. This contention is rendered untenable by positive testimony of all the defendants that she declined to loan them her automobile, and that any knowledge she may have acquired of their purposes was due to the fact that two of them resided at her house and conversed within possible hearing. The record affords no basis for an assumption that she aided in planning or committing the offense.

The refusal to give certain instructions is assigned as error upon a like contention that the appellant could have been guilty of no offense other than that of receiving stolen property. We think this point equally unwarranting further discussion for reasons stated.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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134 Cal.App. 471

PEOPLE v. PACHECO et al.

Cr. 1721.

District Court of Appeal, First District, Division 1, California.

Sept. 30, 1933.

1. Robbery ⚷=26.

Whether accused were parties to robbery *held* for jury.

2. Criminal law ⚷=1159(2).

Verdict is conclusive if based on evidence, though it would support inference of innocence.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Joe Pacheco and Gene Viola were convicted of robbery, and they appeal.

Affirmed.

Thomas T. Califro, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

PER CURIAM.

[1, 2] Appellants and others named White, Pedro, Hickey, and Jones were charged in an indictment with robbing one Hazelhofer of a sum of money, a stick pin, and a quantity of alcoholic liquor. All with the exception of Hickey were found guilty by a jury, and sentenced to imprisonment in the state prison. Pacheco and Viola have appealed from orders denying their motions for a new trial, and from the judgments.

They claim that the evidence was insufficient to support the verdicts of the jury.

The robbery was committed during the evening of October 6, 1932. The evidence tends to show that Viola lived at Pacheco's house in Oakland; that both were there at about 6:30 p. m. on said date. Shortly before that hour one Diffiore agreed to lend Pacheco a Chevrolet delivery truck. On the morning of the same day defendant White negotiated with Hazelhofer for the purchase of a quantity of alcohol, which the latter agreed to procure. During the afternoon White returned with appellant Viola, who, under the name of Marino, was represented to Hazelhofer to be a prospective purchaser of the liquor. The price was fixed, and Viola agreed to call for it at 5 o'clock p. m. At 4 o'clock White returned and stated that he was about to depart for St. Helena to procure a load of grapes. At about 7 o'clock Viola appeared with a Chevrolet truck corresponding in appearance and model with the vehicle borrowed from Diffiore. He had left Pacheco's premises at the same time with Pacheco, Pedro, Jones and Hickey. While Viola was apparently making a test of the alcohol which Hazelhofer had procured, defendants Pedro, Jones, and Hickey entered and bound both Hazelhofer and Viola. They took from the former the property above mentioned, and carried the liquor away in the Chevrolet truck. They also took Viola's watch.

While the evidence shows that Viola knew the three defendants last mentioned, he showed no sign of recognition at the time of the robbery.

Immediately after the robbery, Pedro, with White and Pacheco, returned to the latter's house and Diffiore's truck was delivered to him. On the following day, Viola, in Pacheco's presence, requested Diffiore to state if questioned that the truck was lent to him, Viola. The latter's watch and Hazelhofer's stick pin were later found in Pacheco's house.

Appellants, particularly Viola, contend that they are the innocent victims of circumstances and took no part in the crime. The evidence, however, was amply sufficient to support the conclusion that Pacheco conspired with the others to commit the robbery. As to Viola, his association with the others before, and his conduct at the time of the offense, his conversation subsequently with Diffiore, together with the fact that his watch was found in Pacheco's house, strongly tended to show that he aided and abetted the commission of the offense. The inference to be drawn from appellants' conduct were questions for the jury (People v. Donnolly, 143 Cal. 394, 77 P. 177); and if the circumstances are such as to reasonably justify the inference of guilt, their finding is conclusive upon the appellate court, even though an inference of innocence might have been drawn. People v. Page, 86 Cal. App. 148, 260 P. 591; People v. McGee, 99 Cal. App. 178, 277 P. 1060. Sufficient was shown to warrant the conviction, and the record discloses no ground for reversal.

The orders and judgments appealed from are accordingly affirmed.

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134 Cal.App. 510

GOLDEN GATE MOTOR TRANSPORT CO. v. KLATT.

Civ. 8805.

District Court of Appeal, First District, Division 2, California.

Oct. 6, 1933.

Rehearing Denied Nov. 4, 1933.

Hearing Denied by Supreme Court Dec. 4, 1933.

1. Appeal and error ⚷1010(1).

Trial court's finding, supported by evidence, cannot be disturbed on appeal.

2. Appeal and error ⚷996.

Where court, sitting as trier of facts, could have drawn, from evidence, inference either favorable to plaintiff or defendant, court's decision is binding on appeal.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by the Golden Gate Motor Transport Company against Oscar H. Klatt. Judgment for plaintiff, and defendant appeals.

Affirmed.

Donahue, Hynes & Hamlin, of Oakland, for appellant.

McCutchen, Olney, Mannon & Greene, of San Francisco, for respondent.

STURTEVANT, Justice.

[1, 2] From a judgment against him, the defendant has appealed. The action was brought to recover balances due on six promissory notes. Each document was an accommodation promissory note executed for the benefit of Sonoma Properties Company, a corporation, which became financially involved. The notes were given to American National Company, and by certain transfers at the time the action was commenced they were held by the plaintiff. To the plaintiff's complaint the defendant interposed an answer in which he set forth certain denials and certain affirmative defenses. Among the latter he pleaded a defense charging fraud; another alleged that the plaintiff was the corporate double of A. O. Stewart, one of the joint makers; and in another defense the defendant alleged that the notes had been paid. On the trial all defenses were pressed, but the trial

court found against the defendant and in favor of the plaintiff. On his appeal the defendant stands on the defense of payment. He makes two points. He asserts that an assignment of a note to a comaker or coindorser, who has paid the amount due thereon, extinguishes the note. He also asserts that the only legitimate inference from the testimony is that Stewart paid the notes and passed part of the money through the hands of the plaintiff to disguise the payment into an ostensible purchase. Neither point can be sustained. There is not a particle of evidence that the notes were ever assigned to A. O. Stewart, a comaker, or coindorser. Nor is there any direct evidence that A. O. Stewart paid the notes or any one of them. We do not understand the defendant to contend to the contrary. But it is his claim that from the undisputed facts it must be inferred that in legal effect this plaintiff was in all things the agent of Mr. Stewart and therefore the acts of this plaintiff were the acts of Mr. Stewart. But the defendant is mistaken in this contention. It was the contention of the plaintiff that Mr. Stewart paid nearly one-half of what was due on the notes —more than his share—and that he then requested the plaintiff on its own account to buy the notes and sue the defendant, and that plaintiff did so. In support of its theory, the plaintiff, out of its possession, produced the notes and supported each and every element of its theory by the sworn testimony of each and every actor to the transaction. As the trial court found for the plaintiff and against the defendant on the issue of payment, such finding may not be disturbed by a court of review. Moreover, it was for the trier of the facts to draw the inferences. If, for the purpose of this decision, it be conceded the trier of the facts could have drawn either inference, its decision is binding on appeal. 10 Cal. Jur. 741.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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134 Cal.App. 434

ORLOFF v. PECE et al.

Civ. 7923.

District Court of Appeal, Second District,
Division 2, California.

Sept. 29, 1933.

Rehearing Denied Oct. 26, 1933.

Mortgages 🔑343.

Sale, under deed executed prior to enactment of statute authorizing attorney to act as auctioneer for trustee, could be conducted by trustee through his attorney since trustee may employ agent to do ministerial act of auctioning property following mortgagor's default under trust deed, irrespective of statute (Civ. Code, § 2924a).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by Agatha Orloff against Frank Pece and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Michael Motta, of Los Angeles, for appellants.

Kiggens & Hoffman, of Los Angeles, for respondent.

CRAIG, Justice.

From a judgment in favor of the plaintiff in a suit in unlawful detainer after sale under a deed of trust, the defendants appealed.

The deed of the trustee recited that said sale was made by him "through his attorney." It is contended that such recital rendered the deed insufficient as prima facie evidence of title in the vendee, plaintiff and respondent. It is also contended that except through the authority of section 2924a of the Civil Code the sale could not be conducted by the trustee through his attorney. The appellants seek to invoke the rule announced in Central Savings Bank v. Lake, 62 Cal. App. 588, 217 P. 563, wherein a recital that by proper resolution the signers of a trustees' deed had been substituted for the original trustees was held to be insufficient. This section provides: "Where by the terms of any trust or deed of trust a power of sale is conferred upon the trustee, the attorney for such trustee may conduct the sale and act in such sale as the auctioneer for the trustee." The deed of trust introduced in evidence was made prior thereto and in 1927, but said sale was held in 1930. The appellants contend that to uphold the same would confer upon said section unwarranted retroactive effect. To decide this point we need only hold, which we do, that without regard to the section cited a trustee may employ an agent to do the ministerial act of auctioning the property. There is nothing to indicate that the attorney did more than this, and the trustee named in the deed of trust is not claimed to have done less than its provisions required, nor is it asserted that his conveyance was defective unless prior to the enactment of the quoted section he had no power to sell through another person. As far as the sufficiency of proof that Phipps, the attorney who conducted the sale, was appointed is concerned, that fact is established not only by recital in the deed of trust, but by the testimony of the trustee and his subsequent ratification by means of his execution of the deed. This evidence is amply sufficient. Stockwell v. Barnum, 7 Cal. App. 413, 94 P. 400, 402; Kennedy v. Dunn, 58 Cal. 339. The appellants do not attempt to reconcile their contention with pre-existing decisions of long standing, holding that "there is abundant authority in both this and other jurisdictions to sustain the right of a trustee in employing an auctioneer to cry a sale." Stockwell v. Barnum, supra.

Following defaults under the deed of trust an extension in writing was executed, upon condition that payments in arrears be made, and that future installments be met when due. It was admitted that certain of these obligations were not met. The extension agreement provided that respondent would do all things necessary to permit such refinancing. Evidence as to whether or not there had been conversations between the parties prior to defaults of appellants regarding possible refinancing the first mortgage was excluded on objection by the plaintiff. However, the question to which objections were sustained did not call for answers stating any facts showing that any refinancing arrangement had been made or that respondent was called upon to do anything in that regard. We think the rulings in question were not erroneous.

The judgment is affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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134 Cal.App. 550

PEOPLE v. BRANDON.

Cr. 1277.

District Court of Appeal, Third District, California.

Oct. 9, 1933.

1. Burglary ⚷41(1).

Evidence *held* sufficient to sustain conviction for burglary.

2. Criminal law ⚷520(2).

Defendant's statement to officers, after arrest, as to his manner of entering burglarized house, *held* admissible, though officers first warned him that he had better tell truth.

Appeal from Superior Court, Yolo County; Forrest A. Plant, Judge.

John Brandon was convicted of burglary, and he appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The appellant was convicted of the offense of burglary upon an information filed in the superior court on the 6th day of April, 1933, alleging that on or about the 8th day of March, 1933, in the county of Yolo, the defendant unlawfully, feloniously, and burglariously entered a certain dwelling house belonging to one T. D. Cummins, with the intent to commit larceny. From the judgment entered upon the verdict of guilty the defendant appeals.

Upon this appeal two points are urged for reversal: (1) That the evidence is insufficient to sustain the verdict; (2) that the court erred in the admission of certain testimony.

The record shows that on or about the 8th day of March, 1933, the dwelling house belonging to Mr. Cummins was entered at 8 o'clock p. m., by the defendant, with the intent to commit burglary. At about 8 o'clock in the evening a witness by the name of Lester Morris and Mr. Cummins' daughter, who had been out riding, appeared at the Cummins residence in the city of Woodland. Upon going into the house they heard some one in one of the rooms. Mr. Morris went to the door of the room in question, and found that the door was held or locked from the other side. Miss Cummins went to the telephone to notify the policy. At about this time Mr. Morris heard a crash as of a breaking window. He ran out of the house and saw that some one was running therefrom. He pursued this man and succeeded in overtaking him; the man by some means or other stumbled and fell. This man proved to be the person charged as the defendant in this case. Mr. Morris, upon overtaking the defendant, took charge of him, brought him back to the Cummins residence, and there turned him over to the police. Upon searching the premises where the defendant had fallen, a number of articles belonging to the different ones who resided in the Cummins residence were discovered. Upon being taken to the jail, the defendant was questioned, and in the presence of the officers stated how he had entered the Cummins residence. Mr. Morris testified that he did not lose sight of the defendant from the time he started following him until the defendant was overtaken, where he had stumbled and fallen in the grass, and that there was no other person running in the vicinity. This, in substance, is the testimony.

[1, 2] The contention is made, as we have stated, that the court erred in admitting the defendant's statement as to how he entered

the Cummins residence. An examination of the testimony shows that prior to the statement being made by the defendant he was told by the officers that if he wished to talk it would be best for him to tell the truth. The defendant was not informed that the person with whom he was talking was an officer, although the officer had arrested him and had taken him to jail.

The contention is here made that the statement made by the defendant as to how he had entered the Cummins residence was not free and voluntary. This contention is directly negatived in the case of People v. O'Brien, 53 Cal. App. 754, 200 P. 766, where it was explicitly held that a confession will not be excluded merely because a prisoner was exhorted or urged to speak the truth. The rule stated in that case is amply supported by the decisions cited in the opinion.

What we have stated is sufficient to show that the defendant was properly convicted of burglary in the first degree, and there being no other reasons assigned for reversal, it follows that the judgment and order must be and the same are hereby affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

134 Cal.App. 211

PEOPLE v. FRANK.

Cr. 2405.

District Court of Appeal, Second District, Division 2, California.

Sept. 18, 1933.

Rehearing Denied Oct. 3, 1933.

Hearing Denied by Supreme Court Oct. 16, 1933.

1. **Assault and battery** ⚷92.

Evidence sustained conviction of assault with deadly weapon.

2. **Criminal law** ⚷290, 739(4).
Indictment and information ⚷137(1).

Bar to information on ground that accused was previously placed in jeopardy for same offense must be raised by special plea and not by motion to strike, and when so raised becomes fact issue for jury (Pen. Code, §§ 1017, 1023).

3. **Criminal law** ⚷1167(1).

Accused *held* not prejudiced because charged with assault with deadly weapon with intent to commit murder where previous trial fixed offense as assault with deadly weapon, where same evidence was admissible were information not objectionable.

4. **Criminal law** ⚷1144(15).

Appellate court will assume, in absence of evidence to contrary, that jury followed instructions of trial court to disregard remarks by court and district attorney.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

George E. Frank was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

George E. Frank, in pro. per.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, Acting Presiding Justice.

The appellant was charged with the crime of assault with a deadly weapon with intent to commit murder, and prior convictions of felonies. A jury returned a verdict of guilty of assault with a deadly weapon. He appealed from the resultant judgment.

The denial of a motion to strike said allegations of prior convictions, and of the defendant's motion to withdraw his plea with respect thereto, as well as the contention that a plea of former jeopardy on account of such charges entitled the defendant to offer evidence in support thereof, are identical with questions considered in People v. Frank (Cal. App.) 24 P.(2d) 905, and need not be reviewed here.

[1] The sufficiency of the evidence to sustain the verdict and judgment is attacked by the appellant, but a careful examination of the record does not reveal the discrepancies claimed. There was testimony of two witnesses that upon returning home at dusk during an evening the defendant emerged from the rear of a house, pointed a .38 caliber revolver at one of them, was overpowered, and the weapon was taken from him, after which he escaped.

[2, 3] It is insisted that it was error to present to the jury a charge of an offense other than assault with a deadly weapon. Upon a former trial the defendant was likewise charged with assault with a deadly weapon with intent to commit murder, the crime was fixed by the jury, and was then by them pronounced assault with a deadly weapon. It is conceded on behalf of the people that the defendant should not have been tried again on the original charge, but it is contended that he could not have been prejudiced by the same evidence and the same verdict as had theretofore been recorded against him. People v. Frank (Cal. App.) 19 P.(2d) 850. This cannot be assumed from the subsequent record alone. Having obtained a reversal of the former judgment, the defendant was returned to the superior court for a new trial upon the issues presented to the appellate court on the first appeal. People v. Frank, 75 Cal. App. 74, 241 P.

924; People v. Grace, 88 Cal. App. 222, 263 P. 306. He had legally been acquitted of the charge of an intent to commit murder. Upon the second trial he moved the trial court to strike from the information, "with the intent then and there wilfully, unlawfully and feloniously, and with malice aforethought to kill and murder," which motion was denied. Having once been placed in jeopardy therefor, he might have claimed the same as a bar to another information for the offense charged. Pen. Code, § 1023. But the whole question is foreign to the case unless raised by special plea, and when so raised it becomes an issue of fact for the jury to pass upon. Pen. Code, § 1017; People v. Bennett, 114 Cal. 56, 45 P. 1013; People v. MacFarlane, 138 Cal. 481, 71 P. 568, 72 P. 48, 61 L. R. A. 245. The motion to strike the allegation of said offense from the information was therefore ineffective. Thereafter the jury were instructed as to the charges and they were admonished only that they might under the law of the case find the defendant guilty of assault with a deadly weapon. A review of the evidence discloses that the same evidence would necessarily have been admissible had the information contained none of the language of which complaint was made. It therefore cannot be said that the defendant was prejudiced in the respects claimed.

[4] Assignments as error of remarks made by the district attorney and the trial judge during the trial do not amount to such infringement of the defendant's rights as to require a reversal or extended discussion here. Under proper instructions they were eliminated from consideration, and it must be assumed that the instructions were obeyed by the jury, in the absence of showing to the contrary.

The appeal from intermediate orders is dismissed. The judgment is affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

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134 Cal.App. 355

PEOPLE v. SIANES.

Cr. 91.

District Court of Appeal, Fourth District, California.

Sept. 27, 1933.

Hearing Denied by Supreme Court Oct. 26, 1933.

1. Parent and child ⚷17(1).

Unborn child is "minor child" within act declaring father's willful failure to furnish necessary food, clothing, etc., for minor child a misdemeanor (Pen. Code, § 270, as amended by St. 1925, p. 544; Civ. Code, §§ 25, 26).

Civ. Code, §§ 25, 26, fix period of minority as from date of birth until child reaches age of 21, but Pen. Code, § 270, as amended by St. 1925, p. 544, provides that child conceived, but not yet born, shall be deemed existing person within such section.

[Ed. Note.—For other definitions of "Minor Child," see Words & Phrases.]

2. Statutes ⚷181(2).

Such construction of statute as would deprive addition thereto of any meaning or effect must be avoided, if possible.

3. Parent and child ⚷17(1).

Statute declaring father, willfully omitting to furnish "necessary food, clothing, shelter or medical attendance or other remedial care" for minor child, guilty of misdemeanor, contemplates indirect necessities, or those furnished through mother in case of unborn child (Pen. Code, § 270, as amended by St. 1925, p. 544).

[Ed. Note.—For other definitions of "Necessary Food, Clothing, or Lodging," see Words & Phrases.]

4. Indictment and Information ⚷110(3).

While offense ordinarily may be alleged in words of statute creating it, words of information should be sufficient to give accused notice of, and enable person of common understanding to know, offense charged.

5. Parent and child ⚷17(5).

Information charging that defendant unlawfully omitted to furnish necessary food, medical attendance, etc., "for his minor child, to-wit: a child conceived, but not yet born," *held* defective as not apprising him of identity of child, but amendable (Pen. Code, § 270, as amended by St. 1925, p. 544, and §§ 950–952).

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Criminal proceeding by the People of the state of California against Lucas Sianes for failure to support his minor child. From an order sustaining a demurrer to the information without leave to amend, the People appeal.

Reversed, with directions.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

R. Y. Williams, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

In an information filed by the district attorney of Orange county the defendant was charged with failing to support his minor child, alleged to have been committed as follows: "That the said Lucas Sianes on or about the 1st day of January, 1933, at and in the County of Orange, State of California, and before the filing of this Information, did wilfully, and unlawfully omit, without any lawful excuse, to furnish necessary food and medical attendance and other remedial care for his minor child, to-wit: a child conceived, but not yet born."

This appeal is from an order sustaining a demurrer to the information without leave to amend.

[1] The pertinent portion of section 270 of the Penal Code, upon which this information was based, reads as follows: "A father of either a legitimate or illegitimate minor child who wilfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor. * * * A child conceived but not yet born is to be deemed an existing person in so far as this section is concerned."

The present controversy relates to the last sentence of this section, which was added by amendment in 1925 (St. 1925, p. 544).

As here presented, the first point raised is one urged by the respondent to the effect that it is not possible to state a public offense with reference to a failure to make provision for an unborn child, since the amendment referred to fails to provide that the offense covered by the section shall also apply to an unborn child. It is argued that while this amendment provides that a child conceived but not yet born is to be deemed an existing person it does not provide that such an unborn child is to be deemed an existing child, or an existing minor child; that the original section does not relate to all existing persons, but is limited to such existing persons as are minor children; and that by section 25 and 26 of the Civil Code the period of minority of a child is fixed as being that from the date on which it is born to the date on which it reaches the age of 21. Apparently the contention is that within the meaning of this section an unborn child is not a minor child, and therefore an information attempting to charge a failure to make provision for an unborn child fails to state facts sufficient to constitute a public offense.

We think this contention is without merit. Under the amendment in question an unborn child is to be deemed an existing person "in so far as this section is concerned." The entire section relates to support and provision for minor children only, and to be deemed an existing person for the purposes of the statute is to be deemed a minor child. The plain wording of the amendment, read with the rest of the section, makes an unborn child an existing minor child within the meaning of the act, irrespective of the general period of minority as covered in other connections by other Code provisions. It is objected that the Legislature should have "stated that the offense applied to an unborn child." This the Legislature has done in language sufficiently definite and certain to leave no doubt as to its meaning.

[2, 3] Another question presented, but not argued, is whether a man may be compelled to make the provision required by the statute, in the case of an unborn child, indirectly when it is obviously impossible to furnish the same directly to the child. This question was considered in People v. Yates, 114 Cal. App. (Supp.) 782, 298 P. 961, 962. We are in accord with the main opinion in that case, from which we quote the following:

"Is there any difference in the rule as to food, clothing, and shelter between a child already born and one unborn? If so, it must arise merely from the nature of the case, and not from the language of the section. It is obvious that food, clothing, and shelter cannot be furnished directly to an unborn child. The same is true of medical attendance and other remedial care. Consequently we cannot limit the meaning of necessities, in the case of an unborn child, to those which can be directly furnished to it, for to do so would deprive the addition made to the section in that respect in 1925 of any meaning or effect—a result which is to be avoided, if possible, in construing statutes. 23 Cal. Jur. 758; Glassell Dev. Co. v. Citizens' Nat. Bank, 191 Cal. 375, 384, 28 A. L. R. 1427, 216 P. 1012. We must therefore hold that, as to unborn children, the statute contemplates indirect necessities, or those which are to be furnished through the mother. It is manifest that, if the mother were without food, clothing, or shelter, her health would be impaired, and if such condition were carried to the extreme her death would follow. Such impairment of health would adversely affect the child she was carrying, and her death would be fatal to it. Can it be said that necessities furnished the mother, the lack of which would so affect the child, are not furnished to the child also? We believe not.

"Moreover, every child, while in gestation, needs the materials from which to form bone, tissue, nerves, and the other components of its bodily structure. Without them it cannot grow or develop, or even continue to live. It can receive these materials directly only from its mother, but in a very real, though indirect, sense they come from the food which the mother consumes, and that food is necessary for the child, as well as the mother. It is also necessary for the child's welfare that the mother be provided with clothing and shelter, at least so far as the lack of these things might materially impair her ability to supply her child with the life-giving and body-building materials which it must derive from her. In the somewhat analogous case of a nursing infant, it has been held that it is dependent on its father for food, clothing, and shelter, and he is subject to criminal prosecution for failing to furnish them. Chandler v. State, 38 Ga. App. 362, 144 S. E. 51; Campbell v. State, 20 Ga. App. 190, 92 S. E. 951.

"It is true, the statute in question imposes on the father no duty to support the mother of his child. But neither does it in terms require him to raise crops or build a house, although at some times and under some circumstances it may be necessary for him to do so in order to provide food or shelter for his children. We apprehend that a father whose children were exposed to the storms of winter and who should fail or refuse to construct, from materials at hand, or otherwise provide, a shelter for them, could not escape responsibility for his neglect by the plea that the statute did not require him to conduct building operations, or that the mother of the children might take refuge in the same shelter. What the statute requires of the father is that he provide his child with necessary food, etc. It does not concern itself with the means by which he may do so, whether the child be born or unborn. It allows him to resort to such means as may be available and appropriate to the end in view, the support of the child. If the child, being unborn, cannot be directly reached for the purpose of providing it with sustenance, nature points out that sustenance furnished the mother will inure to its benefit through her. If in the process some of that sustenance also goes to her support, that is an incident which cannot be avoided, by reason of the nature of the case, but does not render any the less imperative the law's command that the child must be nourished."

By its plain provisions this statute has been so extended as to include this responsibility of a father to his unborn child. In our opinion it is entirely possible, under the provisions of the statute, to so word an information as to allege a public offense with reference to a failure to make the required provision for an unborn child.

[4, 5] More specifically, it urged that this particular information does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code, in that it cannot be determined therefrom "who the person is that defendant is charged with failing to support." Without question this fact cannot be determined from the information, and it seems equally certain that this is a fact of which the defendant should be apprised in order to enable him to meet the charge. While ordinarily an offense may be alleged in the words of the statute, it should be in words sufficient to give the accused notice of the particular offense with which he is charged, and must be sufficient to enable a person of common understanding to know what offense was intended. In this respect the information under consideration is defective. The demurrer was properly sustained upon that ground but, for the reasons stated above, an amendment should have been permitted.

The order appealed from is reversed, with directions to the trial court to sustain the demurrer with permission to amend the information.

We concur: MARKS, J.; JENNINGS, J.

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134 Cal.App. 354

MESSER et ux. v. BROCK.

Civ. 7996.

District Court of Appeal, Second District,
Division 2, California.
Sept. 27, 1933.

Appeal and error 🔑1008(1).

In action for injuries sustained from automobile collision, whether driver of defendant's automobile drove with defendant's consent *held* for trial court.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Marion R. Messer and his wife against Edna M. Brock. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Guy H. Hayes and C. V. Caldwell, both of Los Angeles, for appellant.

F. H. Bowers, of Los Angeles, for respondents.

STEPHENS, Justice.

This is an appeal from a judgment for damages suffered through an automobile collision. The driver of the machine causing the injury was the husband of the car owner against whom the judgment was obtained. The judgment was proper if the driver had used the car with the owner's consent. According to the injured person the owner upon arriving at the scene of the accident told her that "he (the driver) went away with it on an errand for her and (she) would take care of things."

Subsequently, according to two other witnesses, the owner stated substantially the same to them. There was testimony by deposition of both the driver and the owner that the automobile had been driven without and against the owner's consent.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In the light of all the circumstances, a conflict of substantial evidence was presented to the trial court, and its conclusion thereon is final.

The judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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134 Cal.App. 498

Ex parte SCHAEFER.

Civ. 9389.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1933.

Searches and seizures ⚷7(1).

One held under bench warrant reciting indictment of others and commanding arrest of "John Doe No. 5," without describing him, was entitled to discharge, since seizure under such warrant violated Constitution prohibiting unreasonable seizures and searches (Const. art. 1, § 19).

Petition by Louis Schaefer for a writ of habeas corpus to be directed to the Sheriff of Los Angeles County.

Writ granted, and petitioner discharged.

Wm. J. Clark and Nathan M. Dicker, both of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker and Alexander H. Van Cott, Deputy Dist. Attys., all of Los Angeles, for respondent.

CONREY, Presiding Justice.

The petitioner for the writ herein alleged, and the return to the writ admits, that the petitioner is held in custody of the sheriff of Los Angeles solely under and by virtue of a bench warrant, issued by the superior court of that county, a copy of which bench warrant appears as a part of the petition. The substance of the warrant, addressed "to any sheriff," etc., reads as follows: "An indictment having been filed on the 7th day of September, 1933, in the Superior Court of the County of Los Angeles, charging Abe Bernstein et al., with the crime of conspiracy to commit vagrancy, a felony; you are therefore commanded forthwith to arrest the above-named John Doe No. 5 and bring him before that court to answer the said indictment, or if the court be not in session that you deliver him into the custody of the Sheriff of the County of Los Angeles, or if he require it that you take him before any Magistrate in that County, or in the County in which you arrested him, that he may give bail to answer to the indictment in the sum of $50,000.00."

It is contended by petitioner that said warrant is wholly invalid and is violative of section 19, article 1, of the Constitution of California. That section reads as follows: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized." The particular point here is that the warrant is void because it does not contain any name or description by which the person to be seized could be identified; and that the arrest under such warrant is an unreasonable seizure.

With two slight and wholly unimportant verbal differences, said section 19 is identical with the Fourth Amendment of the Constitution of the United States. While it is conceded that said Fourth Amendment is not binding upon the states, nevertheless the interpretations thereof by the Supreme Court of the United States are instructive and persuasive with respect to its meaning and effect. In West v. Cabell, 153 U. S. 78, 14 S. Ct. 752, 753, 38 L. Ed. 643, the Supreme Court said: "By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him. * * * The principle of the common law, by which warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested, has been affirmed in the American constitutions; and by the great weight of authority in this country, a warrant that does not do so will not justify the officer in making the arrest." The court then referred to Commonwealth v. Crotty, 10 Allen, 403, 87 Am. Dec. 669, where the conviction was set aside by the Supreme Judicial Court of Massachusetts, "upon the grounds that the warrant was insufficient, illegal and void, because it did not contain Crotty's name, nor any description or designation by which he could be known and identified as the person against whom it was issued, and was, in effect, a general warrant, upon which any other person might as well have been arrested, as being included in the description." Following its discussion of the Crotty Case, the Supreme Court of the United States then quoted in full the Fourth Amendment, and held that it constituted a "declaration of the constitution that all warrants must particularly describe the person to be seized." We think that the foregoing decision in West v. Cabell, correctly states the law, and that the same constitutional protection to personal lib-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

erty, as contained in the above-mentioned section 19 of article 1 of the Constitution of California, is the law of this state; and we find no sufficient reason for a contrary holding. The declaration in the second clause of said section 19, concerning the facts to be shown by oath or affirmation, is a particular instance illustrating the first clause, but does not limit the more complete and general meaning of the entire section. See, also, Go-Bart Importing Co. v. U. S., 282 U. S. 344, 357, 51 S. Ct. 153, 158, 75 L. Ed. 374, 382, a very recent case, where the highest court of the land, in referring to the Fourth Amendment, said: "The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

The warrant under which petitioner is now held in custody refers to an indictment pursuant to which the warrant is supposed to have been issued. It may be assumed that if the defendant was in any way named or identified in the indictment, such identification would have been carried into the warrant.

The constitutional rights of persons are such that no man may lawfully be arrested upon a general warrant which neither names nor in any way describes the person to be seized. This guaranty of personal liberty has been obtained in America and in England as the result of centuries of struggle against tyranny. Even in France, blank lettres de cachet have been out of fashion since the fall of the Bastile.

The district attorney in his final brief herein says: "We freely declare that the finding of the indictment which lies at the base of this case, was resorted to and is the only *legal* resort at hand for the prevention of organized crime, by causing the arrest of persons who are actual criminals, or have known criminal associations, who have come to this city from other big cities and are found in association together here in readiness to prey upon the citizens of this prosperous commonwealth. We beg this court to consider this well-known condition in determining the result of this application." The answer is that anything resorted to as a procedure for the prevention of crime should itself be in accordance with law, and with the fundamental rights of persons. Surely a court of law must thus decide. When a defendant is brought before a court, or comes before a court as the petitioner has come here, the court is bound to accord him the benefit of the legal rights which belong to him as they would belong to any other person in like circumstances.

In this proceeding we are not called upon to discuss the right of an officer to arrest, without warrant, under the conditions set forth in sections 836 and 849 of the Penal Code. We are dealing solely with the undisputed facts disclosed by the record before us.

Let the petitioner be discharged from custody.

We concur: HOUSER, J.; YORK, J.

134 Cal.App. 485

HUGHES et al. v. AMERICAN TRUST CO. et al.

Civ. 8126.

District Court of Appeal, First District, Division 2, California.

Oct. 2, 1933.

Hearing Denied by Supreme Court Nov. 29, 1933.

1. Associations ⟹7.

Member of unincorporated association must first exhaust rights afforded by association tribunals before appealing to courts.

2. Trade unions ⟹7.

Member of local union of unincorporated association, who failed to exhaust rights afforded by association tribunals, could not challenge expulsion of union in proceeding by reorganized local union to recover property, under association laws requiring association to hold expelled union's property in trust until reorganization.

Appeal from Superior Court, City and County of San Francisco; F. M. Jameson, Judge.

Action by John J. Hughes and Martin L. Bavage, suing for the benefit and for and in behalf of Local Union No. 22, United Brotherhood of Carpenters and Joiners of America, a voluntary unincorporated association, against the American Trust Company, E. B. Spencer, and others. From a judgment in favor of plaintiffs, second named defendant appeals.

Affirmed.

George D. Collins, Jr., of San Francisco, for appellant.

John J. Dailey, of San Francisco, for respondents.

DOOLING, Justice pro tem.

This is an action by plaintiffs and respondents, as officers of Local Union No. 22 of the United Brotherhood of Carpenters and Joiners of America, to recover certain money and bonds deposited with defendant American

Trust Company prior to September 2, 1921. Appellant Spencer claims an interest in such property, and from a judgment in favor of plaintiffs and respondents, Spencer takes this appeal.

Prior to September 2, 1921, appellant was a member of Local Union No. 22 which, according to his own testimony, had at that time a membership of 1097 in good standing. Local Union No. 22 was organized in San Francisco in 1882 as a subordinate union of the United Brotherhood of Carpenters and Joiners of America. Prior to September 2, 1921, demand had been made upon Local Union No. 22 by the president of the United Brotherhood to sever its affiliation with an organization known as the Rank and File Federation of Workers, the principles of which were deemed by the officers of the United Brotherhood to be subversive of the principles of their organization. On September 2, 1921, the members of Local Union No. 22 assembled in regular meeting voted down a motion to comply with this request of the president of their parent body. Thereupon, one W. A. Cole, a member of the general executive board of the United Brotherhood who was present at the meeting with authority to act for the president, declared Local Union No. 22 suspended. On September 6, 1921, a meeting of members of Local Union No. 22 who had agreed to remain loyal to the United Brotherhood and comply with the president's request, met and voted to reorganize the union and elect as the officers of the reorganized union the same officers who had been in office at the time Local Union No. 22 was suspended. Thereafter, written charges were prepared and served upon the president and secretary of the union and upon one E. E. Wattles, together with a notice of trial to be held before the general executive board of the United Brotherhood at its head office in Indianapolis, Ind., on October 20, 1921. In the notice the union was directed to appear and show cause why it should not be expelled from the brotherhood. At the trial which followed, the union made no appearance and an order was made, after a hearing, expelling it from the brotherhood. Shortly thereafter a new charter was issued by the brotherhood to the reorganized union designating it as Local No. 22, and ever since that time the association represented by respondents in this action has functioned, and been recognized by the United Brotherhood, as Local Union No. 22. At the time the new charter was presented to the reorganized union in October, 1921, it had 801 members, of whom all but twenty had been members of Local Union No. 22 at the time of its suspension. Appellant Spencer never attempted thereafter to affiliate with the United Brotherhood or the reorganized Local Union No. 22, nor did he nor any one, either as an individual member or purporting to represent the union, take an appeal from the order of expulsion to the general convention of the United Brotherhood, as provided by its constitution and laws. Appellant Spencer testified: "That after the suspension of the said Local Union No. 22 as aforesaid, and at the time the said charges and notice of hearing were served as aforesaid, the said E. E. Wattles was president of an organization called Carpenters' Union, Local No. 22. which was not chartered by any labor organization, but was simply certain fellows together that thought they were still members of Local No. 22; that no one authorized them to take that name of Local No. 22, they took it as members that had their dues paid up, and they were entitled to use it, the way they thought." How long this organization continued in existence does not appear from the evidence. At all times in question, section 30 of the constitution and laws of the United Brotherhood of Carpenters and Joiners of America provided: "If at any time a local union should withdraw, lapse, dissolve, be suspended or expelled, all property, books, charter and funds held by, or in the name of, or on behalf of said local union must be forwarded immediately by express to the general secretary, to be held in safekeeping for the United Brotherhood, as trustee, for the carpenters of that locality until such time as they reorganize." None of the property, books, or funds of Local Union No. 22 were, in fact, forwarded to the general secretary after the suspension and expulsion of Local Union No. 22 in 1921, but the records and property in their meeting room and the original charter issued in 1882 passed into the custody of the reorganized and newly chartered Local Union No. 22, with the acquiescence of the officers of the United Brotherhood, who recognized the newly chartered Local Union No. 22 as the successor of the expelled union.

We may concede to appellant that respondents in this proceeding must recover on the strength of their title rather than the weakness of appellant's. Nevertheless, we are unable to see that the trial court erred in giving judgment to respondents.

[1, 2] Appellant claims that the order of expulsion of the original Local Union No. 22 was in excess of the powers of the United Brotherhood because: (1) The charges should have been served on each individual member of the union; (2) a trial should have been had in San Francisco and not in Indianapolis; and (3) the charges were not of such a character as to justify the order of expulsion. In our view of the case we need not decide these questions. Under the constitution and laws of the United Brotherhood: "A member must exhaust his resources allowed by the constitution and laws of the United Brotherhood before taking his case to the civil courts." A right of appeal to the general convention from the order of expulsion made by the general executive board was allowed and provided for and no such appeal was tak-

en. It is well settled that a member of an unincorporated association must first exhaust the rights afforded by the tribunals of the association before appealing to the courts. Levy v. Magnolia Lodge, 110 Cal. 297, 307, 42 P. 887; Robinson v. Templar Lodge, 117 Cal. 370, 375, 49 P. 170, 59 Am. St. Rep. 193; Greenwood v. Building Trades Council, 71 Cal. App. 159, 168, 233 P. 823. If appellant or any other dissatisfied member of the organization which called itself Carpenters' Union, Local No. 22, had exhausted the right of appeal to the general convention, the questions urged on this appeal might then properly have been presented to the courts. Instead, they stood by and permitted the order of expulsion to go unchallenged by appeal and saw Local Union No. 22 reorganized and rechartered without taking any steps to attempt to secure redress through the channels provided therefor by the constitution and laws of the United Brotherhood. Appellant finds himself, therefore, in no position to challenge the order of expulsion in this proceeding. This being so, we are satisfied that the present Local Union No. 22, as the recognized successor of the original Local Union No. 22, is entitled to the money and bonds here in question under section 30 of the constitution and laws of the United Brotherhood above quoted, since the property of an expelled union under that section is to be held by the United Brotherhood as trustee "for the carpenters of that locality until such time as they reorganize." The conclusion which we have reached finds support in a very similar case on its facts decided by the Supreme Court of Washington. Centralia Labor Temple Ass'n v. O'Day, 139 Wash. 331, 246 P. 930.

Judgment affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

PORTER v. GRANICH.*

Civ. 7646.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1933.

Rehearing Granted Oct. 26, 1933.

1. Appeal and error 🔑82(1).

Order denying judgment notwithstanding verdict is special order made after final judgment and appealable (Code Civ. Proc. § 963).

2. False imprisonment 🔑2.

Merchant merely placing unpaid checks into hands of attorney for collection was not liable for false imprisonment of maker (Code Civ. Proc. § 282).

3. False imprisonment 🔑31.

Evidence in action for false imprisonment showed that arrest and imprisonment were due to investigation of police officers, and not to defendant or his attorney.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by George T. Porter against Fred Granich. From a judgment for plaintiff, and from an order denying motion for judgment notwithstanding verdict, defendant appeals.

Reversed, with directions.

See, also, 20 P.(2d) 972.

Aaron Elmore, of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondent.

WORKS, Presiding Justice.

[1] This is an action to recover damages for false imprisonment. The cause was tried by a jury. Judgment went for plaintiff. Defendant appeals from the judgment and from an order of the trial court denying his motion for a judgment in his favor notwithstanding the verdict of the jury. Such an order, although made after judgment and despite the general clause of the statute as to such orders, is appealable under a special provision of section 963 of the Code of Civil Procedure.

The respondent, Porter, was president of a corporation which had for a long time purchased merchandise from the appellant, Granich. It had been the custom for the Porter concern to send by a driver checks in payment for articles of merchandise to be transported by the driver from Granich's place of business to that of Porter's corporation. These checks were signed, on behalf of the corporation, by Porter, as its president, and by another of its officers. On each of two different occasions, two days apart, a check issued in conformity with the regular practice was delivered to Granich by a driver of the corporation, and each time goods of a price equal to the amount on the face of the check were carried by the driver back to the place of business of the Porter organization. On the day after the second of these two purchases a third check of the corporation, signed by Porter and by the other corporate officer, was delivered to Granich for the purpose of taking up certain checks given to him by the corporation previously to the two transactions just mentioned, and which had been returned to him by the bank or banks upon which they had been drawn, unpaid. On the day of the delivery of the third check, a driver of the corporation handed to Granich a fourth, signed as usual, and took away an

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*For subsequent opinion see 29 P.2d 220.

amount of goods represented by the sum stated on the face of the paper. The four checks, thus specifically designated, were the foundation of the troubles between Porter and Granich out of which arose the present litigation. Granich kept the instruments for more than three months, during which period he presented them to the drawee bank for payment several times, and in each instance payment was by the bank refused. Under circumstances hereafter to be disclosed, Porter was finally arrested on a charge of having violated the provisions of section 476a of the Penal Code, denouncing as a crime the issuance of bank checks with intent to defraud, and was imprisoned in the county jail for a period of two days or thereabout. Porter thereafter commenced the present action.

A reversal of the judgment and order is asked on various grounds, but we find it necessary to consider but one or two of them, which are based on the contention that the evidence was insufficient to support the verdict of the jury.

[2] Granich never in person came in contact with the officers of the law until Porter had been apprehended and imprisoned. After he had held the four checks for more than three months and had repeatedly failed to realize upon them at the drawee bank, Granich placed them in the hands of his legal counsel for the purpose of examining into the affair and of realizing upon the dishonored paper. The lawyer was told by Granich that he "wanted his money" on the checks. Nothing was said between the two as to a possible prosecution of Porter under the Criminal Code, nor even as to his possible culpability from the standpoint of the criminal law. The counsel of Granich heard a statement from his client concerning the affair of the checks, and made some further investigation, a part of which consisted of a telephone conversation which he had with Granich's bookkeeper. The counsel then, without taking the matter up with Granich, presented it to a deputy district attorney, with the result, after certain other steps, that Porter was arrested and confined as already stated. If it be conceded for the sake of argument that the counsel asked the district attorney or any other authorized officer for a criminal complaint, or signed such a complaint—neither of which he did—we fail to perceive how his acts could have been charged to Granich. He was not authorized by his client to go to the district attorney. In an attempt to collect a debt, he was not required, under the provisions of section 282 of the Code of Civil Procedure, relating to the duties of attorneys at law, to go to the district attorney. It is not the duty nor is it within the legitimate powers of the executive department of government to aid in the enforcement of private claims or in the collection of private debts. Even if, in the conduct of his business, Granich had employed the services of a general manager, if he had instructed that agent to take all necessary steps to collect the amounts shown on the face of the four checks, Granich would not have been liable for an imprisonment of Porter resulting from a visit of the general manager to the district attorney. So much is settled by the decision in the late case of Mackie v. Ambassador Hotel, etc., Corporation, 123 Cal. App. 215, 11 P. (2d) 3, where it is said, in effect, that a manager cannot bind his employer by causing the arrest of another for an alleged offense that has already been committed, as "such arrest cannot aid in the business of the principal nor serve to protect the principal's property." And, be it observed, a manager of a business is not confined, in the discharge of his duty, by the limitations which circumscribe the functions and duties of an attorney at law.

[3] We shall mention another point, but shall not particularize in discussing it. When the counsel of Granich went to the deputy district attorney, that individual asked him to present the matter of the checks to the Los Angeles police. The counsel at once went to a captain in the department and told the latter what he knew about the affair. The officer then said to the counsel that the matter would be investigated. The captain and officers under him then conducted an independent investigation of the affair, and one of them signed the complaint under which Porter was arrested. We think the specific evidence supporting these general statements shows that Porter was arrested and confined as a result of the investigation made by the police, only, and that for that reason Granich is not liable for damages for a false imprisonment.

Respondent makes several special points in defense of the judgment and order appealed from, but we think, after what has been said above, that none of them requires a separate consideration.

Judgment and order reversed, with directions to the trial court to enter judgment for defendant.

We concur: CRAIG, J.; STEPHENS, J.

134 Cal.App. 431

PEOPLE v. HURWITZ et al.

Cr. 2423.

District Court of Appeal, Second District, Division 1, California.

Sept. 29, 1933.

Hearing Denied by Supreme Court Oct. 27, 1933.

1. Larceny ⚷65.

Evidence *held* to sustain conviction of petit and grand theft where one defendant, aided and abetted by other, failed to account for money belonging to corporation.

2. Criminal law ⚷1159(2).

Where facts presented furnished substantial evidence of guilt, other evidence showing innocence does not authorize reversal of conviction.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Sam Hurwitz and another were convicted of petit and grand theft, and they appeal.

Affirmed.

S. S. Hahn, W. O. Graf, and P. O. Clough, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

HOUSER, Justice.

On count 1 of an indictment, each of the defendants was convicted of the crime of petty theft, and on count 2 of the same indictment, each of them was convicted of the crime of grand theft. Although the record herein is somewhat uncertain in some important respects, since no question with reference thereto is raised by either of the parties to the appeal, for the purpose of considering the point presented by appellants their appeal will be treated as though no such uncertainty existed.

[1] As is stated by appellants in their opening brief herein, they "raise only one main issue," to wit, "that there was no evidence produced at the trial by the prosecution which would establish, or tend to establish, the crime of embezzlement by the said defendants, or either of them."

Manifestly, it would be impracticable for this court to set forth herein all the evidence adduced on the trial of the action. Somewhat abridged, however, it shows that Brooklyn Knit Sportswear Company, a corporation, had an arrangement with defendant Howard Hurwitz by which the former was to consign, and did consign, to the latter certain merchandise which the latter was authorized to sell for the former and to collect the sales price from the purchasers thereof; which moneys, less an agreed and fixed commission and expense to be paid by the former to the latter, were to be remitted by Howard Hurwitz to said Brooklyn Knit Sportswear Company; that in the conduct of said business, during a period of several years, the other defendant, Sam Hurwitz, was engaged with and assisted his brother, Howard. In the month of November, 1932, the business relationship which formerly had thus existed between Howard and Brooklyn Knit Sportswear Company was terminated; and thereafter, under conditions practically identical with those which theretofore had regulated the relationship existing between Howard and Brooklyn Knit Sportswear Company, Sam continued to transact the business for said corporation. However, at the time when Howard ceased to act as agent for the said corporation he was indebted to it in a sum in excess of $1,200, which represented the difference between commissions which theretofore had been earned by him under his contract, and his "drawing account," expenses, etc. That indebtedness was not liquidated, but was one of the items proposed to be taken care of by Sam under his arrangement with the corporation. Shortly after Sam was placed in charge of the business, he collected from each of two purchasers of merchandise belonging to the corporation the respective sums of money which form the basis for the prosecution of defendants for the crimes of which they are accused by the indictment herein.

The essential question involved in a determination by the trial court of the guilt of the defendants was whether they fraudulently appropriated to their own use the moneys which had been paid to Sam for the use and benefit of the corporation. In other words, a determination of the intent of the defendants was the deciding issue in the case. In support of the implied finding by the trial court that the defendants intentionally misappropriated the moneys in question, included within the incriminatory circumstances adduced in evidence, the following important items may be noted: After Sam had collected the money, and at a time when he had it in his possession, he repeatedly stated to the president of the corporation that he had not yet received it, but that when he did receive it he would promptly remit it to the corporation. On one occasion, he said: "You know well enough that money belongs to you; it belongs to Brooklyn Knit; Howard is not my partner. He will never get a cent of it. It belongs to you and you will get it." Furthermore, the evidence shows that against the express orders of his employer, Sam billed merchandise to purchasers thereof, not in the name of the corporation, but in the name of his brother, Howard Hurwitz; that after the money in question had been collected by Sam and deposited by him in a bank to his credit, he closed his personal account with the bank under the name of Sam Hurwitz, and thereafter opened another account in the same bank under the fictitious name of Sam Copeland; and in which account he deposited not only his own money, but as well the money which theretofore he had collected for the use and benefit of the corporation; that thereafter he sent to another brother, Danny Hurwitz, at San Francisco, the sum of $55; which sum he admitted to Danny was the property of the corporation, and at the same time declared to Howard that he did not know "how he was going to face the music" when he had to pay Brooklyn Knit Sportswear Company. Sam also wrote to Howard that he was "on the danger line now; * * * at his wit's end; * * * that the goose was cooked and couldn't lay any more eggs"; and asked for advice as to the "best move."

[2] It is well-established law that when the facts presented furnish substantial evidence of the guilt of the accused, the circumstance that other evidence tends to show his innocence presents no legal reason for a reversal of the judgment on an appeal therefrom. People v. Gordon, 206 Cal. 29, 273 P. 568; People v. Harris, 100 Cal. App. 78, 280 P. 178.

The fact that the acts of Sam Hurwitz in the premises were knowingly aided and abetted by his brother Howard is not denied or disputed.

This court is of the opinion that the evidence adduced on the trial of the action amply justified the conclusion reached by the trial court.

The judgments are, and each of them is, affirmed.

We concur: CONREY, P. J.; YORK, J.

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134 Cal.App. 505

CONLEY v. WAITE et al.

Civ. 9018.

District Court of Appeal, First District,
Division 2, California.

Oct. 5, 1933.

1. Trusts ⚷225.

Trustee is entitled to reimbursement of all expenses actually and properly incurred by him in performance of trust (Civ. Code, § 2273).

2. Trusts ⚷227.

Fees of attorney, employed by trustee to defend unfounded suit against him by cestui que trust, may be allowed him and made charge against interest in estate of party causing litigation (Civ. Code, § 2273).

3. Trusts ⚷227.

Trustee, improperly joined as defendant in suit to quiet title to beneficial interest in trust property as against one claiming conflicting interest, *held* entitled to allowance of reasonable attorney's fees (Civ. Code, § 2273).

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Suit by Charmion Conley against Effie C. Waite, as administratrix of the estate of Charles C. Waite, deceased, and individually, and L. K. Small, as trustee under a trust agreement. From so much of a judgment for plaintiff as awarded defendant trustee a sum for counsel fees, plaintiff appeals.

Affirmed.

Lynden Bowring, of Los Angeles, for appellant.

Lobdell & Watt, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued to quiet title to a three-twenty-fourths undivided beneficial interest in certain real property held by defendant Small as trustee under a trust agreement which was pleaded in full in the complaint. The trustee was joined as a party defendant, but for what reason it does not appear. The trustee filed an answer denying, on lack of information or belief, plaintiff's claim of title, and pleading, as was done in the complaint, the declaration of trust and his right to act as trustee under it. He did not, however, make any claim to the beneficial interests in the real property which were in issue. Before the cause was tried the defendant Waite abandoned her defense and stipulated that plaintiff might take judgment as prayed for. The trustee made the same stipulation, but claimed the right to an allowance of counsel fees for appearing and defending the action. Judgment was accordingly entered for plaintiff as prayed in her complaint, but the trustee was awarded the sum of $150 for counsel fees, which was made a lien on plaintiff's interest in the property. The plaintiff has appealed from the portion of the judgment covering these fees.

[1, 2] The rule of law applicable to the question is that a trustee is entitled to reimbursement of all expenses actually and properly incurred by him in the performance of his trust (section 2273, Civ. Code); that he is not entitled to reimbursement of attorney's fees paid out in litigation which he has inaugurated unnecessarily or without warrant (Mitau v. Roddan, 149 Cal. 1, 16, 84 P. 145, 6 L. R. A. (N. S.) 275; Estate of Gartenlaub, 185 Cal. 648, 654, 198 P. 209, 16 A. L. R. 520; 39 Cyc. p. 149); but that when an unfounded

suit is brought against him by the cestui que trust, attorney's fees may be allowed him in defending the action and may be made a charge against the interest in the estate of the party causing the litigation. 39 Cyc. p. 480; Perry on Trusts, § 903a.

[3] The litigation here was really between two individuals claiming conflicting interests as beneficiaries of the trust estate. There does not appear to have been any reason for the joinder of the trustee as a party defendant. However, he was joined and was entitled to the benefit of counsel in making his appearance. The trial court allowed the sum of $150, and we cannot say on the record before us that such sum was unreasonable.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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134 Cal.App. 482

FOSTER et al. v. STEWART et al.

Civ. 4881.

District Court of Appeal, Third District, California.

Sept. 30, 1933.

1. Covenants 🔑**6.**

Signatures of all property owners to agreement securing lots against occupancy by persons other than of Caucasian race *held* condition precedent to enforcement of agreement not intended to become effective until signed by all owners.

2. Covenants 🔑**1.**

Agreement securing property against occupancy by persons other than of Caucasian race for unlimited time *held* void (Civ. Code, §§ 711, 715).

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Frank A. Foster and others against Lesley J. Stewart and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Victor L. Bentson, of Los Angeles, for appellants.

Willis O. Tyler, Charles G. Young, Golden & Kaufman, Shapiro & Shapiro, Loeb, Walker & Loeb, Ralph H. Spotts, Fred W. Mears, Arch H. Vernon, and Earl E. Johnson, all of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the plaintiffs sought an injunction restraining and prohibiting the defendants (members of a colored race) from leasing, renting, or occupying certain lots of land described in the complaint. Judgment went in favor of the defendants, and the plaintiffs appeal.

The record shows that the tract of land involved in this proceeding embraces 199 separate lots. The court found that 62 of the owners of the lots described in the plaintiffs' complaint did not sign the agreement; that 18 of the signers did not own the lots set opposite their names in the complaint and alleged to be the owners thereof; that as to 5 of the lots, which apparently were owned by tenants in common, the agreement was not signed by all of the owners of the respective lots. The agreement contains no provision for forfeiture or penalty, and, if otherwise valid, could only be enforced by a prohibitory injunction. No time is specified in the agreement for its duration, as appears by the following paragraph contained therein: "That we and each of us, the undersigned, the owners of the said several parcels of land, will not permit the said property, or any part thereof, to be leased to, or rented to, nor shall the same ever be used or occupied by any person of either the Negro, African or Asiatic race, or any person not of the White or Caucasian race, whether by the owner, tenant or any other person, except, however, that these covenants and conditions shall not prevent the employment on the said property of Negro, African or Asiatic servants."

The map introduced in evidence showing the lots and blocks described in the complaint reveals that the lots owned by the signers to the agreement are widely separated, do not constitute a solid mass, and are interspersed by a number of lots owned by persons not signing the agreement.

[1] The court found from the testimony introduced, and also in the construction of the agreement, that it was not intended to have any force or effect until it had been signed by all of the property owners, which brings the case directly within the ruling had in Oberwise v. Poulos et al., 124 Cal. App. 247, 12 P.(2d) 156, to the effect that an agreement worded in the same language could not be given effect if otherwise valid, until all of the property owners (140 in that case) had signed the agreement. It was also further held that one joint tenant or tenant in common could not bind his cotenant by any such contract. It was held in that case that the purpose was obvious, which is likewise obvious in the instant case, to secure the lots of land in the tract against occupancy by persons other than of the Caucasian race. Here, if the agreement were given effect, a property owner would be restrained from leasing, renting, or conveying his lot of land

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

to any but a member of the Caucasian race, while adjoining him would be a lot that could be conveyed without any limitations whatever. This, of course, shows that no equitable principles exist upon which to base a decree prohibiting a lot owner from renting or conveying his lot to one other than of the Caucasian race while the owners of lots on both sides are left free to lease, rent, or to convey to whomsoever they please.

[2] Another ground exists upon which the judgment of the trial court must be sustained, to wit, the agreement is void as being against the provisions of sections 711 and 715 of the Civil Code prohibiting an unlimited restraint of alienation. This question, while a restraint of occupancy for a limited time has been held valid, in a number of cases an unlimited restraint of alienation, as appears to be the intent of the agreement involved in this action, has been held invalid. We may say the question is definitely settled in this state in the case of Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 P. 470. See, also, DuRoss v. Trainor, 122 Cal. App. 732, 10 P.(2d) 763.

The condition of the agreement which we have quoted is so worded that there can be no segregation of the reasons or inducements for the signing thereof by the respective lot owners. Under these circumstances the whole condition upon which the agreement purports to be based must be held invalid. Other reasons might be assigned, but the foregoing are sufficient to show that the judgment of the trial court must be, and the same is hereby, affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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134 Cal.App. 441

PEOPLE v. HOWARD.

Cr. 2386.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1933.

Rehearing Denied Oct. 13, 1933.

Hearing Denied by Supreme Court Oct. 27, 1933.

1. Criminal law ⚷1141(1).

All intendments and presumptions not contradicted by, or inconsistent with, record must be resolved on appeal in favor of regularity of proceedings and orders below.

2. Criminal law ⚷1128(1).

Appellate court will not go outside record.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Proceeding by the People against James Howard. From an order denying defendant's motion to vacate and set aside judgments of conviction of several burglaries, which judgments had been affirmed (115 Cal. App. 140, 300 P. 987), defendant appeals.

Affirmed.

James Howard, in pro. per.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, Justice.

Having been found guilty of several different burglaries upon a trial in Los Angeles county, and the judgments having been affirmed (People v. Howard, 115 Cal. App. 140, 300 P. 987), the appellant nearly two years thereafter moved the trial court to vacate and set aside said judgments. From an order denying his said motion he again appealed.

[1, 2] The record here presents the entry, "Motion to set aside the judgment is denied"; a "Notice of appeal and application for transcript of phonographic reporter's notes" necessary to fairly present the point "that the court erred in denying defendant's motion to annul, vacate, and set aside the judgment rendered against him by said court in the said cause, and in denying each of the points presented by said motion"; and a notice to the clerk of the superior court: "Comes now the defendant in the above entitled cause, after the court has denied two motions after judgment, and appeals from such orders to the Appellate Court. * * *" Upon this record alone it is asked that the order be reversed. All intendments and presumptions not contradicted by or inconsistent with the record must be resolved in favor of the regularity of proceedings and orders of the trial court, and it must be held that the order denying the appellant's motion to vacate said judgments is valid until the contrary is made to appear. People v. Kaiser, 119 Cal. 456, 51 P. 702; People v. Hower, 151 Cal. 638, 91 P. 507; People v. Russell, 156 Cal. 450, 105 P. 416; People v. Colson, 49 Cal. 679. An appellate court will not be warranted in going outside the record, since error, if any, must affirmatively and clearly appear therein. People v. Bemmerly, 98 Cal. 299, 33 P. 263; People v. Mooney, 176 Cal. 105, 167 P. 696. No error appearing, there is nothing upon which a reversal might be predicated, and the appeal is wholly without merit.

The order is affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

PEOPLE v. DEYSHER.*

Cr. 1713.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1933.

Rehearing Denied Oct. 11, 1933.

Hearing Granted by Supreme Court Oct. 26, 1933.

1. Officers 🔑121.

To create supervisor's interest in public contracts, purchase from company in which supervisor is interested may be made after award of contract, if pursuant to agreement made before (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

2. Officers 🔑122.

As regards supervisor's interest in public contract, making of agreement to deal with company in which supervisor is interested may be inferred by proof of conduct (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

3. Criminal law 🔑369(1).

Evidence showing independent crimes having no tendency to prove any material fact connected with particular crime charged is inadmissible.

4. Criminal law 🔑371(12), 372(1).

Evidence of other crimes of same general character connected as part of one plan and tending to same common end is admissible to show motive and design.

5. Officers 🔑122.

In prosecution of supervisor for being interested in public contracts, evidence relating to work, not covered by indictment, *held* admissible to prove contract between defendant and corporation doing work, warranting inference of agreement as to rental of equipment from company in which supervisor was interested.

6. Criminal law 🔑1159(3).

Jury's finding on disputable questions of fact, if supported by direct evidence or inferences, or both, must be given full faith and credit.

It is only where, as a matter of law, there is no legal evidence supporting charge, that a reviewing court may disturb verdict, and, in criminal case, court must assume in favor of verdict the existence of every fact which jury could have reasonably deduced from evidence.

7. Officers 🔑122.

Evidence *held* to support conviction of supervisor for being interested in public contracts (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

Jury was not required to acquit because defendant denied making any express contract for rental of road equipment, but it was warranted by evidence as to his conduct towards corporation doing work, in inferring an implied contract for such rental, made before his ordering of the work.

8. Officers 🔑122.

In prosecution of supervisor for being interested in public contracts, instruction for acquittal if contracts were entered into between board of supervisors and corporation contractor without previous "arrangement" between defendant and corporation *held* properly refused (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

Word "arrangement" is very wide, indefinite term, which has different signification from word "agreement," and its use made instruction vague, meaningless, and misleading as applied to facts.

[Ed. Note.—For other definitions of "Arrangement," see Words & Phrases.]

9. Officers 🔑122.

In prosecution of supervisor for being interested in public contracts, instruction authorizing acquittal, but erroneously omitting element of previous agreement between defendant and corporation doing work, *held* properly refused (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

10. Indictment and information 🔑171.

As regards variance in criminal case, allegation otherwise not essential may become material and must be proved in all cases when descriptive of that which is necessary to the charge.

11. Officers 🔑122.

In prosecution of supervisor for being interested in public contracts, variance as to location of work under one contract *held* fatal as to conviction on one count (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

12. Criminal law 🔑726.

In prosecution of supervisor for being interested in public contracts, closing argument of state's counsel resenting insinuation that local judge who did not try case had participated in interview of prosecution witness *held* justified.

While defense's cross-examination of such witness did not show such participation, questions asked could be reasonably construed as carrying such insinuation, and redirect examination conclusively negatived such participation.

Appeal from Superior Court, Marin County; Louis H. Ward, Judge.

William L. Deysher was convicted of being interested while Supervisor in certain con-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 40 P.2d 259.

tracts for the improvement of county roads, and he appeals.

Affirmed in part and reversed in part.

Joseph K. Hawkins, of San Rafael, and Edmund J. Thomas, Jr., of San Anselmo, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary and Seibert L. Sefton, Deputy Attys. Gen., for the People.

GRAY, Justice pro tem.

The grand jury of Marin county, by an indictment containing 21 counts, each pleading a separate contract, accused appellant of as many crimes of being interested, while supervisor, in contracts for the improvement of county roads. Upon arraignment, appellant pleaded "not guilty" to each count. Counts 11 and 14 were dismissed upon the prosecution's motion, during the trial. After a trial of ten days, the jury returned a verdict finding appellant guilty on counts 2, 5, and 15, based upon work ordered by him, and not guilty on three counts, based upon work ordered by other supervisors, and disagreed, as to the remaining counts, of which four were based upon contracts awarded by the board, after receipt of bids and nine upon work ordered by other supervisors. His motion for a new trial having been denied, he was sentenced to imprisonment in the state prison at San Quentin, concurrently, on each of the three counts. He appeals from the order denying a new trial and from the judgment of conviction, urging as grounds for reversal: (1) Erroneous admission of evidence; (2) insufficiency of the evidence to support the verdict; (3) erroneous refusal of two requested instructions; (4) variance as to count 5; and (5) misconduct of the prosecutor in closing argument.

Section 71 of the Penal Code provides for the punishment of "every officer * * * prohibited by the laws of this state from * * * *being interested in contracts* * * * who violates any of the provisions of such laws." Section 920 of the Political Code declares that "* * * county * * * officers must not *be interested in any contract* made by them in their official capacity, or by any body or board of which they are members. * * *" Section 4322 of the last code states that "no member of the board [of supervisors] must *be interested, directly or indirectly* * * * *in any contract* made by the board, or other person, on behalf of the county, for * * * the * * * improvement of roads. * * *" (Italics ours.) The evidence, without conflict, proves that appellant, as supervisor, on four different occasions verbally ordered E. A. Forde, as president of Highway Builders Limited, a corporation, to improve three different roads within his district; that in doing such work the corporation subsequently rented road equipment from a copartnership, of which appellant was one of two members; that appellant approved claims for such work totaling $2,124.40; and that the corporation paid the copartnership, as rent for equipment, a total of $1,219.50. The only element of the offenses charged in counts 2, 5, and 15, as to which there is any question as to proof, is appellant's interest in the road contracts. Such interest, if any, must have arisen by the renting of the equipment subsequent to the letting of the road contracts.

[1, 2] Neither the briefs nor our own investigation has disclosed any case deciding what facts sufficiently establish such an interest in a public contract as will subject an officer to punishment under said section 71 or similar statute. But aid can be obtained from civil cases considering the sufficiency of evidence to prove such an interest of an officer in a public contract as to invalidate it. Outside of a general discussion of the public policy, underlying the statutory prohibition, the cases of Stockton P. & S. Co. v. Wheeler, 68 Cal. App. 592, 229 P. 1020; County of Shasta v. Moody, 90 Cal. App. 519, 265 P. 1032; Hobbs, Wall & Co. v. Moran, 109 Cal. App. 316, 293 P. 145; Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095, cited by respondent, are not presently helpful, because, in each case, the prohibited interest existed at the award of contract. The purchase, after award of contract and *without previous agreement so to do*, by the contractor of material used in the performance of the contract from a member of the board awarding the contract, or from a corporation of which such member is a stockholder or employee, does not create, in such member, an interest in the contract which will invalidate it. Escondido Lumber, etc., Co. v. Baldwin, 2 Cal. App. 606, 84 P. 284; cited with approval in Worrell v. Jurden, 36 Nev. 85, 132 P. 1158, and Kerr v. State ex rel., 65 Ind. App. 102, 116 N. E. 590; O'Neill v. Town of Auburn, 76 Wash. 207, 135 P. 1000, 50 L. R. A. (N. S.) 1140; People v. Southern Surety Co., 199 Mich. 30, 165 N. W. 769; Fredericks v. Borough of Wanaque, 95 N. J. Law, 165, 112 A. 309. However, if the purchase is made pursuant to an agreement, made before the award of contract, the latter is void. City of Northport v. Northport Townsite Co., 27 Wash. 543, 68 P. 204, 206. In the last case it is said: "However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void." "In determining whether or not a contract such as this is against public policy and illegal, the court is not concerned with the technical relationships of the parties, but will look behind the veil which enshrouds the matter to discern the vital facts." Tuscan v. Smith, 130 Me. 36, 153 A. 289, 293, 73 A. L. R. 1344. The making of an

agreement may be inferred by proof of conduct as well as by proof of the use of words. Dunham, Carrigan & Hayden Co. v. Thermoid Rubber Co., 84 Cal. App. 669, 258 P. 663; Northern Assur. Co. v. Stout, 16 Cal. App. 548, 117 P. 617; Civ. Code, § 1621.

The conduct of appellant and the corporation in the rental of the equipment, together with attendant circumstances, is shown by the following undisputed facts: Appellant was a supervisor of Marin county for a term of four years commencing January, 1929. Prior thereto, and while such supervisor, he was an equal partner in a copartnership which was engaged in owning, operating, and renting road machinery, especially trucks, and conducting a garage. His stepson, at all times covered by the indictment, was general manager and bookkeeper of the copartnership's business, and particularly was in charge of rentals of equipment. In July, 1929, E. A. Forde incorporated the Highway Builders Limited, for the purpose of continuing his business of road construction and exploiting an agency for the sale of road asphalt. He at all times was the president and sole owner of the corporation, transacted all its business, and received all its profits. At its inception, he transferred to the corporation a scarifier, small tools, and other undisclosed assets, valued at $1,767.49. He bought, for the corporation, from the copartnership, in 1929, a 17,000-gallon tank and pumping equipment for $600; in 1931 a truck, a crusher distributor, a roller, and a tank truck; and in 1932 another truck. The corporation never owned any other equipment. In November, 1929, he hired appellant's stepson as bookkeeper for the corporation, and the latter continued as bookkeeper at all times. Thereupon the office of the corporation was moved from Forde's home to the address of the copartnership, in a building owned by it.

Each supervisor solely ordered all road work within his road district, accepted its performance, and approved the claim therefor, and, upon such approval, the board of supervisors ordered its payment. Appellant verbally ordered Forde to do the work, specified in the counts upon which he was convicted, at an agreed price fixed at cost plus 15 per cent. In the performance of this work, equipment of the copartnership was used, with appellant's knowledge. Of the other remaining sixteen contracts, four were awarded by the board, appellant voting therefor, after receipt of competitive bids, and the remainder resulted from verbal orders of other supervisors. The county paid the corporation a total of $36,416.70 for these nineteen jobs, and the corporation paid the copartnership a total of $13,402.37 for rent of equipment used thereon. During 1930, 1931, and the first month of 1932 the corporation did about $85,000 worth of work for the county. Equipment of the copartnership was used in all of this work exclusively, except on four jobs where additional equipment of a kind not possessed by the copartnership was rented from other parties. The corporation also rented trucks from the copartnership for use in the performance of public contracts in four neighboring counties. Twelve or thirteen years before, appellant, while a town trustee, had been advised by a Deputy Attorney General that it was unlawful for a public official to be interested in a public contract, but that it was lawful to rent equipment to the contractor after the contract was let. Appellant saw the copartnership's equipment used by the corporation in performance of county contracts. The stepson rented the equipment to the corporation and fixed its rental price. Appellant ordered the work, described in count 15, after the corporation had rented equipment from the copartnership which it had used in performance of the contracts specified in the next six counts; the work, described in count 5 after such rental for use in the performance of contracts, specified in the last sixteen counts; and the work described in count 2 after such rental for use in doing the work specified in counts 3 to 21, both inclusive.

[3-5] Appellant assigns as error the admission, over his objection, of evidence relating to work wrongly described in count 14, which had previously been dismissed for variance, and to work not covered by the indictment, but done during the times specified therein. The first job was ordered by appellant at a cost to the county of $2,550 and the corporation paid to the copartnership as rental for its equipment used thereon the sum of $1,306.26. The second job consisted of the oil surfacing of a continuous portion of the San Quentin-Greenbrae-Kentfield road within appellant's district. To evade section 2640 of the Political Code, as amended by St. 1931, p. 178, requiring bids for work in excess of $2,000, appellant gave to the corporation, at a unit cost in excess of the prevailing price, five contracts for this work, each for less than $2,000, but all totaling $7,810.93. Evidence showing the commission of independent crimes which has no tendency to prove any material fact connected with the particular crime charged is inadmissible. 8 Cal. Jur. 58. Evidence of other crimes which are of the same general character, are connected as part of one plan or scheme, and tend to the same common end, is admissible to show motive and design leading up to the particular crime charged, and thus directly tending to show that the crime in question was part of such common scheme. 8 Cal. Jur. 69. The prosecution was attempting to prove such conduct between appellant and the corporation as would warrant the inference that an agreement as to the rental of equipment was made before the work was ordered. Obvious-

ly, the questioned evidence as to their conduct relative to other work during the same time was material on that issue. The court of its own volition correctly, at the time of its admission, admonished the jury as to the limited consideration which could be given such evidence.

[6, 7] "The findings of a jury upon disputable questions of fact, if supported by direct evidence or inferences, or both, must be given full faith and credit. It is only where, as a matter of law, there is no legal evidence supporting the charge that a reviewing court may disturb a verdict. The rule, upon an appeal in a criminal case, is that the court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether or not the guilt of the defendant is deducible therefrom. The question for the court to pass upon is whether there were facts before the jury to justify the inference of guilt. People v. Tom Woo, 181 Cal. 315, 184 P. 389." People v. Hennessey, 201 Cal. 568, 571, 258 P. 49, 50. From the sale by the copartnership to the corporation of practically all of the latter's road equipment and the common use of the same office and bookkeeper, the jury might have reasonably deduced a close business connection between them. From the almost exclusive use of partnership equipment by the corporation in the performance of its contracts and the payment of rentals in a large amount therefor, the jury might well have inferred that the corporation was a favored and valuable customer of the copartnership, whose profits would be increased by reciprocity. The jury might also have believed that appellant was attempting to evade the statutory prohibition, of which he had previously been advised, when he did not himself rent the equipment, but allowed the common bookkeeper, who was his manager and agent, to do so, with his knowledge. The jury also could have reasonably inferred from previous rentals of equipment on other county contracts that appellant had reason to believe, before he ordered the corporation to do any work, that it would, in continuance of its previous practice, rent copartnership equipment in doing such work. The jury was not required to acquit appellant because he denied making an express contract of rental, but it was warranted by the evidence as to his conduct towards the corporation, in inferring an implied contract for such rental, made before his ordering of the work.

[8, 9] The court correctly refused to give two of appellant's proposed instructions, which advised the jury to acquit if they believed the evidence established specified facts. The pertinent part of the first instructed an acquittal if the jury believed the contracts referred to the indictment were entered into between the board of supervisors and the corporation contractor "without any previous *arrangement* between the defendant and the said corporation contractor contemplating the rental or use by said corporation contractor of trucks and equipment from the firm of which the defendant was a member." (Italics ours.) As above pointed out, if an agreement, either express or implied, had been made by appellant and the corporation for the rental of the equipment before the former ordered the roadwork, he was interested in such work. The word "arrangement" is a very wide and indefinite term, which has a different signification from the word "agreement" and does not necessarily mean an "agreement." 5 Cor. Jur. 373. Its use, therefore, made the instruction vague, meaningless, and misleading, as applied to the facts. The second, so far as here material, advised a verdict of not guilty if the jury believed that, in the public contracts, "the defendant was not interested except to the extent that he might have been indirectly interested by reason of said corporation contractor having subsequently hired or used trucks or equipment in the performance of any work or improvement specified in said contracts from the firm of which defendant was a member." If such rental resulted from an agreement previous to the public contract, it would create a prohibited interest. The instruction, by the omission of the element of previous agreement, erroneously stated that such rental could never create an interest. The court, in its own instructions, correctly and fully defined "interest" and when prohibited.

[10, 11] The fifth count of the indictment alleged that during December, 1931, the copartnership rented to the corporation its trucks and equipment, which were used by the corporation upon work which was being performed by the corporation on the Nicasio road in road district No. 5, and for which the copartnership was paid by the corporation the sum of $112. The only identification of the public contract involved is this designation of its location. The evidence proved the time of use and amount of rental of the equipment as alleged, but the location of the work as at White's Hill in road district No. 2. The variance occurs not in surplusage as to venue but in the description of the public contract. An allegation otherwise not essential may become material, and must be proved in all cases when descriptive of that which is necessary to the charge. People v. Handley, 100 Cal. 370, 34 P. 853; People v. Strassman, 112 Cal. 683, 45 P. 3; People v. Lapique, 10 Cal. App. 669, 103 P. 164. Since an acquittal on this count would not have barred a further prosecution on the contract disclosed by the evidence, the variance is fatal. People v. Arras, 89 Cal. 223, 26 P. 766.

[12] Counsel for the people in his closing argument forcefully resented what he designated as an insinuation that the local judge, who did not try the case, had participated in

the interview of a prosecution witness. While the defense's cross-examination of this witness did not show such participation, the questions asked can be reasonably construed as carrying such insinuation. The redirect examination conclusively negatived such participation. The argument was justified, even if the defense immediately disavowed any such insinuation and as strenuously resented the same.

The judgment is affirmed as to counts 2 and 15, and reversed, for variance, as to count 5.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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134 Cal.App. 383

PEOPLE v. BARR et al.

Cr. 2412.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1933.

Hearing Denied by Supreme Court Oct. 27, 1933.

1. Criminal law 🔑**511(2).**

Evidence in corroboration of accomplice is sufficient if it tends to connect defendant with offense charged, even if it is slight and would be entitled to but little weight if standing alone.

2. Conspiracy 🔑**48.**
Robbery 🔑**26.**

Whether defendant was guilty of conspiracy to commit felony and of robbery *held* for jury.

3. Criminal law 🔑**695(1).**

Objection of no foundation laid raises no question except when impeaching testimony is offered (Code Civ. Proc. § 2052).

4. Criminal law 🔑**681(1).**

Evidence of conversations connecting man called "Dago" with conspiracy to commit felony and with robbery was admissible without laying of any foundation, where witness giving testimony did not identify unknown man with accused (Code Civ. Proc. § 2052).

5. Conspiracy 🔑**45.**
Robbery 🔑**23(1).**

Evidence of accused's statement showing knowledge that robbery was to be committed, but denying participation in it or conspiracy to commit it, *held* admissible in prosecution for conspiracy to commit felony and robbery.

6. Criminal law 🔑**656(7).**

That on motion for new trial judge referred to accused's failure to testify in answer to argument that they were not guilty did not show prejudice from such failure in deciding case, and was immaterial, where conviction for conspiracy to commit felony and robbery was supported by evidence.

7. Judges 🔑**56.**

Calling of another judge to try charge of receiving stolen property did not disqualify judge, finding persons accused of principal offenses guilty, from hearing application of one convicted of receiving stolen property for probation, where disqualification to hear stolen property case was not declared in open court and entered in minutes (Code Civ. Proc. § 170 (5)).

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

John Barr and others were charged with an offense, Vincent Marsiglia, Vere L. Eckelberry, and James F. Lawler were convicted of a conspiracy to commit a felony and of robbery, and Dor Denniston was convicted of receiving stolen property, and they separately appeal.

Affirmed.

William P. Redmond of Los Angeles, for appellant Marsiglia.

Samuel A. Rosenthal of Los Angeles, for appellant Eckelberry.

Max M. Gilford and Ben Van Tress, both of Los Angeles, for appellant Lawler.

S. S. Hahn, W. O. Graf, and Phi O. Clough, all of Los Angeles, for appellant Denniston.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Appellants Eckelberry and Marsiglia, together with defendants Barr, Griffith, Woodington, and Lewis, were jointly charged in an information filed by the district attorney with conspiracy to commit a felony, in count I, burglary, in count II, robbery, in count III, and grand theft, in counts IV and V. On the same day another information was filed charging appellants Lawler and Denniston and defendant Laughlin with the same crimes, and in count VI of said second information with receiving stolen property. The first information also charged a prior conviction of felony as against Marsiglia, and the second a prior conviction against Lawler, which prior convictions were admitted. The charges under the two informations were consolidated for trial. Marsiglia, Eckelberry, and Lawler pleaded not guilty, waived jury, and were found guilty by the court on counts I and III of the first information mentioned, and defendant Lawler on counts I and III of the second, the other counts being dismissed. They have filed separate appeals from the judgments of conviction and from the orders denying their motions for a new trial.

Appellant Denniston withdrew his plea of not guilty and pleaded guilty as to count VI. He then applied for probation, which was denied, whereupon judgment was pronounced; the other counts being dismissed. He has appealed from such judgment of conviction and from the order denying his application for probation.

The warehouse of Smart & Final, Limited, in Pasadena, was entered on the night of January 29, 1933, and a large quantity of cigars and cigarettes was loaded on a truck belonging to that firm and hauled away. The watchman, William A. Pinkley, was held up inside the warehouse by two men, one having a gun, and was hit over the head, blindfolded, and his hands tied behind him with a wire. He was then taken to the cellar, where his feet were tied, and was left there while the truck was being loaded and driven away. When he finally worked loose, he found the front door unlocked, although it had been locked by him after entering that evening. It was shown that approximately 120 cases of cigarettes and 6 or 7 cases of cigars were stolen; all of the boxes having the name of the firm stenciled on the outside. The truck was found by the Los Angeles police at Eighty-Seventh and Vermont streets, Los Angeles, and returned the next day. Frank McDannald, a warehouseman employed by Smart & Final, saw a number of cases of Smart & Final cigars and cigarettes in a candy and tobacco store at No. 1010 West Eighty-Fifth street, Los Angeles, on the day after the burglary in question, where he also saw appellant Denniston, and while standing in front of the store, according to his testimony, a man drove up and left six cases of cigarettes. The witness then went back into the store and observed that the stencil mark had been removed from such cases. He identified them in court as having come from Smart & Final's warehouse, by a cross-mark he had put on them in the warehouse.

Defendant Barr pleaded guilty and testified for the prosecution, connecting Laughlin, Lawler, Eckelberry, Woodington, Lewis, and a party known to him as "Dago" with the conspiracy, and Woodington, Griffith, and the "Dago" as having entered the warehouse with him, while it was agreed that Laughlin and Eckelberry would meet the truck somewhere down the street. Pinkley, the watchman, identified defendant Woodington as the man who held the gun on him. Other witnesses, not accomplices, testified to seeing the men together just shortly before the warehouse was entered, and to seeing some of them together thereafter. One of such witnesses identified appellant Marsiglia as one of the group, and testified that he was introduced to him as "Dago."

A police officer testified to seeing Lawler and Denniston at No. 1010 West Eighty-Fifth street on January 30th, and to having observed a number of cigarette cases with something torn away from them. Another officer testified that on January 30th he went to the premises at No. 2058 West Eighty-Fifth street and that defendant Denniston gave him the key to his garage, in which he found a large quantity of cases of cigarettes and cigars; that he then went into Denniston's house and found in the bedroom six or eight cases of cigars covered with a blanket, and more cases in a clothes closet. With regard to the condition of the cases, he testified that something had been removed as if partly cut with a knife and then torn the rest of the way.

Appellant Marsiglia contends (1) that the evidence was insufficient to sustain the judgment against him on either count, and (2) that the court erred in admitting evidence against him.

[1, 2] 1. A witness named Baggett testified that he knew Marsiglia, who was introduced to him as "Dago," and that he saw Eckelberry and Barr with Marsiglia in the afternoon of the 29th of January at his home, and that the three left together, Barr returning later in the evening. A witness named Ream testified that he knew Marsiglia, and that he saw him with Woodington, Griffith, Laughlin, and Lewis at Barr's home on the evening of the 29th; that they were there when he left, at about 7:30 p. m.; that near midnight he saw Barr and Marsiglia at Baggett's home, and went with them to Los Angeles; that on the way he overheard Marsiglia tell Barr that it was a good thing Smart & Final's name on the truck had been covered up, and heard him ask Barr how many cigars they got. Police officer Decker testified that he asked Marsiglia why he ever went in on such a proposition, to which the latter replied, "Well, I was up against it. I wanted to help my sister out," and other language which could only be taken as an admission. All of which was ample evidence to support the implied finding that Marsiglia was not only in the conspiracy, but was actually the "Dago" who took part in the burglary. It is not necessary that the evidence corroborating that of an accomplice should of itself establish the fact that the defendant committed the offense charged; and, even though slight, it is sufficient if it tends to connect the defendant therewith. This defendant's own admissions afforded corroborative proof sufficient to sustain the verdict against him. People v. Negra, 208 Cal. 64, 280 P. 354.

[3, 4] 2. Many objections were made by counsel for Marsiglia to the relation of conversations involving the "Dago," on the ground of "no foundation laid." We know of

no such objection, although it seems to be made by many lawyers. Only where the subject-matter of the conversation is used for the purpose of impeachment is it necessary to lay a foundation of time, place, and persons present. Section 2052, Code Civ. Proc. Here no impeachment was attempted. The testimony consisted simply of a relation of conversations connecting the man called "Dago," who was not identified by the witness Barr as Marsiglia, with the offenses charged. Under such circumstances no foundation was necessary. If those facts are desired, they may be brought out on cross-examination. We cannot take the time or space to review the other objections made, but we have read them and fail to see any error in the rulings thereon.

Appellant Eckelberry also urges the insufficiency of the evidence to support the judgment against him. So far as he is concerned, the testimony of his accomplice Barr shows his connection with the common plan and its execution. A written statement signed by Barr, which Eckelberry verified by his own signature as being true where his name is mentioned, amply corroborates all that Barr said, and shows that this appellant was in the conspiracy from the start, that he furnished the key used to unlock the door of the store, that he watched outside while the burglary was being committed, and otherwise took an active part in the affair. In addition, the testimony of Baggett and Ream connects him up in close association, both as to time and parties.

Appellant Lawler urges that the evidence is insufficient as against him because there is no corroboration of the testimony of accomplices Laughlin and Barr. That Lawler knew all about the contemplated plan to obtain the cigars and cigarettes is clear from the testimony of defendant Barr, together with the fact that he was in close association with Barr and Eckelberry both before and after the commission of the crime. This also appears from the testimony of defendant Laughlin, who drove the truck to defendant Denniston's place of business and there unloaded the loot in Denniston's garage, to the effect that about fifteen minutes thereafter Lawler came along and Denniston paid Laughlin $200 for the cigarettes, $50 of which he gave to Lawler; that he (Laughlin) had a conversation with Denniston before the robbery, and that Lawler then told Denniston to show Laughlin where he wanted the cigarettes delivered, and that, after he abandoned the truck, he went to Lawler's home and there met that defendant and Eckelberry.

[5] Officer Decker testified that Lawler made a statement to him substantially as follows: That on January 26 (the robbery occurring January 29) he (Lawler) was playing cards with Eckelberry, and that during the second game Eckelberry said to him, "Jim, I have a couple of hundred dollars worth of cigarettes; do you know where I can sell them?" That Lawler then said, "Over in the blacksmith shop, just kidding him, that's all." "So he [Eckelberry] didn't say no more for a little while. I then said, 'There's a wholesale place across the street and I will ask them about it.' The next afternoon I went to Mr. Denniston and told him that a friend of mine had a couple of hundred dollars worth of cigarettes and asked if he could use them. He asked the price and upon being told that he asked if I would make any money myself, and I said, 'Not a nickel.' I told him Eckelberry would let him know. Eckelberry dropped in Saturday night. Mr. Laughlin was with him, and that other man—" "Q. John Barr? A. * * * Yes." "He said, 'This is the guy who's going to get trucks for us,' and I said, 'Not for me.' I said, 'Scotty (John Barr), remember I am not in on this and don't intend to have anything to do with it. Well, that's all that transpired that night."

Even Lawler's attempted denial before "Scotty," in the statement he made to the officer, is an admission that he knew the cigarettes were to be stolen, and in our opinion the admission made is sufficient corroboration of the stories told by Barr and Laughlin, even though this appellant denied that their stories concerning him were true. Such denial was of no weight compared with his own statement, which shows a connection with those defendants and a knowledge of the fact that the property was to be stolen. "It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. * * * If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case, it is sufficient." People v. Yeager, 194 Cal. 452, 473, 229 P. 40, 49.

The statement was not in any sense an accusatory statement, and was properly admitted as a statement made by this defendant concerning his connection with the offense charged.

[6] At the argument on defendants' motions for a new trial the court said: "It is a strange thing these gentlemen representing the three defendants who stood trial are arguing a lot of questions whether or not they are guilty when they didn't even take the witness stand. * * * They didn't take the witness stand and deny their guilt. If you want to argue that there was not any evidence at all legally sufficient to show guilt, that is one thing; but to argue that they are not guilty is strange." Appellant Lawler urges that such remark shows that the trial judge was prejudiced by the failure of ap-

pellant to take the stand. We fail to find in such language any support for the conclusion that in deciding the case the judge took that fact into consideration at all. He was criticizing the arguments made, which were apparently directed toward convincing the trial judge, after the judgment, that the defendants were not in fact guilty, rather than that the evidence did not justify the judgment. The statement of the trial judge was not made as a reason for the decision reached by him; and, even if it had been, since the judgment rendered seems to be supported by the evidence, it would not make the judgment erroneous. People v. Hicks, 115 Cal. App. 314, 1 P.(2d) 550.

[7] Appellant Denniston's **trial** was continued until after the decision was made in the cases of his codefendants. At that time Judge Wood, before whom such three cases were tried, evidently feeling that there might be some objection to having him try this appellant's case, called in Judge Fletcher Bowron, whereupon Denniston withdrew his plea of not guilty and entered a plea of guilty to count VI, charging him with the offense of receiving stolen property. He was then granted leave to file application for probation by Judge Bowron. At that time the district attorney remarked that Judge Wood was familiar with the facts in the case, and that he did not know "whether your honor will sit on that matter [application for probation] or want to refer it to Judge Wood." There was some colloquy at this point, during which appellant's attorney stated that, since Judge Wood had heard the prior case and had increased appellant's bail from $2,500 to $15,000 his client felt "that Judge Bowron should act in the matter." Judge Bowron then stated that he would prefer "to have Judge Wood pass upon the matter as he is familiar with the case. The matters will come on in the regular course. I believe that Judge Wood feels, inasmuch as he asked me to come over here in his place today, that if there is any question about his bias or prejudice or feeling in the matter he would want to step aside. If he still feels that way we can arrange to either have the matter transferred to my department in Los Angeles or I can come over here." The matter of probation came on before Judge Wood; no objection having been made by appellant so far as the record shows. No request was made to have it heard by any other judge and no affidavits charging bias or prejudice were filed. Judge Wood denied the application, although the probation officer was apparently favorable to it. Appellant Denniston urges that Judge Wood disqualified himself and could not thereafter further act, and cites several cases which lay down such rule. In the cases cited, however, the judge was legally disqualified by reason of having an interest in the subject-matter of the action, or relationship to party or attorney. No such condition appears here, nor did Judge Wood disqualify himself by admitting bias or prejudice in any sense of the words. That can only be done by so declaring in open court and by causing a memorandum of such declaration to be entered in the minutes. If a judge fails so to declare himself disqualified, and a party honestly believes that he is, proceedings must be resorted to by such party under section 170 (5) of the Code of Civil Procedure. We see no merit in the contention.

The judgments and orders appealed from are affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

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134 Cal.App. 392

CITY OF LOS ANGELES v. WILMOT et al.

Civ. 8506.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1933.

1. Eminent domain ⚷241.

Court *held* to have duty to render judgment in condemnation proceeding where street improvement assessment was levied after commencement of proceeding, but amounts of such assessment were deducted from amount found due and payable (St. 1909, p. 1066, as amended).

2. Eminent domain ⚷251.

Remedy by appeal did not accrue on court's refusal to enter judgment in accordance with plaintiff's demand in condemnation proceeding.

3. Mandamus ⚷51.

If court refuses to render any judgment in condemnation proceeding, mandamus will lie to compel such action (Code Civ. Proc. § 963).

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Proceeding by the City of Los Angeles against Edward E. Wilmot and another. From an adverse judgment, plaintiff appeals.

Appeal dismissed.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for appellant.

CRAIG, Justice.

A motion that final judgment be entered in proceedings to condemn certain real property in the city of Los Angeles was denied by the superior court. The plaintiff appealed.

The real property in controversy, sought for public use under the Park and Playground Act of 1909, p. 1066, as amended, was also burdened with an assessment for street improvements which was levied after commencement of the proceedings in eminent domain, but prior to the rendition of findings of fact and conclusions of law therein. Bonds having been issued pursuant to the street improvement proceedings, the municipality paid to its treasurer the amount due thereon, and said bonds were thereupon canceled, and the amounts of assessment against the properties of the respondents were deducted from the amount found due and payable in the first proceedings. It is contended here that the superior court had no jurisdiction upon presentation of the motion to enter final judgment in accordance with the facts before it.

[1-3] That it was the duty of the court to render a judgment seems plain. It is true that the court might, if permitted so to do, enter an erroneous judgment, but this will not now be presumed nor determined. The remedy by appeal did not accrue upon refusal of the trial court to enter judgment in accordance with the demands of the plaintiff. If the court has refused to render any judgment mandamus will lie to compel such action. Code Civ. Proc., § 963; Russell v. Elliott, 2 Cal. 245; Wood v. Strother, 76 Cal. 545, 18 P. 766, 9 Am. St. Rep. 249; Anderson v. Pennie, 32 Cal. 265; Claudius v. Melvin, 146 Cal. 257, 79 P. 897; Ex parte Ford, 160 Cal. 334, 116 P. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267; Olson v. Superior Court, 175 Cal. 250, 165 P. 706, 1 A. L. R. 1589.

The appeal is dismissed.

We concur: WORKS, P. J.; STEPHENS, J.

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134 Cal.App. 397

RICE et al. v. HARDY.

Civ. 544.

District Court of Appeal, Fourth District, California.

Sept. 28, 1933.

Appeal and error 🔑773(2).

Upon failure of parties to appear or show cause why appeal should not be dismissed when parties failed to file briefs, appeal will be dismissed.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Marie C. Rice and another against B. W. Hardy. From the judgment, defendant appeals. On motion to show cause why appeal should not be dismissed.

Appeal dismissed.

Forgy, Reinhaus & Forgy and L. W. Blodgett, all of Santa Ana, for appellant.

McFadden & Holden, of Anaheim, for respondents.

JENNINGS, Justice.

The clerk's transcript in this case was filed on October 25, 1930. No brief has been filed by either party to the action. This court, therefore, on its own motion, noticed an order to show cause why the appeal should not be dismissed, for September 12, 1933.

No cause has been shown why the appeal should not be dismissed and no appearance has been made.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

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134 Cal.App. 349

In re McALLISTER'S ESTATE.

KENDALL et al. v. McALLISTER et al.

Civ. 7955.

District Court of Appeal, Second District, Division 1, California.

Sept. 27, 1933.

1. **Executors and administrators 🔑87.**

Settlement by compromise of claim owing estate is within executors' and probate court's discretion, and will not be disturbed, unless abuse of discretion is clearly apparent (Probate Code, § 578).

2. **Appeal and error 🔑1001(1), 1010(1).**

Except where circumstances permit but one inference of negligence as matter of law, trial court's or jury's finding of lack of negligence, based on substantial evidence, is conclusive.

3. **Executors and administrators 🔑87.**

Probate court's order authorizing executors to compromise estate's claim against nonresident attorney retaining estate's money *held* no error, where attorney claimed money for services to deceased and executors, and suit against attorney would require executor's personal appearance in state of attorney's residence (Probate Code, § 578).

4. Executors and administrators ⚷506(3).

Finding that executors were not negligent in appointing nonresident attorney to sell estate's property, knowing attorney had claim for services rendered deceased, so as to enable attorney to retain estate's funds in satisfaction of claim, *held* no error (Probate Code, § 578).

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceedings in the matter of the estate of Jessie T. McAllister, deceased, by Mark Kendall and another, contestants, against Thomas W. McAllister and others. From adverse orders, the contestants appeal.

Affirmed.

Lane & Lane, of Long Beach, for appellants.

Rex Hardy, of Los Angeles, for respondents.

HOUSER, Justice.

This is an appeal by two residuary legatees under the will of Jessie T. McAllister, deceased, from each of two orders—by the first of which the executors of said will were granted leave to compromise a claim which the estate held against a certain individual; and by the second of which orders the amended and supplemental account current of said executors, as far as it related to the allowance to them of a credit on their account with the estate for the full amount of said claim, was settled and approved.

The pertinent facts are that, at the time of her death in this state, the testatrix was the owner of all the capital stock of a corporation located in the state of Ohio, which stock she had acquired from the estate of her deceased husband; that for many years preceding the death of the testatrix an Ohio lawyer named Brink had transacted all legal business for the corporation, the husband of the testatrix, and latterly for the testatrix herself; that, following the decease of the testatrix, the executors of her will and estate appointed Brink to "look after" the interests of the estate in the state of Ohio and to effect a sale of the stock in said corporation; that, following the sale by Brink of said stock and upon the confirmation thereof by the probate court, Brink remitted to the executors of the estate the sale price thereof, less the sum of two items represented by commission allowed to Brink for effecting the sale and an amount which Brink claimed was due to him for unpaid services performed by him for the testatrix in her lifetime, for or on account of which he had filed no claim against her estate. In addition thereto, Brink claimed that the amount allowed to him by the probate court as commission for making the sale of the stock was inadequate and, consequently, that he was entitled to a further payment on that account. The right to retain such funds in his possession, which amounted to $10,440.84, was claimed and asserted by Brink under the provisions of a certain statute of the state of Ohio. It was understood that Brink was financially responsible, and that the probabilities were that he would be able to respond to any judgment which finally might be rendered against him. It was also developed that, at the time Brink was appointed by the executors of the estate, they had knowledge of the facts regarding his former employment by the corporation, the husband of the testatrix, and latterly by the testatrix herself; and that one of the executors thought it "entirely probable that she did not pay Mr. Brink, but I didn't know it until after he had this money in hand." On the hearing of the matter, it further appeared that the estate of the testatrix was comparatively greatly financially involved; that the interest and tax charges against the estate amounted to more than $5,000 per year; "that litigation against said Brink by the executors would have to be instituted in the city of Cincinnati, state of Ohio, and an attorney of Cincinnati employed for such purpose; that a satisfactory presentation of the claim of the executors would necessitate the personal appearance of Rex Hardy, one of the executors of this estate, before the court in Cincinnati trying said action."

In such circumstances, by its order made and entered, the probate court authorized a compromise of the claim of the estate against Brink for the sum of $4,690.84; and by its further like order in the premises, as far as concerned the transaction in question, directed the settlement and allowance of the account current of the executors of the estate. In effect, as far as is here material, the probate court concluded that, the facts considered, the situation was such that the best interests of the estate would be served by the compromise hereinbefore indicated; also that the executors had not been guilty of negligence in the premises.

The several points made by appellants for an order of this court, by which the several orders from which the appeal is taken should be reversed, are as follows:

"1. The appellants contend that the executors were negligent in that they had constructive knowledge of Brink's claim against Jessie T. McAllister for services performed in her lifetime; that having such knowledge the executors made it possible for him (Brink) to come into the possession of $92,000.00, which was a part of the estate, and after allowing this situation to arise, have failed to take proper action to recover the moneys due and owing to the estate.

"2. That there is no basis upon which a compromise might be founded since Brink, having failed to file his claim, has no contestable claim and no feasible reason for holding the money in question.

"3. That although the Ohio law provides for an attorney's lien, the attorney's lien law is not applicable to the situation involved herein.

"4. That Mr. Brink is holding money which came into his hands, as agent for the executors of the estate of McAllister, for services rendered by Brink as an attorney.

"5. That the money is not being held for services rendered in negotiating the sale of capital stock hereinabove mentioned, but the lien is claimed for legal services rendered the deceased in her lifetime.

"6. That no obligation rests upon the residuary legatees to protect the executors against loss as the duty was theirs to receive all the moneys from their agent."

From an examination of such specification of points for a reversal of the several orders here under consideration, it is apparent that they may properly be grouped into two general grounds, namely, that the facts did not authorize or justify the probate court in making its order of compromise; nor in declaring that the executors had not been negligent.

[1] As to the first of such propositions, the law is well established that a settlement by compromise of a claim owing to the estate of a deceased person is within the discretionary power of the executors of an estate; and a fortiori of the probate court; and upon an appeal from such an order of compromise an appellate court will not disturb it, unless an abuse of discretion is clearly apparent, either in the executors or in the probate court. Section 1588, Code Civ. Proc., now section 578, Probate Code; 11 Cal. Jur. 1033, and authorities there cited.

[2] Regarding the question of negligence of the executors of the estate by the findings of fact, together with the conclusions of law thereon made by the probate court, the executors were clearly and positively absolved from any negligence in the premises. By the great weight of authority, except where the circumstances in question permit of but one inference of negligence as a matter of law, a finding of lack of negligence by a trial court or by a jury, based upon substantial evidence, constitutes a determination of an ultimate fact, and as such is conclusive. 19 Cal. Jur. 723 et seq., and authorities there cited.

[3, 4] As far as this court may discern from the facts and circumstances connected with the transaction which formed the basis for the two orders here under consideration, no abuse either of discretion, or of authority, was manifested by the probate court in making either of such orders; nor does the situation thus presented suggest any legal impropriety in the finding and conclusion of the probate court with reference to the asserted negligence of the executors.

It is ordered that each of the orders from which the appeal is taken be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

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134 Cal.App. 512

MANUEL v. PACIFIC GAS & ELECTRIC CO.

Civ. 4863.

District Court of Appeal, Third District, California.

Oct. 6, 1933.

Rehearing Denied Nov. 4, 1933.

1. Electricity 🔑19(5).

Evidence *held* to support verdict finding that break in high-voltage wire, which fell over fence, injuring plaintiff, was not caused by rifle shot.

2. Electricity 🔑19(6).

Whether fuse placed at junction of service lines, on which break in high-voltage wire occurred, was defective or too large, *held* question for jury (Code Civ. Proc. § 1963).

3. Negligence 🔑121(2).

When cause of alleged damage is established, doctrine of res ipsa loquitur is inapplicable.

4. Negligence 🔑121(2).

Under doctrine of res ipsa loquitur, burden of proof does not shift, but doctrine establishes prima facie case of negligence.

5. Negligence 🔑121(2).

Where plaintiff establishes prima facie case of negligence under doctrine of res ipsa loquitur, defendant must produce evidence sufficient to offset prima facie case.

6. Electricity 🔑19(3).

Where cause of breaking of high-voltage wire, which fell upon fence, injuring plaintiff, was question for jury, doctrine of res ipsa loquitur *held* applicable.

7. Electricity 🔑19(3).

Electric company, under doctrine of res ipsa loquitur, had burden to establish that power line which broke was properly built of standard material, and that safety appliances of adequate design and operation were installed and functioning.

8. **Electricity** 🔑19(8).

Whether wire fence under power line should have been grounded to carry off surplus electricity from fallen high-voltage wire *held* question for jury.

9. **Electricity** 🔑19(8).

Where high-voltage wire fell across fence, injuring plaintiff, negligence of electric company, under doctrine of res ipsa loquitur, *held* question for jury.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Jessie Manuel against the Pacific Gas & Electric Company. From a judgment in favor of the plaintiff, and from an order denying its motion for judgment notwithstanding the verdict, the defendant appeals.

Judgment and order affirmed.

Clinton F. Stanley, W. H. Spaulding, and Thomas J. Straub, all of San Francisco, for appellant.

Mervin C. Lernhart, of Napa, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff was awarded damages against appellant for personal injuries inflicted by contacting a wire fence which had become charged with electricity from a fallen high-voltage wire.

At the conclusion of the trial the defendant moved for a directed verdict on the ground of the failure of any proof of negligence on the part of the defendant, which motion was denied, and thereafter moved for judgment notwithstanding the verdict upon the same ground. A motion for a new trial followed, and, also, a motion to vacate the judgment and verdict rendered in favor of the plaintiff against the defendant, all of which were by the court denied, and now appeals to this court, asking that judgment be entered in its favor on the ground it appears from the evidence as a whole that a verdict should have been so directed at the conclusion of the trial.

Respondent in his complaint alleges the injuries suffered were caused by reason of the negligence and carelessness of the defendant in constructing and maintaining said power line.

The facts as adduced at the trial disclose that on the day of the injuries alleged the Pacific Gas & Electric Company maintained a service line of high voltage consisting of two wires along a county road in Napa county, and over and above a wire fence, both power line and fence paralleling the road. The fence was built many years prior to the location of the power line, which carried 6600 volts through two strands of number six copper wire from the main power lines of appellant to users of electric power in the neighborhood.

On the day in question a seven year old boy was shooting birds with a .22 caliber rifle along the roadway, and after firing a shot testified he saw one of the wires drop, which fell across the wire boundary fence, whence the current was conducted to a point about one and one-half miles distant, where it started a fire upon the property of the respondent. Respondent, in attempting to extinguish the fire, came in contact with some charged loose wires concealed beneath some rubbish and dry grass, whereby he sustained serious injuries, for which he recovered the judgment herein complained of. Whether the electric wire was severed by the rifle bullet of the youth or from some other cause was the principal issue before the jury.

It may be conceded that the testimony of the boy on that question was not altogether convincing, although he testified he did not hit the wire, but, after he had walked about ten feet, he saw the wire fall. He further testified that he shot towards the mountains and away from the point of break, and the bird at which he was shooting was on a wire between two different sets of electric poles than was the span in which the break occurred. From the map of the surroundings used at the trial, if the line of the shot was towards the mountains, it was then almost at right angles to the point of the break in the wire.

Plaintiff developed by certain witnesses of appellant that a kink in the wire while being strung along the power line, or a chance blow by a tool of one of the employees could have caused the injury to the wire, resulting in its fall.

Certain witnesses of appellant testified as to seeing and examining the broken portions of the wire which appeared to have been damaged by having been flattened in part, leaving the weight of the wire supported by a portion only of the strand and the damaged ends seemed to have been covered by a grayish material, described by one or two of the witnesses as being lead. The broken ends were not produced at the trial, although they were before a coroner's jury at an earlier date.

Five witnesses were called who examined the broken piece of the power line. Enoch Crozier, local agent for appellant at Calistoga, testified he examined the ends of the broken wire and, in the presence of Harry Decker, cut the ends of the broken wire and took them to the office of the company at Calistoga. Mr. Crozier was not asked, nor did he describe, the appearance of the wire ends, nor did he express any opinion as to the cause of the break. Harry Decker, an electrician of Calistoga, testified that he assisted Crozier in cutting the broken ends of the wire, and that it "looked like only half of the wire was there at that broken point * * * having a slight depression on one side * * one side would have the appearance of being flat and the other side would have a small concave on the side of the wire * * * as if you would take a file and run it across a small object." Also, he saw some foreign matter on the ends of the wire, but did not examine it closely enough to state whether or not it was metal. These are the only witnesses who could testify that this wire examined by them was actually the section removed from the power line at the point of the break.

Mr. Ray Long, employed in the engineering department of appellant, testified that he examined two pieces of wire handed him by Crozier, and stated:

"The wire appeared to have been hit by some blunt instrument * * * the wire was bent and flattened * * * a lead deposit on the inside surface * * * which I took to be lead.

"Q. How did you determine it was lead on this wire? A. By the color and the fact I could scrape it with my knife."

Mr. C. D. Clark, district manager for appellant, was also a witness, and in answer to a question to describe the ends of the wire exhibited to him at the coroner's inquest, said: "They were curved in, cut like any other sort of a cut or a break. The ends were coated with lead where they had parted. The curved part was almost all the way through the wire, a small part of the wire remaining, showing where the actual break occurred."

Mr. Treadway, coroner of Napa county, was asked to describe the ends of the wire in question, and he answered: "There was a break where the wire broke and it looked like it had been hit with something and flattened out and then parted * * * it had a dent in it." He also observed some foreign metal, not copper, on the ends of the wire, lighter in appearance than copper. He also testified that shortly after the accident he observed a nick or dent in one of the wires on the other side of the pole from which the break occurred, and in the general direction of where the boy testified he had fired his gun. Subsequently a witness called for the defense testified that he was present on the day following the accident and the spans from the adjoining poles were taken down and examined, and no defects of any kind were found in the wires.

[1] The testimony produced by appellant and by the respondent only raised a conflict, and the jury decided that greater weight and credibility lay with the testimony adduced by respondent. There is nothing before us which impeaches the findings of the jury, and we are bound to accept their conclusions as true, and conclude that the break was not caused by a missile from the rifle of the boy.

[2] It also appeared that one of the fuses placed at the junction of the service lines on which the break occurred failed to break or melt, but was knocked out by one of the employees of the company, thus cutting off the flow of current from the broken wire into the fences and thence into the body of respondent. Appellant claims they were using fuses of proper size for the amperage in question, and that the fuses did not break because the soil, being dry, did not make a sufficient "ground" to increase the flow of current through the fuse. The fuses were not produced at the trial, however, and the jury had a right to infer that they may have been defective or too large for the normal factor of safety required under the circumstances. Section 1963, Code Civ. Proc. That also was a matter for the consideration of the jury.

[3] Respondent relies upon the doctrine of res ipsa loquitur, and has alleged in his complaint general acts of negligence only. Appellant claims that the rule of res ipsa loquitur applies in negligence cases upon the theory that the plaintiff is not in a position to show the circumstances causing the injuries complained of, and defendant, having the exclusive management and control of the instrumentality causing the injury, possesses knowledge of the cause of the accident, but, when the cause is established by either party to the action the doctrine is not then applicable. Carlsen v. Diehl, 57 Cal. App. 731, 208 P. 150; Lyon v. Chicago, M. & St. Paul Ry. Co., 50 Mont. 532, 148 P. 386; Jianou v. Pickwick Stages System, 111 Cal. App. 754, 296 P. 108. That is undoubtedly a correct statement of the rule, and under it appellant insists the evidence establishes the injury was the result of a fallen wire due to a rifle bullet, and that no negligence was chargeable to appellant in the breaking of the wire, or in the construction or maintenance of the line, and that no negligence of the appellant was involved either in the installation or maintenance of the safety devices, or in the failure to ground the wire fence, and therefore the doctrine is not here applicable.

[4, 5] It is true the burden of proof remains at all times upon the plaintiff and that the doctrine of res ipsa loquitur does not shift the burden but merely establishes a prima facie case of negligence which the defendant is bound to meet, and all that the defendant is required to do is to produce evidence sufficient to offset the effect of plaintiff's prima facie case.

[6] As to the law, we believe this to be a case for the application of the rule, and as

to the facts the jury were apparently not convinced by the theory of the break of appellant, and whether the break was due to the impact of the rifle bullet or to kinks in the line put in when the cable was strung or to a blow from an unknown tool, or to some other unexplained cause, was for them to determine.

[7, 8] It was also for appellant to establish to the satisfaction of the jury, under the doctrine of res ipsa loquitur, that the line in question had been built in a proper manner of standard materials and that safety appliances of adequate design and operation were installed and functioning. So, also, was it a question of fact as to whether or not the fences should have been "grounded" to carry off any surplus electricity that might have been carried to them.

[9] Under the application of the rule res ipsa loquitur respondent established a prima facie case of negligence, and the conflict being for the jury to decide, we cannot say they erred in coming to the conclusions they did.

The judgment and the order denying the motion of the defendant for judgment notwithstanding the verdict are affirmed.

We concur: **PLUMMER, J.; R. L. THOMPSON, J.**

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134 Cal.App. 518

SWEET v. VISTA IRR. DIST.

Civ. 1059.

District Court of Appeal, Fourth District, California.

Oct. 6, 1933.

Hearing Denied by Supreme Court Dec. 4, 1933.

Contracts ⚷198(5).

Contractor *held* not entitled to recover under contract providing for trenching of "approximately 46,000 feet of trench" on ground that defendant refused to direct trenching of more than 6,848 feet, where contract also required that contractor should do all work during limited period, and defendant required no more than 6,848 feet (Civ. Code, § 1641).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by B. A. Sweet against the Vista Irrigation District. From an order sustaining a demurrer and dismissing suit, plaintiff appeals.

Affirmed.

A. L. Hubbell, of Escondido, for appellant.

A. M. Thompson, of San Diego, for respondent.

JENNINGS, Justice.

This appeal has been taken from the judgment of the trial court dismissing the action and awarding costs to the defendant and from the court's order sustaining defendant's demurrer to plaintiff's amended complaint without leave to amend. Since the order sustaining the demurrer furnished the basis for the judgment of dismissal, plaintiff makes this order the special object of attack on his appeal.

The amended complaint contains the following allegations: That in the month of July, 1931, defendant published a notice inviting bids for trenching and for hauling and welding steel pipe; that pursuant to said call for bids plaintiff submitted his proposal for doing the work and that when the bids were opened it was discovered that plaintiff's proposal was the lowest bid submitted and it was accordingly accepted by defendant; that an outline of work and specifications therefor were presented to plaintiff by defendant; that on August 8, 1931, plaintiff and defendant entered into a written contract for the performance of the aforesaid work; that the outline of the work provided that plaintiff should do all the work required by the contract within one year and that each portion of the work to be done by plaintiff should be commenced within 24 hours after notice given to plaintiff by the engineer manager of defendant; that said officer directed plaintiff to do certain trenching and hauling and welding and that pursuant to such direction plaintiff trenched and hauled and welded 6,848 feet of pipe; that plaintiff performed all conditions of the agreement which were required of him and has been ready and willing at all times to complete the work according to the contract, but that defendant failed, neglected, and refused to direct plaintiff to perform the balance of the work required by the contract to plaintiff's damage in the sum of $2,727.12.

By appropriate reference the written contract executed on August 8, 1931, and the various preliminary instruments consisting of the notice inviting bids, plaintiff's proposal, the outline of work, and specifications for the work were incorporated into the complaint. It may be observed that the aforesaid preliminary instruments were likewise declared to be essential portions of the contract by specific reference and that copies of said instruments were attached to said contract.

The opening paragraph of the notice inviting bids is in the following language: "Sealed bids are invited for trenching approximately 46,000 feet of trench at an average size of 18"x36" and hauling and welding approxi-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

mately 46,000 feet of Matheson steel pipe ranging from 8" to 4" in diameter."

This language forms the basis for appellant's argument that the contract between the parties contemplated the trenching of approximately 46,000 feet of trench and the hauling and welding of approximately 46,000 feet of pipe by appellant, and that the complaint which alleged appellant's readiness to perform fully his part of the agreement and respondent's failure and refusal to direct trenching and hauling and welding pipe in excess of 6,848 feet sufficiently alleged facts constituting a cause of action for breach of contract and was not therefore vulnerable to respondent's general demurrer. In this connection, it is urged that the word "approximately" is equivalent to "about" and that it cannot be maintained that a direction to do so small a part of the work as was ordered to be done by respondent amounted to substantial compliance with its contract.

If respondent's invitation for bids and the contract entered into between the parties can be construed as a contract for trenching "about" 46,000 feet of trench and for hauling and welding "about" 46,000 feet of pipe, there is obviously much merit in appellant's contention.

It must, however, be observed that respondent's invitation for bids contains the following pertinent language: "Work to be done under this proposed contract will embrace all trenching and welding to be done by the district for one year from date of contract." It must also be observed that appellant's proposal to do the work contains the following language: "The undersigned understands that the quantities in the schedule (forming part of the proposal and indicating approximate length of various kinds and sizes of trench and approximate length of various kinds of pipe of different diameters) are only approximate to be used for estimating purposes." The outline of work contains the following language:

> "The work contemplated under this contract is for all trenching and backfill, and hauling and welding steel pipe for the Vista Irrigation District for a period of one year from the date of contract, together with such extension of time not to exceed thirty (30) days as may be agreed upon by both parties."
>
> "The work to be done will be done as occasion arises for it. The work shall consist of all trenching and backfill, and hauling and welding of steel pipe for the District. * * *"

It is a fundamental rule for the interpretation of contracts that the intention of the parties is to be gathered from the whole instrument, taking it by its four corners. Section 1641, Civ. Code; 6 Cal. Jur., p. 258. This rule is obviously not carried into effect if, in the attempt to interpret an agreement, some one clause is selected without consideration of other parts of the instrument.

When this rule is applied to the contract which is the basis for the cause of action attempted to be alleged in the complaint under consideration it is apparent that it was the intention of the parties to provide for the accomplishment of all trenching work and the hauling and welding of all pipe which should be required by respondent during the period of one year. This is clearly stated in the notice inviting bids, the initial instrument in the series of instruments which preceded the execution of the contract. This dominating intention is again made manifest in the outline of work. That appellant understood that the contract which would presently be executed was to embrace all work of the character specified which would be required by respondent during the period of one year and realized that the quantities specified in the invitation for bids were merely approximate estimates is made clear by the following language contained in his proposal: "The undersigned understands that the quantities in the schedule are only approximate to be used for estimating purposes." While the schedule to which reference is thus made is appellant's schedule contained in the proposal and in it are detailed approximate lengths of various kinds of trench work and approximate lengths of various kinds and sizes of pipe, the use of the word "understands" is significant, and indicates a realization on appellant's part that the quantities specified in respondent's invitation for bids, which quantities are carried into the schedule and form the total quantities of the various kinds of trench and the different kinds and sizes of pipe, were merely the quantities which it was estimated would be required during the period limited by the contract.

The decision in Hackett v. State, 103 Cal. 144, 37 P. 156, 157, is apropos to the problem which is here presented and, in our opinion, is decisive of it. In this case an action was instituted by the assignee of a corporation which had entered into a contract with the state board of harbor commissioners for the construction of a section of sea wall and thoroughfare and wharf along the waterfront of the city of San Francisco. The complaint set forth the execution of the contract by which it was alleged that the contractor agreed to furnish and the state of California agreed to buy 216,000 tons of stone at a specified price per ton and 285,000 cubic yards of earth at a stated price per cubic yard; that the contractor was ready and willing and offered to furnish the aforesaid quantities of the materials but that the board of harbor commissioners would accept no more than 119,025 86/100 tons of stone and 272,499 2/10 cubic yards of earth. The prayer of the complaint was for the recovery of $55,000 which was the amount plaintiff would have been entitled to receive under the terms of the contract for the difference between the quantities specified in the contract and the quantities actually accepted. A demurrer to the complaint was sustained and plaintiff declining to amend, judgment was entered in defendant's favor and plaintiff appealed therefrom. The statement of facts shows that the notice inviting bids for doing the work described the work to be done and gave the dimensions of the sea wall and thoroughfare and the earth embankment. The notice stated that "it is estimated by the chief engineer of the board that it will take 216,000 tons of rock." The successful contractor's bid proposed to furnish 216,000 tons of rock and 285,000 cubic yards of earth at specified prices. The contract which was made by the parties contained the following statement: "The stone embankment will contain about 216,000 tons of stone; the earth embankment about 285,000 cubic yards of broken stone, sand, or other suitable material. * * *" It was plaintiff's contention that the contract called for the furnishing of a definite quantity of stone and earth and that the complaint which fully set forth the making of the contract and defendant's refusal to accept the entire amount of material specified therein properly alleged a cause of action for its breach and that therefore the trial court erred in sustaining the demurrer. The contention thus advanced did not prevail. The Supreme Court interpreted the contract as being one that called for the construction of certain specified embankments in which it was estimated that certain quantities of specified materials would be used, but that the quantities stated were mere estimates of the amounts which it was anticipated would be required in the construction and that the fact which later developed that a very much smaller quantity of stone and a somewhat smaller quantity of earth were required than the quantities estimated could not alter the contract which provided for the construction of designated work and that the defendant was not bound to accept any greater quantities of materials than were actually used.

The reasoning of the court in the aforesaid case is pertinent to the very similar problem which is here presented. The contract alleged in the complaint contemplated the doing of all work of the character specified which the respondent would require to be done in a limited period of time. It was estimated that respondent would require the trenching of approximately 46,000 feet of trench and the hauling and welding of approximately 46,000 feet of pipe within the limited period. It developed that a very much smaller amount of such work was actually required by respondent during the period. In this appellant has no cause for complaint. His contract provided that he should do all the work required by respondent during the period. So far as the complaint shows he was directed by respondent's engineer to do all of the sort of work specified in the contract which was required by the district during the term of the contract. The complaint did not therefore state facts which constituted a cause of action for breach of contract and the demurrer thereto was properly sustained.

We are not impressed by appellant's argument that the outline of work required appellant to keep his equipment idle when it was not being used in the performance of work for respondent. All that is stated in this connection is that appellant "will be required to start on each individual job upon 24 hours' written notice. * * *" This was an entirely reasonable condition which appellant accepted with full knowledge, so far as is shown, that the amount of work which would be required was indefinite and might be materially less than the amount estimated.

For the reasons stated, the judgment and order from which this appeal has been taken are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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134 Cal.App. 507

PEOPLE v. YORK et al.

Cr. 2374.

District Court of Appeal, Second District, Division 2, California.

Oct. 5, 1933.

1. Witnesses ⇨277(1).

Where accused offers himself as witness, prosecutor may cross-examine him as to any facts stated in direct examination (Code Civ. Proc. § 2048).

2. Witnesses ⇨277(4).

In robbery prosecution, cross-examination of defendant regarding statements made to police officers relating to offense charged and other offenses *held* proper, in view of direct examination (Code Civ. Proc. § 2048).

Cross-examination of defendant consisting of question whether he did not remember making certain statements involving offenses charged and some other offenses was proper, in view of direct examination in which defendant denied any recollection of any questions or answers made to police officers.

3. Criminal law ⇨747.

Inconsistencies between testimony of witnesses for prosecution presented question for jury.

4. Witnesses ⚷37(1).

Testimony that defendant shot teller of bank being robbed *held* admissible, as against objection that witness could not have known who fired shot.

5. Witnesses ⚷337(6).

In robbery prosecution, question whether defendant had been convicted of forgery *held* proper as impeaching question, where defendant offered himself as witness to disprove genuineness of signature on confession.

6. Criminal law ⚷741(2).

Weight to be given to testimony identifying defendant as person who drove car used by robbers *held* question for jury.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Robert R. York and others were convicted of robbery in the first degree, and the defendants Henry Turcott and Harold Lamey appeal.

Judgments and orders denying motions for new trials affirmed.

William I. O'Shaughnessy, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Bayard Rhone, of Los Angeles, for the People.

ARCHBALD, Justice pro tem.

Appeal by defendants from judgments convicting them on two counts of first degree robbery, entered upon verdicts of a jury, and from orders denying their motions for new trials.

On August 24, 1932, a branch of the Bank of America in Los Angeles was the scene of a holdup. Four men entered the place about noon. Two of them, with guns, entering through the manager's compartment, took the money from the cages of two tellers. In the meantime the leader of the gang ordered Mr. Ord, the manager, to the back of the bank. The latter started for the rear, but suddenly picked up a gun and shot the two men who were robbing the tellers. The fourth man, afterwards identified as defendant Turcott, then shot Teller Read and all four rushed out of the bank. On the outside the two who were shot by Ord fell dead, and the other two jumped into a waiting automobile at the wheel of which sat a man later identified as defendant Lamey.

In addition to the offenses upon which they were tried, defendant Turcott was charged in the information with a prior conviction of robbery, and Lamey of two priors, grand larceny and forgery, as to which prior convictions both pleaded guilty.

Appellant Turcott urges: (1) That the district attorney was guilty of misconduct in questioning him as to his participation in criminal offenses not involved in the information; and (2) that the evidence is insufficient to justify the verdict against him. Appellant Lamey contends: (a) That the court was guilty of misconduct in questioning him as to a prior conviction after he had admitted same, and (b) that the evidence is insufficient to justify the verdict against him.

[1, 2] 1. Certain statements made by Turcott to police officers in which he was claimed to have related his connection with this and other offenses were about to be related by the officers. After testimony by the officers that such statements were freely and voluntarily made, etc., Turcott took the witness stand on voir dire, and on direct examination denied any recollection of "any questions or any answers" made to any question of Lieutenant Burgess at the Georgia Street Hospital. On cross-examination he was asked if he did not remember making particular statements at the time, some of which involved the offenses charged and some other offenses. On such cross-examination he denied having any recollection of such questions and answers. The statements were afterwards introduced into evidence. When the defendant offered himself as a witness the district attorney had the right to cross-examine him as to any facts stated in his direct examination or connected therewith (section 2048, Code Civ. Proc.), and in our opinion he stayed within the permissive limits.

[3, 4] 2. Lucy Bench, a bookkeeper in the bank, testified that appellant Turcott shot Mr. Read, the teller. It is urged that she could not have known who fired such shot. The record shows, however, that while she might have drawn such conclusion from Turcott's position outside the cage, with his gun pointed at Read, it would seem to have been justified by the other facts as well. Her identification of Turcott was positive and her opportunity to observe him all that could be desired. If there were any inconsistencies between her evidence and that of Mr. Read the matter was for the jury and not for us.

[5] (a) Lamey had pleaded guilty to a prior conviction of forgery. At the trial he offered himself as a witness to disprove the genuineness of the signature on a confession. He wrote his name at the request of his attorney as an exemplar, whereupon the court inquired:

"You are a pretty good writer, aren't you, Mr. Lamey? A. Well, not very good.

"Q. You were convicted of forgery once, weren't you? A. Yes."

The question asked was a proper impeaching question. People v. Romer and Barnett (Cal. Sup.) 23 P.(2d) 749. It may have been out of order, being more properly a part of the cross-examination, but no objection to it was made on any ground, and we fail to see how it can be challenged here.

[6] (b) Appellant Lamey urges that his identification by the witness Roberts, who stopped his car near the one driven by Lamey, in which the two surviving members of the four who entered the bank made their escape, is simply improbable. His identification was positive. The weight to be given to it, however, was a question for the jury and not for an appellate court.

Judgments and orders affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

134 Cal.App. 403

CITY OF SOUTH PASADENA v. CITY OF SAN GABRIEL et al.

Civ. 7801.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1933.

Hearing Denied by Supreme Court Nov. 27, 1933.

1. **Municipal corporations 🔑621.**

Ordinance requiring permits need not contain rules for guidance of city officials where activity involved may harm morals, health, or general welfare.

2. **Evidence 🔑14.**

Court judicially knows that drilling for water and operation of well might be detrimental to health, comfort, or welfare of city.

3. **Mandamus 🔑168(4).**

Evidence sustained denial of permit by sixth class city to drill and operate well within its domain to augment water supply of another city.

4. **Evidence 🔑83(1).**

Presumption is that official duty was correctly performed.

5. **Municipal corporations 🔑621.**

City council's denial of permit to drill and operate well cannot be disturbed, where minds might differ as to whether granting of permit would be harmful to health or general welfare.

STEPHENS, J., dissenting.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer and William C. Doran, Judges.

Proceeding by the City of South Pasadena for a writ of mandate to the City of San Gabriel and others to compel defendants to grant a permit to drill and operate a well. From a judgment for defendants and an order denying plaintiff's motion for another and different judgment on the findings, plaintiff appeals.

Affirmed.

Walter F. Haas, Horace E. Vedder, and Harold C. Johnston, all of Los Angeles (Gerald E. Kerrin, of Los Angeles, of counsel), for appellant.

H. S. Farrell, of Alhambra, and Hill, Morgan & Bledsoe, Vincent Morgan, and Kenneth K. Wright, all of Los Angeles, for respondents.

WORKS, Presiding Justice.

South Pasadena and San Gabriel are both cities of the sixth class. While their respective corporate limits are not contiguous, the two municipalities lie near each other. South Pasadena operates a municipally owned water system by means of which it furnishes water for domestic and other uses to property lying in a certain part of its domain, and as the sources of this water supply had become insufficient to discharge the duty imposed upon them, the city bought a tract or lot of land in San Gabriel, with the purpose of drilling a well upon it, conveying the water developed therefrom into the territory of South Pasadena, thus augmenting the water supply of that portion of the municipality served by it. The parcel of land thus acquired in San Gabriel overlies the water plane of San Gabriel Valley, within which latter both cities are situated. For the purposes of this opinion the lot is sufficiently identified by reference to it as lot A. The property was acquired by South Pasadena in June, 1929.

On March 25, 1930, South Pasadena filed with the city clerk of San Gabriel a communication addressed to the city council of the latter municipality. So far as it is material to the present controversy the paper reads as follows: "The City of South Pasadena, the owner of Lot A, * * * together with the water rights appurtenant thereto, hereby makes application for a permit to drill a water well on said land, construct an underground pump-house and connecting pipeline in Rose's road. In filing this application we do so without prejudice to our rights." The city council of San Gabriel, on April 8, 1930, denied the application thus made.

At all the times which are of interest here there was in effect in San Gabriel an enactment known as Ordinance 197, which had been passed by the city council of the municipality. The ordinance, to quote from appellant's brief, "makes it unlawful for any person to drill for water, oil or any substance within the corporate limits of said city, without first having obtained a permit so to do from the city clerk." In view of this language it is to be remembered that South Pasadena made its application for a permit to the city council of San Gabriel, and not to the city clerk. Moreover, the cause was tried upon the theory that Ordinance 197 required a permit to drill for water to be obtained from the council. There is not, therefore, any real question in the case as to whether the council, in adopting the ordinance, delegated any illegal or unconstitutional authority to the clerk, or attempted to confer any such authority upon him. In this connection, see Gaylord v. Pasadena, 175 Cal. 433, 166 P. 348. It is also to be observed, upon this particular phase of the case, that respondents' brief contains the following: "It is to be noted that in the instant case the application for the permit was presented to the city council and acted upon by it, and consequently the question of whether or not the ordinance unlawfully delegates to the city clerk powers of the city council is not of great moment inasmuch as the city council actually acted." This statement is not challenged or noticed in appellant's reply brief.

The action, so called above, is really a proceeding for the writ of mandate, commenced for the purpose of compelling the allowance of the refused permit. In view of what is said above it is particularly to be observed that the petition or complaint in the proceeding prays that the city council of San Gabriel, not the city clerk, be required to issue it. Judgment went for defendants, and plaintiff appeals.

[1, 2] It is contended by South Pasadena that Ordinance 197 is invalid because it confers arbitrary and uncontrolled powers over the disposition of petitions for permits to drill for water. It is said that where a business is lawful, and permits for its inauguration are required, an ordinance providing the requirement must contain rules and regulations to be followed by the officer or officers who consider applications for permits. This is indeed the rule as to businesses which cannot work harm to the morals, health, or general welfare of the city in which it is to be inaugurated, or to citizens in its proposed neighborhood. But the rule is different where the business, although perfectly lawful in character, may work such harm in its conduct. In such instances the granting or refusing of a permit to operate the business may be confided to the reasonable and proper discretion of an officer or officers, without the imposition of rules to regulate or guide their actions. Gaylord v. Pasadena, supra; In re Holmes, 187 Cal. 640, 203 P. 398; Parker v. Colburn, 196 Cal. 169, 236 P. 921. We think we may take judicial notice that the drilling for water and the consequent use of the water thereby developed, together with the employment and maintenance of such agencies as may naturally conduce to such use, might under certain circumstances and in certain portions of the territory of San Gabriel, or of any other city, be detrimental to the health, comfort, or welfare of its inhabitants. These conclusions bring us to the next question to be discussed.

[3] South Pasadena insists with vigor that the improvement designed by it for installation on lot A would not have been accompanied, either in its installation or in the operation of the well proposed to be sunk, together with the necessary adjuncts of operation, by circumstances detrimental to the rights of any of the people of San Gabriel. South Pasadena therefore contends that the refusal of the city council to grant the requested permit was unjust, arbitrary, and an improper exercise of discretion, and that the issuance of the permit should therefore be compelled. In other words and in effect, South Pasadena contends that it should have its permit for the reason upon which, alone, the judgment in Gaylord v. Pasadena, supra, was affirmed, as shown at the conclusion of the opinion in that case.

Various questions touching this point were developed by the evidence before the trial court, and one of these may be disposed of at once. It is admitted by South Pasadena that "there is a substantial conflict of evidence in the record that such an undertaking [as that contemplated by the request for the permit] may affect property values to some extent." This statement refers to property values in the portion of San Gabriel proposed to be occupied by the contemplated water well and its appurtenances. Leaving this particular point, we go to other matters which will require a somewhat lengthy and particular statement.

The portion of San Gabriel within which the contemplated improvement was proposed to have been installed is considered by that city to be a residence district. It is regarded by South Pasadena as a rural or semirural community. This portion of San Gabriel, and more particularly a section referred to in testimony before the trial court immediately to be mentioned, will hereafter be designated, for the sake of brevity, as the district. The trial court found that the district was being used and developed solely and rapidly as a residence district. The evidence showed that there were forty-seven family residences within a radius of 1000 feet from lot A, and also that the property therein was not cut into lots of the usual city size but much larger. Lot A itself is 3.5 acres in extent. South Pasadena sets forth in its brief some interesting figures concerning the circle referred to in the evidence, although it is erroneously described in the brief as a "1,000 foot circle." The figures given by South Pasadena show, however, that its counsel contemplated a circle with a diameter of 2,000 feet, a 2,000-foot circle, and not a 1,000-foot one. We quote from the brief: "This does not show a highly developed, thickly populated district. In determining the density of population in this area, we should not lose sight of the fact that the land within a 1000-foot circle covers an area of approximately 75 acres; that each city block contains 3 acres of land, that a 1000-foot circle contains 15 [25] city blocks; that 47 residences in 15 [25] blocks averages a little over 3 [a little less than 2] residences per block. As the official average family is composed of four members, we have an average of 190 persons occupying the 47 residences on the 75 acres within the circle; this gives us an average of 2.50 persons per acre. We shall next consider the density of population per acre of the county and surrounding cities. In Los Angeles county south of the mountains the official records give the density of population as 2.70 persons per acre. The city of Alhambra has a density of 7.32 persons per acre, while the city of South Pasadena has a density of 6.84 persons per acre. Pasadena shows a density of 6.57 persons per acre. * * * On the question of the rapid development in the neighborhood, we direct attention to the fact that but 20 buildings were constructed within the district during the three years immediately preceding the commencement of this action. This is an average of less than seven buildings a year * * *."

Upon these figures South Pasadena bases several arguments. Thus: "We therefore contend that the land in question is exactly what we say it is, semi-rural, horticultural and agricultural, and further that its acres are not even as thickly populated as the average farm land in Los Angeles county and used for like or similar purposes." These views require some comment. The district is not semirural, for the reason that in a legal sense there is no such word. A search of five different dictionaries fails to locate it, although the expression is undoubtedly sometimes used in speech and writing, which are not always characterized by the nicety necessary to exact language. Rural, to take the definition of one lexicographer, means "of or pertaining to the country, as distinguished from a city or town," and the word is derived from the Latin rus, ruris, the country. The word urban is defined as "of or belonging to a city or town," and is derived from the Latin urbanis, which in that language imports the same meaning. This Latin word is derived, in turn, from urbs, urbis, a city. It is perfectly apparent that all territory is either rural or urban, and that, etymologically, there not only is not, but there cannot be, any such word as semirural. That is the reason, plainly, why the expression is not to be found in even the unabridged dictionaries. It may be true that the district in question here is partially subjected to horticultural and agricultural pursuits in the same manner as are some parts of rural territory, but it is nevertheless urban and not semirural. That is settled by the fact that it lies within the territorial limits of San Gabriel. As a part of the city, and considering its condition at the time the evidence was taken in the trial court, as well as its adaptability for further settlement and improvement as a residence district, it is entitled, together with the remainder of San Gabriel, to be protected from the invasion of business establishments which, however lawful, are yet susceptible of a manner of operation injurious to the health, comfort, or general welfare of its inhabitants. It must be freely admitted, of course, that harm from such a source is less likely to be wrought upon the people of the district than upon the inhabitants of a closely settled residential urban area, with houses built upon city lots of the usual size.

South Pasadena also contends that the evidence that twenty buildings were constructed within the district during three years—this being an average of 6.66 buildings each year—"does not show rapid development or unusual activity in the way of development." We think the contrary, when the true nature of the district is considered. We have already observed that the territory has not been cut into city lots of the customary size. The lots are much larger, although we are pointed to no place in the record—and it is most voluminous—which shows their average size, nor whether they are of equal size, or the sizes of the smallest and of the largest lots, if they are not alike in extent. Lot A itself comprises 3.5 acres. We have seen that the district includes some seventy-five acres. With this fact in mind, let us present some figures for the consideration of the curious, taking instead of the 6.66 residences, seven, as an aid to comfortable computation. On this basis, if we consider the acreage of lot A as representing the size of lots generally, 24.5 acres of the district have been occupied each year, which would mean that practically the entire area had been settled within the three years. This is a palpable absurdity, but we nevertheless begin with it. It is certain from this test that the lots in the district average less than 3.5 acres in extent. If we suppose two acres to be the average, 14 acres have been put under the hand of man each year. Even this, however, is a reductio ad absurdum, as we shall show by another method of approach. If we divide the number of acres in the district, seventy-five, by the number of houses standing upon its territory, forty-seven, we find one home to each 1.59 acres. Granting that the average size of the lots is less than this figure, which is doubtless the truth, granting that there is a quantum of unoccupied territory in the district, which naturally follows, granting further that the houses are somewhat unequally scattered over the area, it remains that the presence of a residence on each 1.59 acres, on an average, makes no mean showing that the property is a fairly well developed residence district. This is true, especially, because the district is laid out in lots larger than the usual city lot, one of which, at least, is 3.5 acres in extent. The growth of the district, within the three years preceding the commencement of this proceeding, taken together with the conditions as to the size of the lots contained in it, demonstrates that the city council of San Gabriel, when it refused the permit asked by South Pasadena, was justified in finding that the district was adaptable for future settlement and improvement as a residence area.

After this preface, and proceeding upon it as a foundation, we come to a consideration of the question whether the improvement designed by South Pasadena for lot A is likely to be conducted and operated in such a manner as to be injurious to the health, comfort, or general welfare of the inhabitants of the district.

The trial court made the following finding: "That the plaintiff proposed to construct on said lot A * * * a well 26 inches in diameter, with a computed production of 300 inches of water, constant flow (by inch is meant the 1/50th part of a cubic foot per second); an underground pump-house or chamber having its roof or ceiling 18 inches below the surface of the ground, said building to be insulated with sound-proofing material, said chamber to have installed therein two electric motors, one of 250 horsepower to pump water from said well into an underground reservoir to be constructed in the proximity of said well, and one of 350 horsepower to pump said water from said reservoir into the transmission line and thence into the distributing system of the said City of South Pasadena; also a removable derrick to be erected and kept in place only when pulling pipe or making repairs, the power transmission lines to be brought into said pump-house through underground insulated conduits with a transformer to be placed either on the pole line or in said underground chamber, as the circumstances might show to be safest and most desirable. All of said machinery to be of the most modern and approved type. That the plaintiff consented in the event the writ herein sought should be granted, the court, as a part of its judgment, might prescribe all reasonable requirements or conditions as might make the plant and its operation so proposed to be erected on said property as free from deleterious noises, odors, danger and unsightliness as practicable." There is no contention that the finding is unsupported by the evidence.

Upon the face of this finding appear circumstances which, some possibly and some inevitably, will do harm not only to the health, comfort, or welfare of the inhabitants of the district, but even to the people of San Gabriel as a whole. Three hundred inches of water, constant flow, is an immense quantity of the fluid. A 250 horsepower electric motor was to have been employed for the purpose of pumping the water from the twenty-six inch well. A 350 horse-power motor was to have been used to transport the water from the proposed reservoir into the contemplated transmission line. These facts alone show that within San Gabriel the construction, maintenance, and operation of a considerable adjunct to the municipal water system of a foreign city were proposed. Particular injuries to the residents of the district and of San Gabriel generally from such maintenance and operation are pointed out in the finding or may be deduced from it. The water from the well was to have been carried through the transmission line into the distributing system of South Pasadena. It is apparent from a map in the record that this pipe line must have been constructed for some distance across the territory of San Gabriel, either by means of a private right of way or under, along, or across the city streets. If the line were to have been laid along a private way, the strip must have been subject to patrol and to the necessity, more or less frequent, of excavation and to the consequent activity and disturbance incident to repairs or replacements, all to the inconvenience and discomfort of abutting property owners. If the pipe line were intended to occupy the streets, the possible consequences to the general public of San Gabriel would have been even more serious. The effect of the installation, maintenance, repair, and replacement of pipe lines laid beneath city streets, from the standpoint of the comfort and convenience of users of the surface, is too well known to require specific description here. In truth, when South Pasadena asked the city council of San Gabriel for "a permit to drill a water well on said land, construct an underground pump-house and connecting pipeline to its present line in Rose's Road," South Pasadena was either asking for a franchise to lay a pipe line in the streets of San Gabriel or was asking leave by some other means to transport a considerable water supply for its inhabitants across a part of the territory of San Gabriel, to the inevitable discomfort and inconvenience of property owners of the latter municipality. Indeed, the request for the permit amounted to an attempt, however innocently committed or with whatever benevolent intent toward the people of South Pasadena, to levy a contribution upon the inhabitants of San Gabriel to the end that South Pasadena, through the sacrifices of San Gabriel, might minister to the needs of a part of South Pasadena's inhabitants. San Gabriel owed no such self-immolation at the altar of a municipality foreign to itself.

Pursuing the text of the finding of the trial court further, it is to be noted that the improvements on lot A contemplated "a removable derrick to be erected and kept in place only when pulling pipe or making repairs." It is evident to us that this portion of the finding is pregnant with meaning when we seek a justification of the action of the city council of San Gabriel in refusing the requested permit. A removable derrick of the size apparently necessary to the performance of the functions expected of it under the plans of South Pasadena would surely occasion disturbance, and consequent discomfort to the denizens of the district, in its peregrinations to and from its necessarily varying places of duty in lot A. And with such a "plant" as the one proposed by South Pasadena for installation on the lot, the occasion for "pulling pipe" or "making repairs" would doubtless have been of sufficient frequency to work discomfort, by the actual use of the derrick, to the community immediately surrounding lot A.

It is to be observed that the finding recites, "the power transmission lines to be brought into said pump-house through underground insulated conduits with a transformer to be placed either on the pole line or in said underground chamber, as the circumstances might show to be safest and most desirable." This reference to a pole line showed the possibility of injury to the comfort and general welfare of the people of the district. It has been a prominent point in local governmental conduct for many years to exclude "pole lines" from urban areas to as great an extent as possible. The objection to these unsightly erections is not merely esthetic—and an objection of that nature is not wholly unworthy of consideration—but practical as well, for their presence in a residence neighborhood will undoubtedly to some extent affect realty values in it. Further, the city council of San Gabriel could not have perceived, with equanimity, the possible necessity of burdening the city streets with poles, nor of subjecting a part of the people to the inconvenience subject to the maintenance, patrol, and repair of a line of poles along a private right of way abutting upon their property, all this for the benefit of a foreign municipality. Nor could the council have seen with complacency the stringing, maintenance and repair of extra wires upon pole lines already in existence, if that is what the plan of South Pasadena contemplated—for the finding is informative upon this question.

The finding is partially to the effect that "the plaintiff consented in the event the writ herein sought should be granted, the court, as a part of its judgment, might prescribe all reasonable requirements or conditions as might make the plant and its operation so proposed to be erected on said property as free from deleterious noises, odors, danger and unsightliness as practicable." This consent was negatively pregnant with the idea that the complete elimination of "deleterious noises, odors, danger and unsightliness" from the plant and from its operation would not have been practicable. This circumstance to some extent justified, after the event, the refusal to grant the permit requested by South Pasadena.

So much for the finding of the trial court which we have traversed. There is evidence in the record which serves to fill out and amplify the picture presented by the finding. There was testimony from an hydraulic engineer that the use of the derrick referred to in the finding would be necessary to "raise the sand" pumped from the well. Then:

"Q. * * * Have you any idea in that territory how often that would be required? A. No; that is another thing that absolutely would be— the amount of sand that the well pumps, it might be once a month or it might be twice a month or it might be once in three months, but it would all depend; probably about once a month they would have to clean that out during the first year.

"Q. And they would have to dispose of the sand in some fashion? A. Yes.

"Q. Either in dumps upon the property or cart it away? A. Yes."

The following testimony was given by the same witness:

"Q. With reference to the operation of the well, would you anticipate in your opinion that it would be necessary to clean the well or pull it during the first year of operation? A. Well, from the general practice on wells in that vicinity, I would say yes.

"Q. If so, more than once, or how many times? A. Sometimes it requires twice and sometimes three times during the year, a new well has to be pulled— a new pump has to be pulled and the well sand pumped, or certain conditions arise for pulling the pump.

"Q. If that were necessary how much time would be required during each period it would be necessary to have a derrick there? A. 30 days.

"Q. 30 days on each occasion? A. On each occasion, yes.

"Q. In your opinion after the first year would it be necessary to pull the well or clean it? A. Well, that is problematical entirely.

"Q. Well, just your opinion from experience. A. Well, it all depends on what formation they get for their water-bearing material. You might go into very coarse gravel with very fine sand and in that case clean the well out, of course, the second time or third time. Or the second time during the year might mean the well might be operated without being touched two or three years; it all depends entirely on the condition of the formation that you go through.

"Q. Are you familiar with the formation in that general territory? A. Yes; I am more or less familiar with that territory.

"Q. Well, from your familiarity and your knowledge of conditions there, what would you expect with relation to the necessity for pulling the well following the first year? A. Well, I will just compare it to two—one well, we will say, the Alhambra well, called the Longdon well, from which the pump has been pulled, as I remember, twice now to sand pump the well. And on the Graves well we discharged sand and gravel there for thirty—practically thirty days before the water started to clear up. One spell when we pulled the pump out there probably was about 75 to 80 feet of sand in the well, and it was sand pumped again. That was the Graves well; that was about sixty days after the installation of the pump.

"Q. I mean following the first year now. A. As I said, that is problematical entirely, depending altogether—it might have to be pulled out every year and in four years it might go two or three years without having to be pulled; it all depends on conditions.

"Q. In pulling a well what is necessary; is it necessary a derrick be constructed? A. A derrick has to be either constructed, or if it is not constructed there has to be one that is constructed, a portable derrick, put over the pump and the pump raised by means of the derrick out of the well."

There was also testimony to the effect that the power to be brought by wire into lot A for the purpose of operating the two proposed electric motors would have been of a comparatively high voltage, with the danger usually attendant upon such a state of affairs. Under a custom observed by companies which furnish electric power, the wire would have carried from 2,300 to 2,400 volts, the transformer mentioned in the finding then to reduce it to 440 volts.

South Pasadena attempts to make much of the fact that in the operation of its water plant it is engaged in the discharge of a sacred trust in behalf of the beneficiaries thereof, the people of the portion of the city which is served from the water system. It is contended, in effect, that because of this circumstance South Pasadena was entitled to special consideration at the hands of the city council of San Gabriel when the former city asked for the permit we have so often mentioned. We think the circumstance leads to the contrary conclusion. San Gabriel, too, is engaged in the administration of a trust, that of protecting its people from dangers to their health, comfort and general welfare. San Gabriel is not concerned with the trust with which South Pasadena burdened itself when it embarked in the conduct of the water business, if the execution of the latter trust improperly impinges upon the rights of the people of San Gabriel. When South Pasadena asked the permit from the city council of San Gabriel, no matter how honestly that request was made, no matter how badly South Pasadena required an augmentation of its water supply, the latter city asked too much. Under the law South Pasadena could not levy such a tribute upon San Gabriel as would have been paid if the permit had been granted. To grant the permit would have been to impose upon San Gabriel no inconsiderable portion of the burden which rests upon South Pasadena as a purveyor of water to a portion of its territory. The city council of San Gabriel was amply justified in refusing the permit.

[4, 5] At the back of the above discussion lies the rule that official duty is presumed to have been correctly performed, as well as the rule that where, in such instances as that which presented itself to the city council of San Gabriel, there is a question upon which minds may differ—a conflict of evidence—the decision of the body concerned cannot be disturbed. But there is little reason to invoke these rules, after all, as we fail to perceive how the city council of San Gabriel could properly have granted the requested permit.

South Pasadena contends that various errors were committed by the trial court during the progress of the proceeding there. The conclusions we have reached upon the points above discussed make it unnecessary to consider these claims. The procedural delinquencies of the trial tribunal, if any there were, are no longer matters of interest. The outcome of the proceeding was settled before ever it came before the courts.

In addition to its appeal from the judgment, South Pasadena also appeals from an order of the trial court denying its motion for another and different judgment on the findings.

Judgment and order affirmed.

I concur: CRAIG, J.

STEPHENS, Justice (dissenting).

The supply of water for the rapidly increasing population of the highly favored section of territory that embraces both of the litigating cities is of the highest importance and should be given the most serious consideration. The site of the proposed well is very close to the boundary of San Gabriel and piping across this territory would be no more than a trivial and temporary inconvenience to anybody. The city lot owned by South Pasadena, the site of the proposed well, is, and so are all of the surrounding lots, much larger than the ordinary city residential lot. It is proposed to place all power current cables and all structures beneath the surface of the ground and it is apparent that the site would yield readily to beautification through parking, striking examples of which may be found in this county. The sinking of the well and all of the construction work would scarcely be more noisy or otherwise objectionable than the erection of a first-class residence. The evidence and the ordinary knowledge extant on the science of electrical pumping show that the operating noise would be unnoticeable a few yards from the pump. The periodical removal of sand by means of a temporary derrick no higher than an ordinary fruit tree would seem to present no element of danger to the health, safety or welfare of the neighborhood. It is undoubtedly true that pumping plants can be objectionable, but there is nothing inherently or incurably objectionable about them. It may be that the two or three plants in the vicinity have been and now are objectionable. A residence may be objectionable and so may a ragged vacant lot be objectionable. With the proposed plant out of sight and out of hearing, and with the site beautified it would seem a more logical procedure to profit by the example of a properly regulated and restricted plant than to stop progress by a prohibitory order. Rather than one municipality being compelled unrighteously to bear the burden of another, as the majority opinion indicates would be the case if the well were sunk, I think the sinking of the well and the maintenance of the pumping plant under proper and strict regulation would create no burden but would show the way for the elimination of present burdens. The broader and truer vision is that the prosperity of South Pasadena would also aid the prosperity of its neighbor, San Gabriel, as an adequate water supply for each is essential to the general prosperity of the whole section of which these two cities are a part.

It should be borne in mind that there is no issue of water ownership or of so-called water rights in the case.

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134 Cal.App. 278

NINETEENTH REALTY CO. v. DIGGS et al.

Civ. 9099.

District Court of Appeal, First District, Division 2, California.

Sept. 25, 1933.

1. Forcible entry and detainer 🔑29(1).

In unlawful detainer by purchaser at sale under trust deed, defendant claiming under lease *held* required to prove present right of possession.

2. Mortgages 🔑126.

Trust deed under which plaintiff in unlawful detainer claimed *held* to cover entire apartment building as against contention that 99-year leases were excluded, particularly where language of trust deed respecting such leases, if intended to except them from estate conveyed, was so uncertain as to render exception void.

3. Mortgages 🔑97.

Doubtful language in trust deed securing bond issue must be construed most favorably to bondholders.

4. Forcible entry and detainer 🔑29(3).

In unlawful detainer, court properly excluded deed not affecting title or right of possession of any party.

5. Assignments 🔑92.

Debtor with full knowledge of assignment of contract to trustee cannot contrive with assignor to defraud assignee by purported settlement with assignor.

6. Evidence 🔑357.

In unlawful detainer by purchaser of apartment building at sale under trust deed, letter from original owner to trustee stating defendant's contract paid *held* properly excluded.

Defendant claimed under 99-year lease and claimed that his contract for apartment had been paid in full, but proposed exhibit merely disclosed an intent on part of original owner and defendant to defeat beneficiaries under trust.

7. Forcible entry and detainer 🔑29(3).

In unlawful detainer by purchaser at sale under trust deed, leases to defendants *held* properly excluded.

Such leases were properly rejected because, being subject and subordinate to trust deed, any rights which they might have given defendant were destroyed by trustee's sale.

8. Forcible entry and detainer 🔑29(2).

In unlawful detainer by purchaser at sale under trust deed, offer of proof respecting purported settlement of obligations of original owner of property to defendant *held* properly rejected.

9. Pleading ⚷356(1).

Amended answers not conforming with proof *held* properly stricken.

10. Forcible entry and detainer ⚷6(2).

Unlawful detainer proceeding was not improper because it required trial of question of title (Code Civ. Proc. § 1161a, subd. 3, as added by St. 1929, p. 719).

11. Forcible entry and detainer ⚷6(1).

Unlawful detainer is purely statutory remedy (Code Civ. Proc. § 1161a, subd. 3, as added by St. 1929, p. 719).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action in unlawful detainer by Nineteenth Realty Company against M. I. Diggs and others. From an adverse judgment, named defendant and others appeal.

Affirmed.

Ira Abraham, of Oakland, and Keyes & Erskine, of San Francisco, for appellants.

Robinson, Price & Macdonald, of Oakland, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued in unlawful detainer as purchaser at a sale under a trust deed to recover possession of certain portions of real property held by the defendants. The cause was tried by the court and judgment was entered for the plaintiff for possession and damages. Four of the defendants have appealed upon the judgment roll and a bill of exceptions.

On December 1, 1924, Lake Drive Corporation, as owner of the real property in suit, executed a trust deed upon the property to secure a bond issue in the sum of $350,000. The defendants George G. Jamieson and Maury I. Diggs were then respectively the president and secretary of the corporation. The purpose of the bond issue was to finance the construction upon the real property of an apartment building containing twenty "community" apartments. Certain contracts were executed by the corporation for the sale or lease of these apartments, all of which were terminated on May 28, 1927. On that date new contracts were executed, one to Diggs covering apartment No. 19, and one to Jamieson covering apartment No. 20. The corporation then assigned to the trustee as further security under the trust deed all its interest as vendor under these contracts. These contracts were in accordance with a standard form theretofore adopted to cover all apartments in the building. Among other things they provided for installment payments to be made on account of the purchase of a ninety-nine year lease to become operative January 1, 1940, and that the purchasers' right of occupancy in the meantime should be under the terms of the contracts. They also provided that they were subject to the terms of the trust deed which in this respect provided that as long as the corporation was not in default upon the bonds issued it should be entitled to receive and retain 45 per cent. of the contract payments and that if and as long as the corporation shall be in default the trustee should hold such sale and lease funds as a part of the mortgaged property and should disburse the same for the payment of expenses, fees, principal and interest due under the terms of the trust deed. Default under the bond issue occurred on December 1, 1930, and thereafter the corporation purported to execute and deliver to the defendants Diggs and Jamieson leases on apartments Nos. 19 and 20 for a period of ninety-nine years commencing January 1, 1940. These leases were dated January 20, 1931, and were acknowledged October 19, 1931. The purchase price of these ninety-nine year leases was not paid to the trustee as required by the contracts of sale and by the deed of trust but the defendants claimed that it was paid to the corporation in the form of a set-off of some indebtedness of the corporation to defendants Diggs and Jamieson.

[1] At the outset we cannot understand how appellants can claim right of possession under a lease which, by its express terms, does not become operative until January 1, 1940. The point is suggested by respondent and appellants' only reply is that the only evidence as to the terms of the lease comes from the document which was marked for identification and which was not received in evidence. The terms of the ninety-nine year leases are not disputed and are frequently referred to throughout the briefs. As they are the only basis upon which the appellants may claim right of possession it would seem to follow that it was incumbent upon them to prove that right. Respondent made out a complete case as purchaser under the deed of trust under which it took the title in fee to the entire property. If the evidence is insufficient to show the terms of the purported lease and thus a *present* right of possession the appellants have no standing on this appeal.

[2, 3] However, the primary question involved is the interpretation of the deed of trust in so far as it affects the rights of these appellants. This deed conveyed to the trustee the entire fee of the real property without limitation, reservation, or exception, and without any provision for a partial release of any portion of the real property or of any portion or unit of the apartment building

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

which was to be erected thereon. Following the description of the real property which was thus conveyed to the trustee the deed contains five paragraphs, each commencing with the word "also" and each conveying to the trustee some additional interest in the property theretofore described or in the buildings and improvements which were thereafter to be erected thereon. The second and third of these paragraphs read:

"Also, all contracts, either written or oral, now or hereafter executed, for the sale of any portions of the above described land or of the building to be erected thereon as provided in article III hereof, as apartments or otherwise, and all payments due thereunder, *except* that if and so long as the company be not in default hereunder, and subject to the provisions of section 5 of article IV of this indenture, it shall be entitled to receive and retain free from the lien of this indenture all payments not in excess of forty-five (45) per cent of each contract price when and as made under said contracts.

"Also, all leases, either written or oral, now or hereafter executed (except ninety-nine year leases), of said land or building and rentals and payments accruing thereunder."

Following these paragraphs there appears the following: "It is hereby expressly provided that any rights of purchasers or tenants created by contracts of sale or leases, whether executed prior or subsequent to the recording of this indenture, shall be at all times subordinate to the lien hereof."

Section 2 of article 4 of the indenture reads: "The company expressly covenants to assign to and deposit with the trustee as further security for the performance of all the terms and conditions of said bonds and of this indenture, contemporaneously herewith if already executed or within ten days after execution if executed subsequently, all leases, except ninety-nine (99) year leases, of all or any portions of the aforesaid mortgaged premises or the building to be erected thereon, and the company further covenants that all the rentals under said leases shall be paid directly by the tenants therein named to the trustee."

It is the contention of the appellants that by reason of the quoted provisions of the deed of trust all ninety-nine year leases executed by the lessor are withdrawn as security under the bond issue. The trial court found adversely to appellants on this point after a trial particularly addressed to that issue. We are in full accord with the interpretation given by the trial court. The purpose and intention of the parties in the execution of the deed of trust cannot be in doubt. The owner of the realty for the purpose of obtaining funds to construct a building thereon conveyed to the trustee as security the entire fee without limitation, reservation, or exception. This, of course, included all interest in the building and improvements thereafter erected upon the premises. The "also" clauses in the deed were all added as additional collateral and were in no sense an exception to or limitation upon the conveyance of the fee. These clauses required the assignment to the trustee of all contracts of sale of any portion of the building and of all leases, written or oral (except ninety-nine year leases), covering the land or building "and rentals and payments accruing thereunder." The purpose of these assignments was to enable the trustee to take 55 per cent. of the rentals and payments accruing under such leases as long as the corporation was not in default and to use such moneys in the payment of interest and principal of the bonds. Likewise, if the corporation should be in default, the trustee was authorized to retain one hundred per cent. of these funds to be used for the same purposes. Under the plan of financing the construction and sale of the apartments the corporation stipulated that where a lessee had completed payments of the full purchase price of his apartment a lease was to be given him to run for a period of ninety-nine years from January 1, 1940. The purchase price having been theretofore fully paid for the apartment, no rentals or payments would accrue under a ninety-nine year lease and hence there would be no purpose of an assignment of such a lease to the trustee. But the exception of such leases from the requirement of assignment to the trustee does not except the property covered thereby from the security of the trust. The purpose and intention of the parties seems so clear from the language used in the document that there should be no room for the application of the rules of construction of instruments of this character. But if there be any doubt as to the language used, that construction must be adopted which is most favorable to the bondholders—the one which will not impair their security. It is not within reason to say that the parties contemplated that the trustor and lessor herein might execute a ninety-nine year lease "of said land or building" or of any portion or portions thereof free from rental or other charges and thus wholly destroy the security of the trust deed. But if appellants' argument is sound that this course could be followed as to two of the twenty apartments constructed it would follow that it could be done as to all twenty apartments and to the land and building as well.

Furthermore, these ninety-nine year leases are not described or explained in any portion of the deed. It does not appear what portion of the estate they may cover, when or under what conditions they may be made, or when they may commence to run. If the language of the deed was intended to except them from the estate conveyed to the trustee then the exception is void for uncertainty and the deed stands without the exception. Lange v. Waters, 156 Cal. 142, 146, 103 P. 889, 19 Ann. Cas. 1207; Simpson v. Schurra, 91 Cal. App. 640, 648, 267 P. 384.

[4] Appellants complain of the rulings of the trial court refusing admission into evidence of their proposed exhibits designated E to I for identification. Exhibit E was a deed of grant from Lake Drive Corporation to a corporation known as 244 Lakeside Drive. The deed was dated September 12, 1931, and was expressly made subject to the trust indenture. None of the parties claimed any rights under it; it did not affect the title or the right of possession of any party, and had no bearing on the case.

[5, 6] Exhibit F was a letter from the Lake Drive Corporation to the trustee dated October 10, 1931, notifying the trustee that the Diggs contract had been paid in full in *January*, 1931. The purpose of this offer is not clear. By the terms of the trust indenture and by the terms of the Diggs contract assigned to the trustee all payments under the contract were required to be made to the trustee. Diggs was an officer of the corporation; the corporation was in default; he knew this and knew his contract had been assigned to the trustee. But a debtor, with full knowledge of the assignment, cannot contrive with the assignor to defraud the assignee by a purported settlement with the assignor. 5 C. J. p. 960; 2 R. C. L. p. 632. The proposed exhibit merely discloses an attempt on the part of the corporation and the appellants to defeat the beneficiaries under the trust and was of no evidentiary value.

[7] Exhibits G and H were the purported ninety-nine year leases from the corporation to Diggs and Jamieson. They were properly rejected because, being subject and subordinate to the deed of trust, any rights which they might have given to the appellants were destroyed by the trustee's sale. For the same reason exhibit I was properly excluded. This was an assignment of the Jamieson lease to his wife.

[8] At the conclusion of the trial and following argument of counsel an offer of further proof was made by counsel for appellants to the effect that when it was found that the Lake Drive Corporation was having difficulty in meeting the interest and principal on the bonds the appellants made a portion of these payments in an amount which was in excess of the amounts which they owed the corporation upon their contracts of purchase; that in January, 1931, they represented these facts to the corporation and that thereupon the corporation adopted a resolution reciting that their contracts had been fully paid up and that they were entitled to receive ninety-nine year leases for their respective apartments; that such leases were executed and that they now claim to hold under them; that in 1930 default had been made upon the principal and interest of the bonds and that on September 12, 1931, a deed was delivered from the Lake Drive Corporation to a nonprofit corporation comprised of the fourteen contract holders and known as 244 Lakeside Drive; that thereafter the members of this corporation purchased a sufficient number of the outstanding bonds to proceed with foreclosure; that such proceedings were had; that the interests of the 244 Lakeside Drive Corporation were transferred to the respondent herein, which corporation became the purchaser at the trustee's sale. Proof was also offered that the exception heretofore noted in the deed of trust relating to ninety-nine year leases was inserted with the consent of the state commissioner of corporations. This offer was followed with the tender of Exhibits E to I which have heretofore been discussed. Objection was made to the introduction in evidence of the matters outlined in the offer of proof and to the introduction in evidence of Exhibits E to I for identification. This objection was on the general ground that such evidence was incompetent, irrelevant, and immaterial and also upon the ground that there were no pleadings to support the introduction or to permit the introduction of such evidence. Thereupon briefs were requested from both sides on this objection and when the objection was thereafter sustained the appellants asked and obtained permission to amend their answers. Such amendments were filed and the respondent demurred thereto and moved to strike the amendments from the record. The trial court granted the motion to strike and sustained the demurrer. The offer of proof relating to the purported settlement of the obligations of the corporation to the appellants was properly rejected. The appellants were seeking to take advantage of the terms of section 13 of their contract of sale which was received as Defendants' Exhibit D and which authorized the vendee of any of the apartments in the event that the vendor was in default to pay the full purchase price to the trustee, whereupon the vendee should be entitled to delivery of a ninety-nine year lease. It will be noted that appellants did not offer to prove that they complied with the all-important condition of this contract—payment of the balance due to the trustee. In fact, the offer discloses that no money changed hands but that after the vendor was in default and after the contracts had been assigned to the trustee the officers of the corporation purported to discharge their obligations to the trustee by means of a settlement with the corporation of a claim which they held against the corporation. But aside from the technicalities presented, if we are correct in our holding that the ninety-nine year leases were subordinate to the trust indenture, the only purpose of the offer of proof would be to show that the appellants held such leases. There is nothing in the offer which would have constituted a de-

fense to the action and hence the objection was properly sustained.

[9] The amended answers which were thereafter filed did not conform with the proof made at the trial. They pleaded a separate and special defense upon which there was no evidence. They thus went beyond the permission granted by the trial court and were properly stricken from the files.

Appellants argue that the instrument of security was in fact a mortgage and should have been foreclosed under the provisions of section 726, Code of Civil Procedure. The point is answered in La Arcada Co. v. Bank of America, 120 Cal. App. 397, 401, 402, 7 P.(2d) 1115, where a similar instrument was held to be a trust deed and as such subject to foreclosure and sale under section 2924, Civil Code. See, also, McDonald v. Smoke Creek Live Stock Co., 209 Cal. 231, 236, 286 P. 693.

[10] Appellants contend that this is not a proper proceeding in unlawful detainer because it requires a trial of questions of title. The proceeding was brought under the authority of section 1161a, Code of Civil Procedure. This section was added to the Code in 1929 (St. 1929, p. 719). Subdivision 3 permits the action "where the property has been duly sold in accordance with section 2924 of the Civil Code, under a power of sale contained in a deed of trust * * * and the title under the sale has been duly perfected." The section is a legislative recognition of the departure from the early common law rule of unlawful detainer which limited summary proceedings thereunder to the strict relation of landlord and tenant. An accepted doctrine in the operation of that rule was that a tenant was estopped from denying the title of his landlord and hence that the question of title was not triable in such a proceeding. As the right to sue was extended to the successor in interest of the landlord (Plummer v. Agoure, 20 Cal. App. 319, 128 P. 1014), the courts recognized the necessity of permitting the plaintiff to prove that he had acquired the landlord's title. This subject was before us recently in Hewitt v. Justice's Court, etc. (Cal. App.) 21 P.(2d) 641, a case involving the jurisdiction of a justice's court to entertain a proceeding under the third subdivision of section 1161a. The point was there made that the title to real property became involved whenever the plaintiff started to prove that "the title under the sale has been duly perfected." In this connection this court said [page 643 of 21 P.(2d)]: "In other jurisdictions the right to maintain an unlawful detainer action has long been given to a purchaser under a mortgage or deed of trust against the mortgagor or maker of the deed of trust, despite the fact that the purchaser must prove his acquisition of title by the purchase. Gage v. Sanborn, 106 Mich. 269, 64 N. W. 32; Peters v. Balke, 170 Ill. 304, 48 N. E. 1012. It is clear, of course, that questions of title cannot generally be litigated in an unlawful detainer action. But to the limited extent of proving deraignment of title in the manner expressly provided for in the unlawful detainer statutes themselves the question of title not only may, but must, be tried in such actions if the provisions of the statutes extending the remedy beyond the cases where the conventional relation of landlord and tenant exists are not to be judicially nullified." And see American National Bank v. Johnson, 124 Cal. App. (Supp.) 783, 11 P.(2d) 916 and Berkeley Guar. B. & L. Ass'n v. Cunnyngham (Cal. Sup.) 24 P.(2d) 782.

[11] In the instant case there is no constitutional nor jurisdictional question involved. This remedy is purely statutory and, if the determination of the question of title to realty becomes necessary, there is no reason why the Legislature could not provide for the trial of that issue in a proceeding of this character. To what extent the inquiries into the title may run we need not decide. It is sufficient to say that if, in the proof of a "perfected" title as purchaser under a deed of trust the validity of the deed or of the sale under it are put in issue by defendants' denials, the plaintiff cannot be denied the right to complete his proof unless the courts are prepared to nullify the remedy granted by the code section.

The judgment is affirmed.

We concur: SPENCE, J.; DOOLING, Justice pro tem.

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134 Cal.App. 360

WALTER v. AYVAZIAN.

Civ. 7944.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1933.

1. **Appeal and error** ⚷123.

There is no right of appeal from verdict of jury.

2. **Automobiles** ⚷244(11).

Evidence *held* to support judgment for plaintiff based on injuries received in automobile collision at intersection.

3. **Trial** ⚷108½.

In qualifying prospective jurors in personal injury case, question respecting interest in insurance company, *held* not error.

4. **New trial** ⚷143(1), 145.

Jurors cannot deny or assert improper influences which might have affected judgment, in endeavor to impeach verdict, nor may affidavits of third persons be used to prove admission of jurors to same effect.

5. New trial 🔑143(1), 145.

Prejudice of juror may not be shown by affidavit of foreman nor by that of defendant's attorney.

6. Appeal and error 🔑1069(1).

After expert medical evidence had been received, juror's action in consulting family doctor respecting matter under consideration *held* to require reversal.

7. Appeal and error 🔑110.

Appeal does not lie from order denying new trial (Code Civ. Proc. § 963).

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by J. M. Walter against Krikor H. Ayvazian. Judgment for plaintiff, and defendant appeals.

Judgment reversed, and appeal from order denying new trial dismissed.

Purpus & Hiss, of Los Angeles, for appellant.

Perry G. Briney and Arch E. Ekdale, both of San Pedro, for respondent.

CRAIG, Justice.

[1] In an action for damages alleged to have been caused by the careless and negligent operation at excessive speed of an automobile, a verdict and judgment were rendered in favor of the plaintiff. The defendant filed a notice of appeal under the alternative method "from the verdict given and the judgment herein made and entered, and all the decisions and orders of the judge made in said action, and in the decision and order entered on the proceedings for a motion for new trial." None of the decisions or orders appearing of record herein were subject to appeal, nor is there a right of appeal from the verdict of the jury. As to all else except the judgment, the appeal must be dismissed.

[2] While the plaintiff and his wife were approaching an intersection of public streets in their automobile the defendant drove his car against the same, causing injuries to Mrs. Walter, from which she did not recover. The plaintiff testified that he approached the safety zone at a moderate rate of speed, began to signal with his hand at a distance of about 148 feet before attempting to turn that he intended to change his direction; that he slowed down to about 6 or 7 miles per hour; that there was "traffic coming both ways from behind and facing me, to the east and west * * *; and I held out my hand to make that turn, and after I got to about the middle of the street on Armacost, this man Ayvazian came from behind and hit my car before I had made my turn"; that between the first and second impacts his car was carried possibly 12 or 15 miles per hour a distance of about 35 feet. He further swore that the defendant later had said that he "started to pass me on my left, and when he saw my hand extended this way he didn't think he could make it and pulled his car through to the right, and struck me on the right of my car." A disinterested witness testified that he saw the defendant's machine before the accident, and that it was traveling at about 40 miles per hour after the first impact. If believed by the jury, this and other evidence which need not be recited was sufficient to justify them in rendering their verdict in favor of the plaintiff upon the cause as alleged in his complaint.

[3] During the qualification of prospective jurors the question was asked as to whether or not a candidate for the jury or any of his family had an interest as stockholder or employee of an insurance company or insurance broker, to which objection was interposed, which objection was sustained and the question was stricken out as to the broker. The appellant calls attention to argument of his counsel upon a motion to disqualify all jurors present, and to the question by the court if said action involved an insurance company, to which the respondent's counsel replied, "not as far as the title of the case shows." The juror answered the question in the negative, all jurors were instructed that if any reference had been made to an insurance company all remarks of counsel and the court should be disregarded, and said motion was denied. The effort to obtain impartial jurors was not improper, as the plaintiff was entitled to know whether or not they might in the manner indicated be interested in the outcome of his action. Murphy v. Shaffer, 58 Cal. App. 453, 208 P. 1003.

[4-6] A more serious question was presented upon the motion for a new trial by evidence of a communication by one of the jurors with a physician after the case had been delivered into their hands for deliberation. Expert witnesses had testified that under the described conditions a sudden impact of a vehicle in which the deceased was riding might cause an affection of the kidneys, that she was found to have suffered such affection, and that the demise of one so injured to the extent revealed by her examination would probably result. One of the symptoms by which these doctors determined and gave their conclusion was excessive blood pressure, which they swore was found to be about 190. Other physicians had in turn testified that the family history

showed a nephritic condition "when she was quite young, approximately in her twenties," and "running all the way down the family"; that nephritis had been diagnosed as based on increased blood pressure, but that he had told her "as far as that test was concerned she would live many years, unless nature disturbed that balance." It was shown by some of the witnesses that death was hastened if not produced by conditions resulting from the accident; by others that the primary cause was uremia, and that it was "very highly improbable" that it resulted from the accident. By affidavits of the juror mentioned and of other jurors as well as a physician, it was made to appear that "during the time the jury was considering its verdict * * * she had consulted with a doctor regarding the case at bar as to the disease 'uremia' and that she was satisfied in her own mind as to the verdict she was going to give": that she had called the physician on the telephone and inquired "if 190 was a dangerous blood pressure, and he, the affiant, said it was." By the affidavit of one of said jurors it appeared that she stated to the jury thereafter during deliberations "that because of a conflict in the testimony of the doctors relative to blood pressure, affiant called her family doctor to determine what he thought about high blood pressure." Neither the impropriety nor the possible prejudicial effect of such conduct is seriously minimized by counsel for the respondent. It has been said that in order to warrant setting aside a verdict for misconduct it must appear that prejudice resulted therefrom. Saltzman v. Sunset Tel. & Tel. Co., 125 Cal. 501, 58 P. 169. Yet here we have direct and positive evidence solicited and received by a juror from an outside source upon a question which had been made material to the principal issue and submitted to the jury for their determination as a question of fact upon which to base their verdict, and upon which fact qualified expert witnesses in the case had differed. The courts are giving more and more scrutiny to the fairness or unfairness of the means employed in presenting issues. Each case must be decided on its own merits, much depending upon the issues, the parties, and the general atmosphere of the case. Perez v. Crocker, 86 Cal. App. 288, 260 P. 838. Certain experiments by jurors, viewing of premises, and examination of exhibits not in evidence but acquired by them, have been held the equivalent of such taking of evidence out of court and deprivation of the constitutional right of the presence of parties, without the possibility of knowledge on the part of the latter, or of contesting the reliability of such information, as to require a new trial. Higgins v. Los Angeles Gas & Electric Co., 159 Cal. 651, 115 P. 313, 315, 34 L. R. A. (N. S.) 717; Tunmore v. McLeish, 45 Cal. App. 266, 187 P. 443. "It is a fundamental rule that all evidence shall be taken in open court, and that each party to a controversy shall have knowledge of, and thus be enabled to meet and answer, any evidence brought against him." Higgins v. Los Angeles Gas & Electric Co., supra. It is not conceivable that the expert opinion of one in whom a juror must be said to have greater confidence than is manifested toward strangers under oath could withstand that degree of scrutiny as to fairness which guarantees the rendition of a just verdict, uninfluenced by outside evidence. As properly contended by the respondent, jurors may not be heard to deny or to assert improper influences which might have affected their judgment upon the issues before them, in an endeavor to impeach their verdict. Saltzman v. Sunset Tel. & Tel. Co., 125 Cal. 501, 58 P. 169. Nor may affidavits of third persons be used to prove admissions of such jurors to the same effect. Siemsen v. Oakland, S. L. & H. Elec. R. R., 134 Cal. 494, 66 P. 672. Prejudice on the part of a juror may not be shown by the affidavit of the foreman nor by that of the defendant's attorney. Davilla v. Liberty Life Ins. Co., 114 Cal. App. 308, 299 P. 831. But all that is claimed by the appellant to have constituted prejudicial misconduct is fully supplied by the affidavit of the physician, that on the morning in question said juror "consulted him in reference to blood pressure, and she asked him if one hundred and ninety (190) was a dangerous blood pressure; and he, the affiant said it was." Disregarding other evidences of the reprehensible conduct of the juror for the purposes of decision of the instant question, proof of the same having properly been presented it does not require more. Tunmore v. McLeish, supra.

[7] From the views expressed it follows that the judgment must be reversed. An examination of the instructions of which complaint is made does not disclose reversible error. Much has previously been said of attempted appeals from nonappealable orders, and the burdening of the record with unnecessary discussion of matters reviewable upon appeal from the judgment. Owing to recent repetitions of such practice and the necessity for dismissals it again becomes incumbent upon us to call attention to an amendment of section 963 of the Code of Civil Procedure in 1915 (St. 1915, p. 209) since which time an appeal does not lie from an order denying a new trial. H. G. B. Alexander & Co. v. Martz, 107 Cal. App. 277, 290 P. 300; In re Estate of Ivey, 110 Cal. App. 561, 294 P. 420; Bethurum v. Krumm, 109 Cal. App. 5, 292 P. 287.

The judgment is reversed. The appeal from the order denying a new trial is dismissed.

We concur: WORKS, P. J.; STEPHENS, J.

134 Cal.App. 490

WOODRUFF v. ADAMS.

Civ. 7716.

District Court of Appeal, Second District, Division 1, California.

Oct. 2, 1933.

1. Contracts 🔑159.

Words "from" and "to," used in contract, may be given meaning to which reason and sense entitles them, under circumstances of case.

[Ed. Note.—For other definitions of "From" and "To," see Words & Phrases.]

2. Contracts 🔑195.

Contract by owner of subdivision employing plaintiff to improve streets between designated streets, "from 109th street to 111th street," *held* to include 111th street at owner's election.

> Contract by owner of subdivision, employing plaintiff to improve streets between designated streets, described streets to be improved as "all streets lying between Vermont and Hoover from 109th street to 111th street, * * *" all work on 111th street from Baring Cross to Vermont avenue to be figured in contract at same rate as other streets, owner, however, reserving right to include same in contract or leave it out.

3. Contracts 🔑313(1, 2).

Prevention of performance of contract is equivalent to repudiation, and party, having repudiated contract, cannot rely upon conditions contained therein to escape liability for money judgment for breach of contract.

4. Contracts 🔑313(1).

Owner of subdivision, having prevented plaintiff from performing contract to make street and sidewalk improvements, *held* not entitled to credit against damages for breach of contract, of agreed price for machinery sold to plaintiff.

> Owner of subdivision agreed to sell to plaintiff, employed to make street and sidewalk improvements in subdivision, certain machinery at an agreed price, the price to be deducted on completion of the work, but the ownership of the machinery to remain in the name of the owner until completion and acceptance of the contract, and the machinery to remain on the owner's premises until final settlement was made.

5. Contracts 🔑313(2).

Direction by owner of subdivision, through his engineer in charge, to plaintiff, employed to make street and sidewalk improvements, to stop work until owner adjusted financial matters with him *held* to constitute prevention of performance, constituting breach of contract, where owner did not withdraw stop notice within reasonable time.

6. Contracts 🔑313(2).

Failure of owner of subdivision, who employed plaintiff to make street and sidewalk improvements, to pay labor claims weekly as required by contract *held* not prevention of performance on theory that payment of labor claims was concurrent obligation.

> Contract by owner of subdivision, employing plaintiff to make street and sidewalk improvements in subdivision, required owner to make payment for labor on job once a week, according to labor list approved by owner's engineer, and provided that if the amount of such payment did not exceed 75 per cent. of actual cost of job to date, the difference between the labor bill and 75 per cent. was to be paid to the plaintiff contractor.

Appeal from Superior Court, Los Angeles County; James L. Allen, Judge.

Action by C. E. Woodruff against B. G. Adams. From a judgment in favor of the plaintiff, and from an order denying a new trial, the defendant appeals.

Judgment affirmed, and appeal from order denying new trial dismissed.

Andrew H. Rose, of Los Angeles, for appellant.

Robert H. Dunlap and George R. Larwill, both of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This is an appeal from a judgment of $5,074.94, rendered by the court sitting without a jury, in favor of the plaintiff, and from an order entered by another judge of the same court denying a new trial.

Defendant early in 1929 was the owner of a tract of land in the city of Los Angeles which he proposed to subdivide into building lots. He employed plaintiff to level the ground, grade streets within or bordering upon the tract, and construct sidewalks and curbs on certain of the streets. The agreement of the parties was reduced to writing and fixed the price to be paid plaintiff for each item of the work, leveling to be reckoned on an acreage basis, yardage removal to be figured on the grading work, surface or linear measurements to govern the cost of oiling streets and the concrete construction. The streets to be improved were described in the contract as "all streets lying between Vermont and Hoover from 109th street to 111th street, also Baring Cross from 108th to 111th streets. (Note: 111th street from Baring Cross to Vermont avenue. All work on this portion of street to

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

be figured in contract at the same rate as the other streets named in this contract, but owner reserves right to include same in this contract or leave out." The contract also contained the following: "Owner agrees to sell to Contractor: 2 Tractors, 1 Road King, 3 Scrapers, 1 Scarafier and 1 Plow, in the same condition as machinery is today, at a total price of $1,500.00, which amount is to be deducted from said Contractor on completion of the work. Ownership of said machinery to remain in the name of Owner until final completion and acceptance of this Contract, at which time Owner will deliver a Bill of Sale for the machinery to Contractor. Said machinery to remain on Owner's premises until final settlement is made."

By the terms of the contract, payment for labor on the job was to be made once a week according to labor lists approved by the owner's engineer, one F. A. Smith, and if the amount of such payment did not exceed 75 per cent. of the actual cost of the job to date, the difference between the labor bill and said 75 per cent. was to be paid to the contractor, i. e., to the plaintiff. Any balance due on the job at time of its completion was to be paid within 35 days thereafter. There were various conflicting provisions in the contract as to furnishing of labor and materials which need not be specially noted. The contractor was bound to prosecute his work until fully completed "without delay, except such as may be caused by weather conditions or other conditions beyond his control."

Plaintiff began work on the tract on February 12, 1929, and stopped work there March 16th, four weekly pay rolls accruing meanwhile. Defendant was approximately one week late in meeting each of these pay rolls except the last, and as to that payment both plaintiff and defendant were summoned to appear before the Department of Industrial Relations and payment was made in the early part of April. Defendant's engineer, Mr. Smith, testified at the trial that on the evening of March 14th defendant telephoned him from Arrowhead Hot Springs, where he was ill, saying that he had better have plaintiff stop work until he adjusted financial matters with him, a message which he delivered next day to plaintiff on the tract. The plaintiff testified that "Mr. Smith told me Mr. Adams called him up the night before and told him to have me discontinue the work out there until he made definite arrangements to pay for the improvements." Defendant did not deny that he discussed the negotiation of a loan with the various witnesses who gave testimony to that effect, but stated that he did not mention the matter "of the procuring of a loan to Mr. Woodruff in connection with his going ahead on the contract. The loan had nothing to do with his going ahead. I had plenty of money to pay Mr. Woodruff. I believed and claimed that Mr. Woodruff had been submitting incorrect payrolls and was claiming money for materials in excess of the amount moved." Other conversations bearing on the cessation of work were before the court, and from these somewhat conflicting statements and appropriate findings thereon the trial court concluded that "the stoppage notice constituted a prevention of performance by plaintiff." In regard to work to be done on 111th street, a public street, forming the southerly boundary of the tract, testimony of the plaintiffs was as follows: "On or about February 15th I had a conversation with Mr. Adams concerning 111th street in the presence of my foreman, Mr. Lambert. Lambert said: Are we going to grade 111th street, take the rough grade out of 111th street? and I says, Well, that is up to Mr. Adams, and he says, Mr. Adams says, Yes, we would just as well go ahead and take the grade out anyway for I intend to go ahead and put in 111th street at the same price that this contract was agreed on." Plaintiff also testified that the gross price for the job excluding 111th street was $16,320.38, and including 111th street $22,213.

[1, 2] The trial court found that if respondent had been permitted to complete his work he would have made all the improvements, including all of 111th street where it bordered on the tract and which, on the testimony of an engineer called by plaintiff, would have netted a profit of $5,074.94, the profit not including all of 111th street being estimated at $3,764. It is clear, therefore, that the court construed the words of the contract "from 109th street to 111th street" as meaning "to 111th street inclusive." Appellant claims error in this regard. However, we are not prepared to say this was an incorrect interpretation of the terms, in view of the careless use of prepositions (e. g., from 109th street indubitably meaning including 109th street) in this contract and considering the following proviso of the contract "Permits and Inspection Fees 111th street contractor will pay for Permits and inspection fees, if any, for work done on 111th street, being a street of record, therefor belonging to the city. It may be necessary for owner to install heavier sidewalks and curbs than called for in this contract, in which event the price for said work will be 5c extra per lineal foot on curb only than the price called for in this contract for lighter curb." The words "from" and "to" may be given the meaning to which reason and sense entitle them, according to the circumstances of the case (Stough v. Reeves, 42 Colo. 432, 95 P. 958; 8 Words and Phrases, First Series, 6984), and in view of the conversation of February 15th, in which defendant expressed his intention to improve 111th street, we feel that the court was justified in its finding that he thereby included the portion of 111th street between Baring Cross street and Vermont avenue, concerning which

the contract permitted him to exercise his election.

One of the conclusions reached by the court was that "the contract * * * provides for the payment of labor claims as a dependent condition or covenant, and payment by defendant was an obligation to be performed concurrently with performance by defendant. That said contract is not an installment contract"; another, "that the notice to stop work until defendant procured a loan was a stoppage notice entirely unauthorized by the contract and that the defendant did not withdraw the said notice within a reasonable time or at all; and that the said stoppage notice constituted a prevention of performance by plaintiff"; another, "that the failure to pay labor promptly continued for over one (1) month and covering four (4) payrolls constituted an anticipatory breach going to the heart of the contract and justified the plaintiff in refusing to proceed further with the contract and asserting his right to anticipated profits."

Appellant sets up five grounds of error predicated on the following contentions: (1) That payment of labor claims was not an obligation to be performed concurrently, and that this was not an installment contract; (2) that the appellant was at no time in default; (3) that the stop notice did not constitute prevention; (4) that 111th street from Hoover street to Vermont avenue should not have been included by the court in estimating the profits that would have been derived by plaintiff if the job had been completed; (5) that there should have been deducted, from estimated profits as a credit to defendant, the sum of $1,500 mentioned in the contract as the purchase price of the equipment.

[3, 4] For convenience we shall consider these contentions in reverse order. The fifth claim of error is not in our opinion well grounded. Prevention by defendant, found by the learned judge of the trial court, was equivalent to repudiation of the contract on his part, and, having repudiated, he may not rely upon a condition of that same contract to escape liability as to any part of a money judgment, which, through his initial fault does not become effective for more than three years. If the machinery in question still exists or is still in possession of appellant, it may be assumed that after so long a time it is worth considerably less in money than $1,500, the price acceptable to both parties in 1929. For the principle herein involved, see Morrison v. Sycamore Canyon Gravel Co., 102 Cal. App. 536, 539, 283 P. 84. Furthermore, as counsel for respondent remark in their brief, there was no counterclaim filed for this or any amount, no evidence showing tender of a bill of sale, nor was the work completed, the sole contingency upon which the agreement to sell was based.

[5] We have already passed adversely on the fourth ground of appeal in ruling that the court committed no error by including 111th street in its calculation. As to the third ground, that the stop order did not constitute prevention, we feel that in view of the fact that this respondent, on the testimony before the court, was ready, willing, and able to continue with his work and was deterred therefrom solely by the defendant or his authorized agent, and not advised to continue within the period of approximately four months that ensued prior to filing suit, we have a case closely approximating in its facts the circumstances that obtained in Crawford v. Pioneer Box & Lumber Co., 105 Cal. App. 760, 288 P. 694. The language of the court, at page 767 of 105 Cal. App., 288 P. 694, 697, in that case is peculiarly applicable to the situation here. "The performance of the contract here depended wholly and entirely upon plaintiff's access to the lands of the defendant company. Such access being denied him, he could proceed no further. Just how far the notice to stop cutting timber had the effect of withholding or denying access to the lands was a question of fact as well as one of law. * * * All that distinguished plaintiff from a mere trespasser was the implied license of the defendant. The latter retained at all times control of the lands and the disposition of any timber thereon standing. Whether plaintiff was removed from the lands by actual physical force or merely by order the effect is the same."

It may be noted also that in one of the cases cited by appellant it was held that prevention takes place not only where a positive affirmative act of prevention is performed by one of the parties, but also where a party "has neglected to do some act, without which, the plaintiff could not, in the nature of things, go on with his contract, as where he refused to furnish a place whereon to erect a building," etc. Palm v. Ohio & Miss. R. R. Co., 18 Ill. 217. This might be made to read, as applied to the present case, "a tract whereon to do his grading and street improvement work." It appears to us, therefore, that the trial court correctly concluded that plaintiff was prevented from completing his contract. The second ground above mentioned, that appellant was at no time in default, is disposed of by our ruling on the third ground sustaining the trial court's view that prevention took place.

[6] It remains only to determine the merit of appellant's claim "that the trial court erred in concluding that the payment of labor claims was an obligation to be performed concurrently by the appellant and that the contract was not an installment contract." If the conclusion means that defendant's failure to make payment of labor claims promptly in each of the four weeks of the working period

constituted a breach of a condition precedent, and that this is a severable contract (and no other meaning occurs to us), we feel that appellant's point is well taken. It is our opinion that here, as in the case of Cox v. (McLaughlin) Western Pac. R. Co. reported first in 44 Cal. 18, at page 28, "the contract * * * is an entire contract. The provision for the payment for the work, etc., from time to time, according to estimates to be made, does not change the character of the contract in that respect, and make it severable." The opinion by Mr. Justice Garoutte in Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 P. 146, contains interesting references to the case of Cox v. McLaughlin, reported in 44 Cal. 18, 52 Cal. 590, 54 Cal. 605, 63 Cal. 196, and 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164, and points out the remedy available to the contractor when an employer fails to make payments as agreed, namely, rescission and an action for fair value of the work done.

Judged by the reasoning of the court in Palm v. Ohio & Miss. R. R. Co., supra, quoted in Cox v. McLaughlin, 54 Cal. 605, 609, failure to pay promptly week by week under the contract before us would not of itself establish legal prevention. The excerpt is as follows: "A contract, no doubt may be so drawn as to make the payment of a part of the consideration by installments as the work progresses, or at stated times, independently of the progress of the work; a condition precedent to the further prosecution of the work, and make its non-payment such a substantial violation of the contract as to authorize the other party to abandon the work and sue upon it, as for having been prevented from completing it by the act of the party who had thus failed to perform such condition precedent. But the law cannot infer such a consequence from the ordinary obligation to pay money at a particular time, or upon a completion of a specified part of the work."

While, therefore, we conclude that the evidence does not support a finding that prevention arose through nonpayment of labor claims which, as a matter of fact, were all paid not later than early April, long before this suit for anticipatory breach was filed, it does not follow that there must be a reversal (24 Cal. Jur. 993, and cases there cited), for, as has been noted, the court found also "that on or about the 16th day of March, 1929, the defendant B. G. Adams notified plaintiff to stop work until he could procure a loan with which to complete his performance of the contract. * * * That defendant did not withdraw said stop order prior to the institution of this action."

While, as we have indicated, the failure to pay labor claims promptly did not constitute prevention, there is sufficient in the various findings reached by the court, and in the evidence offered, to support the conclusion that prevention resulted from the stop order and to sustain the judgment on that ground alone.

Judgment affirmed.

The attempted appeal from order denying motion for a new trial is dismissed.

We concur: CONREY, P. J.; YORK, J.

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134 Cal.App. 501

ALDERMAN v. BAGGETT et al.

Civ. 684.

District Court of Appeal, Fourth District, California.

Oct. 4, 1933.

1. **Fixtures** ⚷35(3).

Whether a building has been affixed to and has become part of realty is question of fact dependent on particular circumstances (Civ. Code, §§ 658, 660, 663).

2. **Fixtures** ⚷4.

Intent of parties as determined from character of building, use, annexation, and other facts generally controls in determining whether fixtures have become part of realty (Civ. Code, §§ 658, 660, 663).

Other facts that should be considered in determining whether fixtures have become part of realty are the character of the building, manner of its construction, presence or absence of customary methods of attaching to or embedding in the soil, the use to which the building is adapted and to which it has been put, and any expressed intent with regard to its permanence.

3. **Fixtures** ⚷21.

Facts sustained finding that cottage placed on land by purchaser's husband had not become part of realty (Civ. Code, §§ 658, 660, 663).

Facts disclosed that cottage was of light construction; that it was placed on skids and hauled to property in question; that no part of cottage was imbedded in soil, but was placed on cement blocks which were laid on the surface of the ground; that cottage was placed some 15 to 20 feet from the main building, and contained no plumbing and was not connected to anything else on the property except electric wires; and that purchaser's husband informed vendor that it was his intention to let cottage remain on property temporarily to be later removed by him to his ranch.

4. Appeal and error ⟹1010(1).

Trial court's findings of fact cannot be disturbed where based on sufficient evidence.

Appeal from Superior Court, Riverside County; Benjamin F. Warmer, Judge.

Action in claim and delivery by Mattie Evans Alderman against Clara Jane Baggett and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Lewis & Lehman, of Los Angeles, for appellant.

Kelley & Hews, of Riverside, for respondents.

BARNARD, Presiding Justice.

In April, 1925, Clara Jane Baggett entered into a written contract to purchase from the plaintiff certain lots in the town of Thermal with a hotel and rooming house located thereon. She took possession immediately, and proceeded to operate the hotel and rooming house. In November, 1925, her husband, William C. Baggett, moved a cottage or "tent house" belonging to him and theretofore located on lots owned by him to the premises being purchased under contract by his wife. This cottage was thirty-six feet long, ten feet wide, and divided by plaster board partitions into four rooms. Its exterior walls were of screen wire except for about three feet of weatherboard siding at the bottom, and the roof was shingled. About September, 1928, the plaintiff, upon receiving notice from Mrs. Baggett that she would not complete the contract, took possession of the property covered thereby. Shortly thereafter, and while the plaintiff was absent from the property, William C. Baggett removed the cottage or tent house referred to. The plaintiff brought this action in claim and delivery seeking to recover possession of the cottage or its value. The court found in all respects in favor of the defendants, and from the ensuing judgment plaintiff has appealed.

The findings are not attacked, and the only contentions made by the appellant are that it conclusively appears from the evidence that the cottage in question was so affixed to the land as to become a part of the realty and that no agreement for its removal existed.

[1, 2] It is well settled that the question of whether a building has been affixed to and has become a part of real property is one of fact and is dependent upon the peculiar circumstances of each case. Bond Investment Co. v. Blakeley, 83 Cal. App. 696, 257 P. 189; Fisher v. Pennington, 116 Cal. App. 248, 2 P.(2d) 518; Miller v. Waddingham, 91 Cal. 377, 27 P. 750, 13 L. R. A. 680. In Gosliner v. Briones, 187 Cal. 557, 204 P. 19, 20, the court said: " 'Real or immovable property consists of: 1. Land; 2. That which is affixed to land; 3. That which is incidental or appurtenant to land; 4. That which is immovable by law.' Civ. Code, § 658. 'Every kind of property that is not real is personal.' Civ. Code, § 663. Consequently the buildings in question were personalty unless they were 'affixed to the land,' for, obviously, only in that sense can they be brought within the above classification of real property. 'A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.' Civ. Code, § 660. This section of the Code is simply a rule for general guidance, concerning itself more with ultimate than with probative facts. Whether or not in any case a building is 'permanently resting upon' the soil, so as to be deemed 'affixed to the land' within the meaning of the section, remains a question of fact to be determined upon the evidence of that case. Pennybecker v. McDougal, 48 Cal. 160; Miller v. Waddingham, 91 Cal. 377, 13 L. R. A. 680, 27 P. 750. As a general rule the intent of the parties is a controlling criterion in ascertaining whether property is permanently attached to the land or retains its identity as personalty; the character of the annexation to the land or other realty and the use made of the property are important considerations, but in most cases are subsidiarily employed for the purpose of testing the intention of the parties"—citing cases.

Among the things that should be taken into consideration in deciding such a question are the following: The character of the building and the manner of its construction; the presence or absence of customary methods of attaching to or embedding in the soil; the use to which the building is adapted and to which it has been put; and any expressed intent with regard to its permanence.

[3, 4] The record before us contains evidence to the effect that the building in question was of light construction; that it was placed on skids and hauled to the property now owned by the appellant; that no part of the building was embedded in the soil; that the cottage was placed upon 8x10-inch cement blocks about twelve inches long, the blocks being some seven or eight feet apart; that the blocks were laid on the surface of the ground; that the cottage was placed some fifteen or twenty feet from the main building on the property; that it contained no plumbing; and that it was not connected with anything else upon the property except for electric wires extending from it to a meter used

in connection with the hotel building. There is also evidence that before placing this cottage upon the property being purchased by his wife the respondent husband informed the appellant that it was his intention to let it remain there temporarily, to be later removed by him to his ranch. It further appears that Mrs. Baggett had rented rooms in the building in its former location; that one or two roomers had been there for years and remained during and after its removal; and that her husband had informed the appellant that he proposed moving the building in order to make it more convenient for Mrs. Baggett to look after the rooms.

From this evidence the trial court was justified in finding and concluding that the cottage in question was to be used there temporarily, that there was no intention that it should remain and become a part of the realty, and that the same was not affixed to the land within the meaning of the statutes. Civ. Code, §§ 658, 660. The question of fact having been decided by the trial court upon sufficient evidence, the conclusion reached cannot be disturbed.

It may also be observed that the evidence, with the reasonable inferences therefrom, is sufficient to justify the conclusion that the appellant agreed in advance that the building might be removed.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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134 Cal.App. 462

McPHERSON v. RICHARDS, County Auditor.

Civ. 5017.

District Court of Appeal, Third District, California.

Sept. 29, 1933.

1. District and prosecuting attorneys 🔑5(4).

Amendment to county charter fixing salary of assistant district attorney *held* void under constitutional provision requiring that salary be fixed by ordinance (Const. art. 11, § 7½, subsec. 5; St. 1917, p. 1791, amended by St. 1923, p. 1558, and further amended in 1933 as to art. 3, § 3, subd. (k).

2. District and prosecuting attorneys 🔑5(4).

Resolution of board of supervisors of county having freeholder's charter *held* invalid in so far as it sought to fix salary of assistant district attorney (Const. art. 11, § 7½, subsec. 5).

A "resolution" of board of supervisors is usually a mere declaration with respect to future purpose or proceeding of the board, while an "ordinance" is a local law which is adopted with all the formality of a statute.

[Ed. Note.—For other definitions of "Ordinance" and "Resolution," see Words & Phrases.]

3. District and prosecuting attorneys 🔑5(4).

Ordinance of county supervisors providing for fixing salary of assistant district attorney by resolution *held* ineffectual, where county was governed by freeholders' charter (Const. art. 11, § 7½, subsec. 5).

4. Counties 🔑24.

General law *held* controlling on county having freeholders' charter on question respecting which supervisors had taken no lawful action (Const. art. 11, § 7½).

Petition by J. M. McPherson for writ of mandamus to be directed to Lucy A. Richards, as county auditor of Butte county.

Writ granted.

J. M. McPherson, of Chico, in pro. per.

Bond & Price, of Chico, and George F. Jones, of Oroville, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a petition for a writ of mandamus to compel the auditor of Butte county to draw a warrant in payment of the salary provided by law for the services of the assistant district attorney for the month of August, 1933.

The petitioner was appointed and qualified as assistant district attorney of Butte county, January 5, 1931, since which time he has performed the duties of that office. At the time of his appointment, his salary was fixed by the terms of a freeholders' charter of Butte county at $1,950 per annum, payable in equal monthly installments. That charter was adopted pursuant to the provisions of article 11, section 7½ of the Constitution of California. St. 1917, p. 1791. The charter was amended in Statutes of 1923, page 1558, so that article 3, section 3 thereof, provides that: "The Board of Supervisors shall, once every four years, determine the number of deputies, assistants, clerks, and stenographers, except as herein otherwise expressly provided, for each and every county officer, and shall, at said time, fix the compensation of each and every deputy, assistant, clerk or stenographer."

In 1933 this charter was again amended so that article 3, section 3, subdivision (k) thereof provides that: "The district attorney and ex-officio public administrator shall be allowed the sum of $1,200.00 per annum for the assistant's salary."

After the adoption of the last-mentioned amendment to the charter, the auditor refused to pay the petitioner more than $100 per month for his services as assistant district attorney. The petitioner demanded the payment of his salary as provided by law for the month of August, 1933, which was refused. This petition for a writ of mandamus was then filed, to require the payment of the salary for that month.

[1] The petitioner contends that the amendment to the Butte county charter which is contained in article III, section 3 (k) thereof, purporting to fix the salary of the assistant district attorney at $1,200 a year, is unconstitutional and void, for the reason that the board of supervisors failed to fix his compensation by ordinance as required by article 11, section 7½, subsection 5 of the Constitution.

We are persuaded the last-mentioned amendment to the charter is unconstitutional and void. The board of supervisors failed to adopt an ordinance authorizing the appointment of an assistant district attorney and fixing his compensation. Article 11, section 7½, subsection 5 of the Constitution, makes it mandatory that this designation of assistant county officers and the fixing of their salaries shall be done by boards of supervisors by means of an ordinance. That section of the Constitution declares that a freeholders' charter "shall provide, for the following matters: * * * For the fixing and regulation by boards of supervisors, by ordinance, of the appointment and number of assistants, deputies, clerks, attaches and other persons to be employed, from time to time, in the several offices of the county, and for the prescribing and regulating by such boards of the powers, duties, qualifications and compensation of such persons, the times at which, and terms for which they shall be appointed, and the manner of their appointment and removal."

Regarding the necessity of the adoption of an ordinance by the board of supervisors authorizing the appointment of a deputy county officer and fixing his compensation, it is said in the concurring opinion of Mr. Justice Shaw, in the case of Jones v. De Shields, 187 Cal. 331, 339, 202 P. 137, 141: "The provisions of section 7½ of article 11 of the Constitution above set forth, it is to be observed, do not authorize the Legislature, or the county, by means of a freeholders' charter, to provide directly for the appointment of deputy county officers or for their compensation. On the contrary, that section prescribes in subdivision 5, as above shown, that the charter shall provide for the fixing and regulation by the board of supervisors by ordinance for such appointment and compensation. The matter is not to be fixed by the charter itself, but by ordinance adopted by the board of supervisors. It follows, therefore, that the charter contains no valid provision either for the appointment of the petitioner or other person, * * * or for his compensation when appointed. Also it follows from the fact that the charter contains no [valid] provision therefor that the provisions of the general law empowering the county clerk to appoint his own deputy and fixing the compensation of such deputy are not superseded by the charter, but remain in full force as if no charter had been adopted."

[2, 3] Instead of adopting an ordinance respecting the appointment and compensation of the assistant district attorney, as required by the Constitution, the board of supervisors of Butte county passed a resolution in the following language: "It is moved by Supervisor White, seconded by Supervisor Meeker, that the following resolution be adopted: * * * Commencing January 5, 1931, * * * the county officers of the county of Butte, state of California, shall have and be allowed the following deputies, assistants, clerks and stenographers, whose compensation is hereby fixed and determined as follows, to-wit: District attorney. One assistant district attorney whose salary shall be nineteen hundred fifty ($1,950.) dollars per annum."

Subsequently, by the last amendment to the charter, as above related, his salary was fixed at $1,200 per annum. The board has never passed an ordinance as required by the Constitution authorizing the appointment or fixing the compensation of the assistant district attorney. The only ordinance which was ever passed by the board with relation to that subject is numbered 333, chapter II, section 26 of which provides that, "Officials of Butte county shall have such deputies, assistants, clerks and stenographers as may be allowed by the board of supervisors by resolution and the salaries thereof shall be as fixed by said board of supervisors by resolution as provided in section 3, article III of the county of Butte."

This ordinance is insufficient to comply with the mandate of the Constitution. Clearly it contains a mere notice that such deputy and assistant county officers will be authorized by the board as they may indicate by a resolution to be passed in the future. The same thing is true with respect to the fixing of their compensation. In other words, it is the resolution and not the ordinance which authorizes the appointment of specific deputies and fixes their salaries. This is clearly in contravention of the constitutional provision heretofore referred to which declares that the appointment of deputies and the fixing of their compensation shall be done by boards of supervisors "by ordinance." The ordinance above referred to and the resolutions of the board are ineffectual. The effort to perform this mandate of the Constitution by means of incorporating a provision with relation thereto in the charter, as well as by resolution of the board, is unconstitutional and void. The resolution of a board of supervisors is ordinarily not equivalent to an ordinance. A resolution is usually a mere declaration with respect to future purpose or proceedings of the board. An ordinance is a local law which is adopted with all the legal formality of a statute. It is distinguished from mere current rules of procedure with respect to municipal affairs. In 2 McQuillin's Municipal Corporations (2d Ed.) page 523, § 663, it is said in that regard, "As the terms are commonly used in charters, there is a distinction between an ordinance and a resolution. The corporation cannot accomplish by an order or resolution that which, under its charter, can be done only by an ordinance."

In support of this declaration of law, the case of Pimental v. City of San Francisco, 21 Cal. 351, is cited.

[4] Since the provisions in the Butte county charter and the resolutions of the board with respect to the appointment and compensation of a deputy district attorney are unconstitutional and void, the petitioner must rely upon the general law to legalize his appointment and to fix his compensation. In the absence of lawful action on the part of the board of supervisors, the general law is controlling with respect thereto. Section 4256 of the Political Code (as amended by St. 1929, pp. 218, 220) places Butte county in the twenty-seventh class of counties. Subdivision 8 of that section provides in part that, "The district attorney shall be allowed one deputy at a salary of two thousand five hundred twenty dollars per annum."

This is authority for the appointment of a deputy district attorney of Butte county, and for the fixing of his salary at $2,520 a year. This salary is payable monthly in twelve equal installments. The petitioner is therefore entitled, under the general law, to the sum of $210 as compensation for his services for the month of August, 1933.

It is ordered that a writ of mandate issue directing the respondent, as auditor of Butte county, to draw a warrant in favor of petitioner for the sum of $210 as compensation for his services as assistant district attorney for the month of August, 1933.

We concur: PULLEN, P. J.; PLUMMER, J.

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134 Cal.App. 396

PEOPLE v. COLLIE et al.

Civ. 643.

District Court of Appeal, Fourth District, California.

Sept. 28, 1933.

Appeal and error ⚷434, 773(2).

Appeal would be dismissed where no brief was filed by any party and no appearance made.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by the People against Frank Collie, also known as J. F. Collie and another, in which appeal was taken by defendant Los Angeles Surety Company, Incorporated. On an order to show cause why appeal should not be dismissed.

Appeal dismissed.

Thomas W. Cochran, of Los Angeles, for appellant.

Sam L. Collins, Dist. Atty., and Leo J. Friis and S. B. Kaufman, Deputy Dist. Attys., all of Santa Ana, for respondent.

JENNINGS, Justice.

The record on appeal in this case was filed in this court on February 24, 1932. No brief has been filed by any party to the action. This court accordingly, on its own motion, noticed an order to show cause why the appeal should not be dismissed, for September 12, 1933.

No cause has been shown why the appeal should not be dismissed and no appearance has been made.

The appeal is therefore dismissed.

We concur: BARNARD, P. J.; MARKS, J.

134 Cal.App. 393

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. EVANSON.

Civ. 540.

District Court of Appeal, Fourth District, California.

Sept. 28, 1933.

1. Executors and administrators ⊂⇒264(2).

Mortgagee, under statute in force at time, after filing claim against mortgagor's estate, could foreclose mortgage (Code Civ. Proc. § 1500).

2. Executors and administrators ⊂⇒264(2).

After filing of claim against mortgagor's estate, mortgage may be foreclosed at any time default exists, subject to requirement that claim against other property of estate must be waived (Code Civ. Proc. §§ 1500, 1569).

3. Executors and administrators ⊂⇒264(2).

Mortgagee's retention of payments covering interest and principal, made after filing of claim against mortgagor's estate, *held* not election to rely on payment in course of administration of mortgagor's estate, so as to preclude foreclosure (Code Civ. Proc. §§ 1500, 1569).

4. Executors and administrators ⊂⇒264(2).

Mortgagee's retention of payments covering interest and principal, made after filing of claim against mortgagor's estate and before foreclosure proceedings, *held* not violation of statutory requirement that mortgagee waive recourse against all other property of estate (Code Civ. Proc. §§ 1500, 1569).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by the Security-First National Bank of Los Angeles against C. S. Evanson, administrator with the will annexed of the estate of Ivy Overholser, deceased. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

John B. Nichols and John Clarkson, both of Santa Ana, for appellant.

S. M. Davis, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment dated July 29, 1930, in favor of the plaintiff in an action to foreclose a mortgage brought against the administrator of the mortgagor. It appears that a claim for the amount unpaid on the note and mortgage was presented, approved, and filed in the estate on June 11, 1926. About four years later, and while probate proceedings were still pending, this action was commenced; all recourse against any property of the estate other than that covered by the mortgage being expressly waived in the complaint. During the intervening four years, the administrator had paid to the mortgagee out of estate funds some fourteen scattered payments, ranging from $17.50 to $52.50 each, amounting to a total of $364.68. Apparently these payments covered interest with a small amount to be applied on the principal sum.

The only points raised on this appeal are that the court erred in permitting a foreclosure of the mortgage under these circumstances, and that, in any event, the foreclosure should have been made conditional upon the return of the amount paid from the funds of the estate. It is contended that the filing of this claim and the acceptance of these payments constituted an election by the mortgagee to proceed under what was then section 1569 of the Code of Civil Procedure; that the mortgagee was thereby estopped from foreclosing as then permitted by section 1500 of that Code; and that the mortgagee could not and did not make the required waiver of all recourse against the property of the estate other than that covered by the mortgage, so long as the payments referred to were retained.

[1] It is well settled that a mortgagee had the right under the former section 1500 to foreclose his mortgage after presenting and filing such a claim in the estate of the mortgagor. Visalia Savings Bank v. Curtis, 135 Cal. 350, 67 P. 329. The only question remaining is whether the acceptance from the estate of payments upon such a mortgage would prevent a subsequent foreclosure either on the ground of election of an inconsistent remedy or as in fact showing that recourse against other property of the estate was not waived.

[2-4] Under the contention here made, any mortgagee, after filing such a claim, could accept payments of either principal or interest from the estate of the mortgagor only under penalty of losing his right of foreclosure. This contention is supported neither by authority called to our attention nor by reason and common experience. Ordinarily, estates are closed within a reasonable time and the mortgaged property distributed subject to the mortgage, and it is to the benefit of all concerned that a mortgage shall be kept in good standing during the probate proceedings by the payment of interest and otherwise. Where this is voluntarily done and is mutually satisfactory to the parties it should be the policy of the law to encourage the same. It is not to be expected, especially where probate proceedings are unduly prolonged, that a mortgagee will wait indefinitely for interest payments, and, in the absence of any statutory provision, a mortgagee should not be compelled by judicial decision to refuse to accept interest or other payments and to foreclose immediately.

⊂⇒For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

There is no provision that the right to foreclose shall be exercised immediately after filing the claim, and this right may be invoked at any time a default exists, subject to the provision that, when it is invoked, the mortgagee must waive any claim against other property of the estate. This waiver of the right to proceed by legal action against property of the estate other than that covered by the mortgage relates entirely to what must be done when and if foreclosure proceedings are begun, and not to any payments theretofore made voluntarily or in accordance with the terms of the contract. Since the mortgagee has the right to accept payments on the mortgage indebtedness without losing his right to foreclose in case of default, the acceptance of such payments indicates no election to thereafter look exclusively to the probate proceedings for the payment of his debt.

We conclude that the retention of money paid upon a mortgage after filing a claim in the estate of a mortgagor and before foreclosure proceedings thereon are commenced is neither an election to rely upon payment in the course of administration nor a violation of the provision that recourse against all property of the estate other than that covered by the mortgage must be waived when enforcement is sought through foreclosure.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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134 Cal.App. 460

JOHNSON v. JOHNSON.

Civ. 4891.

District Court of Appeal, Third District, California.

Sept. 29, 1933.

1. Pleading ⚿236(7).

Request to amend answer by setting up new defense is addressed to trial court's discretion.

2. Pleading ⚿236(7).

Court's refusal at trial, occurring twelve months after framing of issues, to permit defendant to amend answer by setting up new defense, *held* not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for divorce by James A. Johnson against Myra Johnson. From the judgment and an order denying a new trial, defendant appeals.

Affirmed.

Harry S. Harper, of Los Angeles, for appellant.

F. H. Bowers, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

An action for divorce was filed by plaintiff, the respondent herein, alleging certain acts of mental and physical cruelty inflicted by defendant upon plaintiff, in which defendant answered, denying the several acts of cruelty set forth, and asking that the decree of divorce be not granted.

The cause was tried and an interlocutory decree of divorce was granted plaintiff. Appellant moved for a new trial, which was denied, and thereupon took this appeal from the order and judgment.

Appellant enumerates various grounds for reversal, but relies principally upon two points: (1) That the trial court erred in denying the motion of defendant for leave to file an amendment to her answer setting up a defense of condonation; (2) that the evidence is insufficient to justify or support the finding and judgment of the court.

As to the question of the amendment to the answer setting up matters by way of further defense, the record discloses that the complaint was filed in March, 1930, the answer was thereafter filed in June, 1930, and the cause was tried in May, 1931. During that time no amendment was proposed nor filed, but at the trial, and after plaintiff had rested, counsel for the defendant asked leave to amend her answer by setting up facts to show a reconciliation or condonation. This request was by the trial court denied.

[1, 2] Such a request to amend an answer by setting up a defense not previously pleaded is addressed to the sound discretion of the trial court, and while great liberality is the general rule, here no proposed amendment was submitted to the court, nor reason advanced for the delay in suggesting the additional defense, and it cannot be said under the circumstances any abuse of discretion was shown.

In Sullivan v. Richardson, 119 Cal. App. 367, 6 P.(2d) 567, 568, the court said: "The record does not show that the proposed answer was filed or served. It has been held that the court does not abuse its discretion in denying an amendment when 'it does not appear from the transcript that any proposed amendment (to the answer) was served or presented, or that the notice of motion pointed out the precise amendment which plaintiff would ask leave to make or file.' Martin v. Thompson, 62 Cal. 618, at page 622, 45 Am. Rep. 663."

The issues were framed nearly twelve months prior to the date of trial and no motion was made during that time to amend the answer, and for that reason also the refusal of the trial court to grant leave to amend during the trial cannot be said to be an abuse of discretion. Reay v. Reay, 97 Cal. App. 264, 275 P. 533; Hagar v. Home Stores, Inc., 85 Cal. App. 533, 259 P. 1007.

The second assignment goes to the credibility of the witnesses. We have read the transcript, and there is ample evidence to support and justify the conclusions of the trial court.

Judgment and order are affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

RILEY, Controller, v. ROBBINS et al.*

Civ. 8932.

District Court of Appeal, First District, Division 1, California.

Sept. 25, 1933.

Hearing Granted by Supreme Court Nov. 23, 1933.

1. Husband and wife 🔑4, 19(5).

Husband must support wife according to his means, though wife has ample means of her own, and "necessaries" which husband must furnish include physicians', nurses', and hospital services.

[Ed. Note.—For other definitions of "Necessaries," see Words & Phrases.]

2. Husband and wife 🔑151(7).

Husband must pay wife's funeral expenses, and no reimbursement therefor can be made from wife's estate, unless husband is poor and wife leaves considerable estate.

3. Statutes 🔑183, 190.

Court must give statute its plain meaning where words are not ambiguous and their effect not absurd, but letter of statute will not be followed where result would be contrary to true intent and meaning.

4. Taxation 🔑895(6).

Expenses of wife's funeral and last illness, paid by her surviving husband *held* not deductible from value of wife's estate subject to inheritance tax (St. 1921, p. 1503, § 2, subd. 10, as amended by St. 1925, p. 475; pp. 1500, 1503; St. 1925, pp. 471, 475).

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Ray L. Riley, as controller of the state of California, against Albert C. Robbins, and others. From a judgment for defendants, petitioner appeals.

Reversed.

David Tannenbaum, of Los Angeles (W. H. H. Gentry, of Sacramento, of counsel), for appellant.

Dempsey & Mackay and Howard W. Reynolds, all of Los Angeles, for respondents.

PER CURIAM.

Hortense L. Robbins died intestate on August 12, 1929, leaving property subject to an inheritance tax. Respondents succeeded to said property in equal shares. The expenses of her last illness, amounting to $10,750.80, and her funeral expenses in the sum of $844.35, were paid by respondent Albert C. Robbins, who is her surviving husband. It is admitted that he was financially able to pay these expenses without recourse to the estate. The inheritance tax appraiser found the market value of the estate to be $434,319.71. In determining its value the appraiser refused to make any deduction on account of the above expenses. Respondents objected to his report on that ground, and the trial court ordered the expenses deducted from the sum reported as being subject to the tax, and entered judgment accordingly. The controller has appealed therefrom.

Subdivision 10 of section 2 of the Inheritance Tax Act of 1921 (St. 1921, pp. 1500, 1503), as amended in 1925 (St. 1925, pp. 471, 475), in effect when Mrs. Robbins died, provided that in determining the market value of the property transferred which is subject to the tax certain deductions should be made from the appraised value thereof. Among these were the "expenses of funeral and last illness." Respondents claim that the amounts paid by decedent's husband were accordingly proper deductions.

[1, 2] The husband is bound to support his wife according to his means and station, even though she has ample means of her own (Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 295 P. 41; Shebley v. Peters, 53 Cal. App. 288, 200 P. 364); and the necessaries which he must furnish include physicians', nurses', and hospital services. 13 Cal. Jur., Husband and Wife, § 28, p. 826; 30 Cor. Jur., Husband and Wife, § 146, p. 603; Davis v. Fyfe, 107 Cal. App. 281, 290 P. 468. Had Mrs. Robbins survived what proved to be her last illness, her liability for the expense incurred in that connection would in the absence of her agreement to pay therefor have been limited to the taking and selling under execution of such of her separate property as was not held by her at the time of her marriage, or acquired by her by devise, succession, or gift other than by gift from her husband after marriage. Civ. Code, § 171; Title Ins., etc., Co. v. Ingersoll, 158 Cal. 474, 111 P. 360. Neither her consent to be charged, nor that her estate was chargeable under the above section was shown. It is also the husband's duty to pay his wife's

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*For subsequent opinion see 34 P.2d 715.

funeral expenses, and no reimbursement on this account can properly be made from his wife's estate (In re Weringer's Estate, 100 Cal. 345, 34 P. 825; Brezzo v. Brangero, 51 Cal. App. 79, 196 P. 87; Medros v. Kohn, 68 Cal. App. 367, 229 P. 873), unless, as held in the above cases, he is poor and his wife leaves a considerable estate, in which case it is proper for the court to allow a suitable amount therefrom. His obligation with respect to funeral expenses is generally deemed to be included in or incident to the duty to support and maintain his wife while living. 30 Cor. Jur., Husband and Wife, § 156, p. 607; In re Weringer's Estate, supra. The case last cited recognizes a secondary liability in the estate of the deceased wife both for funeral expenses and the expenses of her last illness; and the decisions in other jurisdictions, where the rule that the husband is primarily liable prevails, generally admit that the wife's estate is secondarily liable for her funeral expenses. 31 A. L. R. 1500, note. The liability of the estate of a decedent for the latter expense has been placed upon the ground that the funeral is a work of necessity as well as of charity and piety. Golden Gate, etc., Co. v. Taylor, 168 Cal. 94, 141 P. 922, 52 L. R. A. (N. S.) 1152, Ann. Cas. 1915D, 742.

Respondents contend that notwithstanding the primary liability of the decedent's husband and that he performed his obligation the plain terms of the statute make these facts immaterial.

[3] It is the rule that where the words of a statute are not ambiguous and their effect is not absurd the court cannot give it other than its plain meaning (City of Eureka v. Diaz, 89 Cal. 467, 26 P. 961; Smith v. Union Oil Co., 166 Cal. 217, 135 P. 966; People v. Stanley, 193 Cal. 428, 225 P. 1); nevertheless, the letter of the statute will not be followed where the result would be contrary to what appears to be its true intent and meaning (Riley v. Havens, 193 Cal. 432, 225 P. 275; Golden Gate Bridge, etc., District v. Felt, 214 Cal. 308, 5 P.(2d) 585), it being also the rule that the spirit and reason of a law should prevail. 23 Cal. Jur., Statutes, § 113, p. 735.

The Inheritance Tax Act also provided that in determining the market value of the property transferred there should be deducted from the appraised value thereof the "debts of decedent owing at date of death." St. 1921, pp. 1500, 1503; St. 1925, pp. 471, 475. In Re Estate of Parrott, 199 Cal. 107, 248 P. 248, 249, it appears that decedent died in 1922 leaving estate subject to the tax. She and her brother were jointly and severally obligated as the makers of a promissory note, the principal of which had been received by them in equal shares. A claim for the whole amount was filed by the holder of the note against decedent's estate and allowed. Subsequently her brother paid one-half of the principal of the note, with interest. The inheritance tax appraiser, in fixing the market value of the property transferred, deducted one-half of the debt from the appraised value thereof. Decedent's heirs claimed that the whole amount of the note, which as between the holder and decedent was a debt owing by the latter at the time of her death, should be deducted. The superior court, however, confirmed the report of the appraiser, and the heirs appealed. In affirming the order the court held that revenue and taxation acts are not to be approached in a spirit of hostility and with the purpose of ignoring the intention of the Legislature; that such statutes should be liberally construed with a view to effect their object and promote justice; and that no construction should be given thereto which would make their application impractical, unfair, or unreasonable. Further, that the debt never lost its joint and several character, no matter which obligor paid it; and if the surviving obligor paid his portion this could not be regarded as a subsisting debt of the decedent; that the brother's portion of the obligation, though unextinguished at the time of decedent's death but thereafter paid, could not be shifted for the purpose of furnishing a fictitious basis for a tax reduction in favor of the estate. The court said: "The Inheritance Tax Act * * * is quite convincing to the point that a debt of which the act takes notice is one which has actual existence, and it does not attempt to artificially create a debt where in fact none exists. The fact that the note, as between the payors and payee, possessed the potentialities of an enforceable demand against either one of the debtors, affected his or her estate only in the proportion that he or she was required to pay it."

[4] It is clear from the facts that decedent's husband was primarily liable for the expenses in question, and that so far as he was concerned the assets of the estate were not chargeable therewith. To hold in the circumstances that these sums were proper deductions under the statute would be, as was said in the Parrott Case, to artificially create an expense where in fact none existed, and to shift the husband's debt to the estate for the purpose of furnishing a fictitious basis for a tax reduction.

The only case from another jurisdiction involving the same question which has come to our attention is In re Mellor's Estate, 286 Pa. 149, 133 A. 29. There under a similar statute it is held that while the husband was primarily liable for his wife's funeral expenses, the language of the statute, which explicitly provided that an allowance should be made for "reasonable and customary funeral expenses," negatived the idea that the deduction should be made only in the event the husband was unable to pay. However, we are satisfied that the principle declared in the Parrott Case should be applied to the facts of the present case, and this notwithstanding respondent Robbins is, and Mrs. Parrott's coobligor was not, a transferee under the statute.

The judgment appealed from is accordingly reversed.

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134 Cal.App. 366

CITY OF LONG BEACH v. WRIGHT et al.

SAME v. HALL et al.

Civ. 8009, 8008.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1933.

Hearing Denied by Supreme Court Nov. 27, 1933.

1. **New trial 🔑114.**

Party is entitled to decision on facts of case, tried without jury, by judge who heard evidence, and cannot be compelled to accept decision from another judge.

2. **New trial 🔑114.**

Judge hearing motion for new trial after trial before another judge without jury may weigh evidence and determine its sufficiency to support judgment, but cannot change trial judge's findings and enter different judgment on conflicting evidence (Const. art. 6, § 5; Code Civ. Proc. § 661, and § 662 as added by St. 1929, p. 842, § 7).

3. **Courts 🔑50.**

Decision on fact question by one judge of trial court composed of more than one judge is decision of court.

4. **Eminent domain 🔑128(1).**

Value of fee in land, used as electric railway right of way, cannot be considered in measuring damage to railway company by condemnation thereof for joint public use as street; measure of damage being diminution in value of company's reserved rights of use (St. 1903, p. 376, as amended).

5. **Eminent domain 🔑47(5).**

Municipality may take longitudinal strip of land, used as railway right of way, for joint use as public street, if public necessity exists therefor and compensation is paid railway company (St. 1903, p. 376, as amended).

6. **Eminent domain 🔑203(7).**

Evidence of electric railway company's loss of earnings because of slower running time of its trains in consequence of additional use of right of way as public street *held* inadmissible as immaterial in proceeding to condemn land covered thereby for such purpose (St. 1903, p. 376, as amended).

7. **Eminent domain 🔑107.**

Award of damages to business is not authorized in condemnation proceedings.

8. **Eminent domain 🔑128(1).**

Award of damages to electric railway company for loss caused by public interference with its use of right of way over land condemned for joint use as public street *held* properly made for entire strip, instead of dividing loss proportionately between several parcels condemned (St. 1903, p. 376, as amended).

Appeals from Superior Court, Los Angeles County; William Hazlett and Frank C. Collier, Judges.

Consolidated actions by the City of Long Beach against Harry S. Wright, the Pacific Electric Railway Company and others, and against Clark D. Hall, such railway company, and others, to condemn land for public use. From original and amended interlocutory judgments, awarding compensation to defendants railway company and others, and an order amending the trial judge's findings and judgment, plaintiff appeals.

Amended interlocutory decrees reversed, original fact findings and conclusions of law adopted, and lower court directed to enter judgments in accordance therewith.

Nowland M. Reid, City Atty., and George W. Trammell, Jr., Harlan V. Boyer, and John O. Palstine, Deputy City Attys., all of Long Beach, for appellant.

Frank Karr and C. W. Cornell, both of Los Angeles, for respondents Pacific Electric Ry. Co., Wells Fargo Bank & Union Trust Co., and United States Mortgage & Trust Co.

ARCHBALD, Justice pro tem.

This action was brought by the city of Long Beach, under the Street Opening Act of 1903 (St. 1903, p. 376, as amended), to condemn for the public use a strip of land approximately 60 feet wide, extending from the intersection of Anaheim street and American avenue in Long Beach to the south line of Willow street, where it intersects American avenue, and used by defendant Pacific Electric Railway Company as a portion of its private right of way between the cities of Long Beach and Los Angeles. The length of such strip, including street intersections, involved in the Wright case is 5,370 feet, and in the Hall case 2,480 feet. On each side of the strip are streets now known as "American Avenue," and the purpose of the proceeding is to widen that thoroughfare for the public use by extending said use to the land occupied by said strip. The portion of the right of way involved in the Wright case is intersected and crossed by seven streets and that in the Hall case by one street. The map in the Wright case shows seven streets entering American avenue which do not cross the private right of way, and the Hall case five.

The cases were consolidated for the purpose of trial. Respondents demanded a trial by the court, and referees were appointed to recommend the compensation to be awarded the defendants waiving such trial. The written report of such referees, filed in court, awarded nominal damages of one dollar to each of the defendants appearing to have some claim to the fee or reversionary interests if the land should be used for other than railway purposes.

The trial of the issues between plaintiff and the respondents here, Pacific Electric Railway Company, Wells Fargo Bank & Union Trust Company, and Chemical Bank & Trust Company, was had before Judge Hazlett, who filed a preliminary opinion on the evidence, directing plaintiff to prepare, serve, and present to the court findings in conformity therewith. Such findings were prepared. Amendments to such findings were prepared by respondents, proposing in the main a material increase in the award to them, apportioned to the thirteen parcels described in the complaint, and the matter of their adoption was argued before Judge Hazlett, who refused them except in so far as they were incorporated in the findings filed. Interlocutory judgments based on such findings by Judge Hazlett were duly signed and filed. On December 31, 1930, respondents filed notices of intention to move for a new trial. Judge Hazlett's term of office having expired before such motions could be heard, Judge Collier was designated by the presiding judge to hear them, and on February 20, 1931, after argument thereon, an order was made by Judge Collier amending finding No. XXIV of the findings signed by Judge Hazlett in the Wright case, by changing the award made by the latter of $68,400, as the value of the property belonging to respondents sought to be condemned, to $451,185.07, apportioned to thirteen parcels where the award by Judge Hazlett was a lump sum, the property belonging to respondents being treated as one parcel, and making corresponding changes in the conclusions of law and interlocutory judgment filed. In the Hall case a similar order was made, changing the award from $31,600 to $135,084.95, apportioned between three parcels, where the first award treated all the interest involved as one parcel, and making the same change in the conclusions of law and interlocutory judgment. Such changes were made in the findings and interlocutory judgment signed and filed by Judge Hazlett. The orders also denied the motions for new trial made.

Plaintiff has appealed from said interlocutory judgment as amended by said order, from the order amending said findings and judgment and, out of a superabundance of caution, from the interlocutory judgment as signed by Judge Hazlett. Appellant does not question the awards made by Judge Hazlett, however.

Appellant contends: (1) That Judge Collier had no authority on the hearing of the motion for a new trial to increase the amount of the award made by Judge Hazlett on conflicting evidence, and erred in so doing; (2) that Judge Collier erred in using evidence as to the value of the fee as the measure of respondents' damage.

[1, 2] 1. Respondents urge that a judge who did not preside at the trial, but who is designated under section 661 of the Code of Civil Procedure to hear a motion for new trial, may exercise all the powers of the court in connection therewith as provided in section 662, Code of Civil Procedure. Section 661 provides that in case of the inability of the judge who tried the case to hear such a motion it shall be heard and determined by any other judge. Section 662, so far as material here, provides: "In ruling on such motion, in a cause tried without a jury, the court may * * * change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues."

It has long been the law of this state that "a party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury," and that "he cannot be compelled to accept a decision upon the facts from another judge." In re Sullivan, 143 Cal. 462, 467, 77 P. 153, 155; DeMund v. Superior Court, 213 Cal. 502, 505, 2 P.(2d) 985; Hughes v. DeMund, 96 Cal. App. 365, 368, 274 P. 405. In the last-cited case it was urged that a judge other than the one hearing the evidence may weigh the evidence and decide according to its preponderance in determining a motion for a new trial. With this contention the appellate court was in accord, but said (page 370 of 96 Cal. App., 274 P. 405, 406): "If the motion is denied, however, an appeal may be taken from the original judgment, rendered by a judge who heard the evidence. If a new trial is granted, the case will be decided again by a judge who hears the evidence. But in this case the judgment was rendered by a judge who did not hear the greater and more important part of the evidence." In the award of damages as changed and made in the instant case the judge who made the changes heard none of the evidence and yet made a very substantial increase in the award, on extremely conflicting evidence, over that made by the judge who heard all of the evidence. On principle there would seem to be little difference to a litigant in being compelled to take findings and judgment in the first instance from a judge who did not hear the evidence but read the transcript, and in having such a judge make new and different findings to support a different judgment entered on a motion for new trial, thus substituting his conclusions for those of the judge who heard the evidence. Such a judge has the right to weigh the evidence and decide as to its sufficiency to support the judgment entered, but to give him the power to change the findings and enter a different judgment on conflicting evidence would be to give him a conclusive right of review not even claimed by appellate courts under legislation based upon a constitutional grant of power much clearer in expressing such an intent than is the section under which the power is claimed here.

Prior to 1927 findings could not be changed after judgment by any court, trial or appellate, even though such act involved only the adding of findings supported by the evidence which were necessary to support the judgment. A retrial of the issues of fact, after the granting of a motion for a new trial by the trial court or a reversal of the judgment on appeal, was necessary to obtain relief for an apparently successful litigant who had proved his case to the satisfaction of the trial or appellate court, but the fruits of whose victory were denied him because the findings were insufficient to support the judgment. Such judgment, however, would have had a basis in the evidence if the findings had been skillfully drawn. The same unfortunate situation arose in the case of conflicting findings, due to inadvertence or oversight, as in Johnstone v. Gloster, 49 Cal. App. 750, 194 P. 504, where the appellate court found itself powerless to do anything except reverse the case. To avoid such anomalous situations in the appellate courts the people of this state adopted section 4¾ of article 6 of the Constitution, which authorized the Legislature to grant to any court of appellate jurisdiction the power, in its discretion, to make findings of fact "contrary to, or in addition to, those of the trial court." Acting upon such constitutional authority the Legislature adopted section 956a of the Code of Civil Procedure in 1927 (Stats. 1927, p. 583), which empowered appellate courts, in all cases where the facts were tried by the court, to "make findings of fact contrary to, or in addition to, those made by the trial court." "Contrary" means "opposite," and, in the phrase above quoted from, might easily be construed to mean that the appellate courts are no longer bound by the decisions of the trial court on conflicting evidence, but can weigh such conflicting evidence and make contrary findings if the weight thereof be determined to lie in that direction. Such was the contention of appellants in the case of Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, 976, but the Supreme Court there held that it was not intended by the added section "to abrogate the general rule that findings of the trial court founded on substantial evidence are conclusive on appeal," but "that the primary and principal purpose of this exception is to enable the reviewing courts to make contrary or additional findings on the record presented or on new evidence taken, to the end that the judgment be affirmed or modified and affirmed and the litigation be terminated." The Supreme Court has many times since reaffirmed the holding that where the evidence is conflicting it is bound by the decision of the trial court.

In spite of the power thus given to the appellate courts, the trial courts remained powerless, on motions for a new trial, to add to their decisions, or to change them where they were conflicting in order to support the judgments rendered thereon, until 1929, when the Legislature adopted section 662, Code of Civil Procedure (St. 1929, p. 842, § 7). In our opinion it was not the purpose of such section to authorize a judge who did not hear the evidence to change the decision of one who did, by weighing conflicting evidence as to values and selecting the values which in his opinion are the best, even assuming that such decision is not supported by the evidence.

[3] The decision on a question of fact of one judge in a trial court composed of more than one is the decision of the court, and in our opinion to hold that the action of the Legislature does what respondents claim for it would in effect be holding that the Legislature has the power, without constitutional authority so to do, to vest a superior court judge with powers not contemplated by section 5, article 6, of the Constitution, and more akin to the jurisdiction of courts of appeal, though greater even, extending, as they would, not only to the reviewing of conflicting evidence but to the modifying of decisions reviewed in accordance with the judgment reached by the reviewing judge.

The strip sought to be condemned in the instant proceeding, which is one continuous right of way, is divided in the complaints into and described as thirteen separate parcels in the Wright case, and three in the Hall case. Parcels 2, 4, 6, 7b, 8, 10, and 12 in the Wright case and parcel 2 in the Hall case are the portions of said strip included in the intersecting streets, which cross said strip and which the public now uses in crossing said right of way. The other parcels are the connecting strips of said right of way not in any way impressed with a public use. The award, as amended by Judge Collier, fixed the damage on each parcel. It fixed the damage at one dollar on each parcel embraced in an intersection and now impressed with a public use. Respondents urge that the failure of Judge Hazlett to apportion his award to each parcel required Judge Collier to make a change in the findings to correct such error. The values used by Judge Collier were based on the value of the fee as determined from the lots adjacent to American avenue. The testimony of the appraisers shows that this value changed in each block, not alone in each parcel, and that it had no relation to the separate parcels as such. Assuming that the fee value was the proper measure of damages, the single allotment of Judge Hazlett could have been apportioned to the separate parcels, if such was necessary under the law, by a proportionate mathematical calculation, and such a change would have been justified under section 662 of the Code of Civil Procedure.

[4] Over the objection of appellant the trial court permitted respondents to prove the value of the fee. Some eight experts testified for respondents as to such value. In computing the same they divided the right of way longitudinally into three strips, one being the center strip upon which the rails are laid and the other two the strips on each side, between said center strip and the street. The values given the land were based on the values fixed on lots facing American avenue along such right of way. In computing the total value of the right of way in each parcel such appraisers put in the two outside strips at their full value and the center strip at 50 per cent. of such values, because of the proposed joint use with the public. The appraisals of said eight experts in the aggregate ran from $974,645, the highest, to $957,763, the lowest. An appraiser for appellant placed the value at $613,012, without any such deduction for joint use, as the value of the fee for its highest and best use, not taking into consideration the continuance of the use by the railroad. Judge Collier, evidently by reason of the fact that the interlocutory decree reserved the right of the Pacific Electric Railway Company to use the full width of the strip, took fifty per cent. of the value of the two side strips in fixing the award made by him, instead of the full value fixed by the appraisers. He adopted the appraisement of one expert as the basis for his computation, saying that his "work as an appraiser I have watched a number of times and in whose ability and integrity I have the utmost confidence." Such statement would seem to demonstrate the real predicament a judge finds himself in when he is compelled to draw a conclusion from the testimony of witnesses he did not observe during the trial, and the possible injustice to litigants that might arise in such cases. Another judge might have had confidence in the appraiser who fixed the total value at some $5,000 more, or in the rebuttal expert produced by appellant, which would have given respondents some $361,691 less than Judge Collier awarded. The judge who observed the experts testify might not have felt the necessity for relying entirely on a witness whose reputation and ability were known to him.

It was stipulated by the parties that on the 4th day of December, 1901, and for many years before, all of the land embraced in said right of way was part of a regularly dedicated public street or highway known as American avenue; that the owners of all of the real property on both sides of American avenue adjacent to said right of way executed an agreement to execute and deliver a deed to said Pacific Electric Railway Company of all their right, title, and interest in and to said right of way, upon the completion of the roadway, such deed, however, to contain a clause to the effect that such conveyance was made to said company "for the purpose of the construction and operation of a railroad thereon," and upon the condition that if said company "shall permanently cease to use said strip of land for railroad purposes, then and thereupon the title hereby granted shall become forfeited" to the grantors. Certain of said parties executed deeds in conformity with said agreement, but to the greater portion of said property no deeds were given. However, all of said right of way, except the crossings used by the public, has been exclusively used and maintained as a right of way by said Pacific Electric Railway Company since on or about July 4, 1902, and said company has paid all taxes assessed against such property. On February 12, 1902, the board of supervisors of Los Angeles county vacated and abandoned the land embraced in said right of way and ordered the same returned to acreage. Such strip at the time was not embraced within the limits of any body politic other than Los Angeles county. The interlocutory judgment provides that the easement obtained by condemnation is subject to the right of said railway company to maintain, repair, reconstruct, and operate a double-track railway, together with its adjuncts and appurtenances as then operated, as well as to the right of such company at any time to lay, maintain, operate, repair, and reconstruct one or two additional tracks or additional switch tracks and appurtenances. The findings and interlocutory judgment also allow as severance damages an additional sum of $146,811.

2. It would appear from the foregoing that as to a portion of said land the respondent railway company holds the fee subject to forfeiture if it is not used for railway purposes. As to the balance, entering as it did with the permission of the owners under agreements to give similar deeds, not fulfilled, it is difficult to see how anything more than an easement for railway purposes could possibly have been acquired by prescription, as that is the only right that would seem to have been urged by the company through the prescriptive period. It would seem that for all practical purposes the use of the right of way for railway purposes is the extent of the company's right thereto; and in view of the fact that its right to such use of the land is not taken, but will still continue after the public use is imposed thereon, we fail to see how the value of the fee can be used as the basis of measuring the damage to the company's use of such right of way.

In the case of City of Los Angeles v. Allen, 32 Cal. App. 553, 163 P. 697, 700, part of the land sought to be condemned was a parcel belonging *in fee* to the Pacific Electric Railway Company. There, as here, the plaintiff did not seek to interrupt the maintenance and operation of the electric railway over such right of way, but only to impress it with the public use as a street. Nominal damages alone were awarded. The court held that the results of the condemnation sought "are concrete, its interferences are to be actual, and the compensation therefor should be real. In ordinary cases where the condemnation is for a right of way for a use which constitutes a perpetual easement and which will require practically the exclusive use of the surface, evidence is permitted to show, and the condemning party must pay, the value of the fee as the measure of damages sustained. Under such circumstances * * * there can be no difference in value between the easement taken and the fee. 'When, however, such a difference does exist, the rule is different, and the value of the easement taken as distinguished from the value of the fee, is alone to be ascertained by the jury, and the owner compensated therefor.' Southern Pacific R. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 106 Am. St. Rep. 36, 2 Ann. Cas. 962, 70 L. R. A. 221, 79 P. 961." Evidently the court in that case was of the opinion that even though the railway company owned the fee, where the only use made of it was as a right of way over which to lay its rails and operate its cars, there was a very real difference between the value of the fee and the interference with its use of the fee by the joint use thereof with the public, and it laid down the rule that the measure of damage in such a case is the "diminution in value of the railroad company's reserved rights of use in the property, to the extent that such diminution in value can now be shown to be actually involved as a consequence resulting from the process of subjecting the land to street uses." That would seem to be the only damage that could possibly result from the taking of such an easement by the public. This was recognized by the court in such case in the use of very apt language as follows: "The corporation having the original right is not, when the land is occupied concurrently by another corporation, entitled to recover the value of the land as measured by the most advantageous use to which it could be put. The true measure of damages in each case is the decrease in the value of the use of the land for the first purpose by reason of its being concurrently used for the second purpose."

The Supreme Court, in the case of City of Oakland v. Schenck, 197 Cal. 456, 462, 241 P. 545, 547, says: "As the right to open a street across the railroad tracks was all that the city sought to obtain by the proceedings in condemnation, it was not bound to acquire and pay for the fee in the land over which the street is opened. *The extent to which the value of the companies' right to use the land for railroad tracks was unduly diminished by opening the public street across it* was the only question to be determined by the jury. Chicago, B. & Q. R. R. v. Chicago, 166 U. S. 226, 251, 41 L. Ed. 979, 17 S. Ct. 581 [see, also, Rose's U. S. Notes]." (Italics ours.) (Certainly such *diminution in value* is not supported by evidence of the value of the fee, or by any arbitrary mathematical division of such value. Nor, in our opinion, does it necessarily follow that the value of defendant railway company's easement is the difference between the full value of the fee and a nominal value fixed on the fee by reason of its being subjected to the railroad use. But even assuming that it was, the question to be determined, in view of the fact that the railway company has all the rights it ever had, is: What is the damage to those rights by reason of the proposed concurrent use of the right of way by the public? The answer to that question cannot be found by determining the value of either the fee or the company's easement. In our opinion, and with all due respect to authoritative language that on its face would seem to differ therewith, but which in principle we think does not, the question is one that cannot be settled by experts familiar only with given real estate values, or values of easements over given real property. The question to be solved involves the maintenance of tracks and the operation of trains, not the ownership of a right of way. The right of respondent railway company to operate its trains over which the public seeks a concurrent use will still exist. The maintenance of tracks and the operation of those trains may be somewhat interfered with by such public use, but the extent of that interference is certainly not within the scope of the experience of experts in land values only, but experts whose experience has involved the operation of trains under conditions of traffic interference. This damage, when ascertained, may be reflected back as the extent to which the exclusive right to operate trains over the right of way has been diminished; but it would seem that any other method of *ascertaining such diminution* is only a haphazard guess by one who has had no experience with the problem to be solved.

[5] The case of City of Los Angeles v. Allen, supra, points out that an important difference exists between the extension of a street crossing over a railroad track and a taking for the purpose of constructing a street longitudinally covering the same, the opinion quoting the much-quoted language found in Elliott on Railroads, § 1098, 2d Ed.; § 1566, 3d Ed., viz.: "The right to take longitudinally is very different from the mere right to cross, for in the one case the rights of the railway company are materially impaired,

while in the other the taking is such that both uses can stand together." A reading of the entire section shows that the learned author was not writing about the measure of damages, but concerning *the authority of a municipality to exercise the right of eminent domain.* He shows such important difference to be this, viz., that under the general power conferred upon a municipality to lay out and open streets and highways or to construct a highway from one point to another, the power is implied to cross the tracks and rights of way of railroad companies, but that under such implied general power to cross, no part of the railway can be taken for the purpose of constructing a parallel or longitudinal street covering such rights of way. And the cases cited support the text to that extent. We must admit it is a very important difference, but it has nothing to do with damages. Just where the learned author finds any justification, after saying "for in the one case the rights of the railway company are materially impaired," to add, "while in the other the taking is such that both can stand together," we fail to see. The language last quoted seems to imply that the right of way is useless to the railroad after a longitudinal taking for a public street. Such joint use in every city and town in the land having street railroads within its borders is a complete refutation of such statement, if refutation is needed. No question exists in California as to the right of a municipality to so take, if the public necessity exists and compensation is paid.

In the Hall case, now before us, there are three 60-foot streets entering American avenue on opposite sides which do not cross the right of way. Under the crossing rule the railway company would get one dollar for each crossing; yet under the measure of damages upon which the award herein was made a very substantial amount was awarded therefor.

[6, 7] That the additional use proposed by the city of Long Beach will to some extent slow up the running time of respondent railway company's cars—already slowed up to some degree, no doubt, by the existing crossings—must be conceded. That such slowing of time, together with the stopping and starting involved, would cause a loss of electric energy and an increase in cost of operation was testified to by witnesses for the company; but a witness for appellant testified that while there would be only a slight loss in running time for the length of the strip, there would be an actual saving in electricity. The loss was fixed by one witness for defendants at approximately $6,000 per year for the entire strip. At 6 per cent. interest the amount awarded by Judge Hazlett would produce such an amount. Respondents also introduced some evidence, which was purely speculative, as to loss of earnings that would be caused by the slowing up of the running time of the railway company's trains. In our opinion such evidence was immaterial. An award of damages to business is not authorized. City of Oakland v. Pacific Coast Lumber, etc., Co., 171 Cal. 392, 153 P. 705.

[8] Inasmuch as in our opinion the damage to be awarded must be based on the loss caused by the public interference with defendant railway company's use of the right of way in question, there would seem to be but one parcel to be considered in each case, so far as respondents are concerned. The damage relates to the strip as a whole, and not to the respective parcels. This, of course, is not true as to the defendants who were awarded one dollar each. In view of that fact we conclude that the award of Judge Hazlett was properly made on the entire strip covered by each complaint, and it would seem to be a useless and unnecessary requirement to divide the single loss proportionately between the several parcels named in each complaint as such—possibly for the purpose of more convenient description.

There being evidence to support the original award made for the rights that will actually be taken, and no complaint concerning the same by appellant, it would seem that such award should stand; and there being no appeal from the other provisions and awards in the original interlocutory decrees, and no objection thereto by appellant, those also should stand.

The interlocutory decrees as amended in each case are reversed, and we hereby adopt as findings of fact and conclusions of law in each case the findings of fact and conclusions of law originally filed therein. The lower court is directed to enter judgment in each case in accordance with such findings of fact and conclusions of law.

We concur: WORKS, P. J.; STEPHENS, J.

219 Cal. 65

WARD v. READ.

MATHEWS et al. v. SAME.

L. A. 14118.

Supreme Court of California.
Sept. 26, 1933.

Rehearing Denied Oct. 26, 1933.

1. Trial 🔑**296(3).**

In action for injuries in automobile accident, instruction as to negligence *held* not error as imposing duty to control cause of injury if possible and not merely to control it where there is opportunity in exercise of reasonable care, in view of other instructions.

2. Trial 🔑**296(3).**

In action for injuries in automobile collision, instruction respecting negligence *held* not erroneous in view of other instructions, as against contention that it advised determination of whose acts "directly" caused collision.

3. Trial 🔑**253(4).**

In action for injuries in automobile collision, instruction respecting negligence *held* not erroneous as formula instruction omitting element of contributory negligence.

> Although instruction omitted element of contributory negligence as such, it referred to specific conduct and only conduct named by defendant to constitute contributory negligence.

4. Trial 🔑**296(3).**

In action for injuries in automobile collision, instruction respecting negligence *held* not erroneous for authorizing recovery if careful action by defendant would have avoided collision "or" if plaintiff was driving on right of highway in careful manner, in view of other instructions.

5. Trial 🔑**295(11).**

Instruction on damages correct as whole *held* not erroneous as against criticism of cautionary words selected from context.

6. Evidence 🔑**528(2).**

In personal injury action, expert testimony concerning possibility of tuberculosis resulting from severe blow just below chest *held* properly admitted, though confined to possibility instead of probability.

7. Appeal and error 🔑**761.**

Claim of excessive damages not supported by substantial argument nor citation of authorities will not be considered.

In Bank.

Appeals from Superior Court, Riverside County; G. R. Freeman, Judge.

Actions for damages for personal injuries sustained in an automobile accident brought by Bertha L. Ward against W. P. Read, and by Leontine Mathews and others against W. P. Read. From adverse judgments, defendant appeals.

Affirmed.

For prior opinion, see 16 P.(2d) 799.

George H. Moore, of Los Angeles, for appellant.

Sarau & Thompson, of Riverside, and H. C. Ellis, of Los Angeles, for respondents.

IRA F. THOMPSON, Justice.

Two actions were instituted against the defendant for damages arising out of a collision between an automobile driven by him and one operated by the plaintiff Robert E. Mathews, and owned by plaintiff Bertha L. Ward, the first action being by the plaintiff just named to recover for injuries to herself and damage to her automobile, and the second by the other occupants of the machine, all of whom were related to Mrs. Ward, to recover for injuries to themselves as follows:

Leontine Mathews, a daughter, $15,000.

Evelyn E. Mathews, daughter-in-law, $10,000.

Robert E. Mathews, son, $15,000.

John Edward Mathews, grandson, $5,000.

The defendant not only answered but filed a cross-complaint against Bertha L. Ward and Robert E. Mathews, by which he sought to recover damages to his automobile. The causes were consolidated for trial and verdicts returned in favor of the plaintiffs as follows:

Bertha L. Ward, $3,000.

Leontine Mathews, $1,000.

Evelyn E. Mathews, $500.

Robert E. Mathews, $10,000.

Nothing was awarded the grandson. From separate judgments entered upon the verdicts the defendant prosecutes these appeals.

The accident occurred on the morning of October 25, 1930, at about 6:10 o'clock on a highway in the county of Riverside. The plaintiffs were traveling in a westerly direction towards the city of Riverside and the defendant was driving easterly. The two machines collided at a point where the highway had been cut through a hill, leaving steep banks on either side, and at the time a fog prevailed which caused the highway to be wet and slippery. The appellant testified that he was driving at the rate of twenty-five miles per hour, but other witnesses said he was traveling at a speed as high as forty-five miles per hour. The respondent Robert E. Mathews testified that he had been driving the car at a rate of about twenty-five miles per hour prior to the accident, but had reduced his speed to five miles per hour just immediately before, when he had heard the approach of appellant's machine. The highway at the point of collision was sixteen feet wide with crushed granite shoulders on either side from four to six feet wide.

The question of negligence, so far as the contentions of the parties are concerned, would be easy of solution if we knew for a certainty which one of them was driving on his own or right side of the road. The respondents based their case upon the claim that appellant was driving upon his left, or the north side of the road, while the appellant asserted, in his effort to support his cross-complaint and his plea of contributory negligence, that respondent Robert E. Mathews was driving at an excessive rate of speed on his left, or the south side of the road. The evidence was conflicting and of such a character as to support a verdict for the appellant as well as those for the respondents.

[1, 2] The principal attack against the judgments is directed against the instructions and particularly number 12 thereof, which reads as follows:

"I further instruct you that the word 'negligence' does not mean an act or thing that can be measured according to a precise standard.

"It is always relative to particular circumstances. It may consist in originating a cause of injury or in failing to control the same when possible. It imports an omission or disregard of some duty and is opposed to diligence or carefulness. It has been clearly defined as an omission to do something which a reasonable man or woman, guided by those circumstances which ordinarily regulate the conduct of human affairs, would do or in doing something which a reasonable or prudent man or woman would not do. Such being the meaning attached by the courts to this word and in view of the fact that each of the parties to this action charges the other with negligence it will be your duty to carefully consider all the evidence in the case and determine whose act it was that directly caused the collision, and if you find that the collision would have been avoided if the defendant had acted in a prudent and careful manner, or if you find that the plaintiff was driving on his right side of the highway and in a careful manner and as a reasonable and prudent man would drive then and in that event you will find a verdict for the plaintiff."

It is asserted that the given instruction was not only erroneous for the reason that it was a formula instruction which omitted the element of contributory negligence, but also that it contained the following internal errors: (1) It imposed upon appellant the duty to control the cause of injury if possible and not merely to control it "where there is opportunity in the exercise of reasonable care," and (2) advised the jury to determine whose act it was that directly caused the collision, instead of using the term "proximately." It must be immediately confessed that the instruction is not a model of excellence. But the question with which we are concerned is whether, in view of all the instructions given, the jury as reasonable men and women might have been misled so as to apply an incorrect rule of law. Turning then to the query as to whether they could have understood that appellant was required to avoid the accident if possible, it is first to be noted that the language assailed is shortly followed by a correct statement of law to the effect that negligence consists in doing something which a reasonable man or woman in the exercise of ordinary care would not do, or failing to do something which, guided by like caution, he or she would do. In other words, the true intent of and a proper limitation was imposed upon or annexed to the words "when possible." Furthermore, instruction No. 13 was to like effect, advising the jury that ordinary care and caution was to be measured by that degree of care and caution customarily used by a person of ordinary prudence, and in another instruction the court informed the jury that it was just as much the duty of the driver of the car in which respondents were riding to use care and caution for his own and the safety of those with him as it was the duty of the appellant to use like care in the operation of his car. In view of these instructions and others which touch upon the subject it is difficult to believe that the jury thought that appellant was under any obligation other than to employ ordinary care in the operation of his machine.

What has already been said has a bearing upon the second claim, to wit, that the court incorrectly advised the jury to determine "whose act it was that directly caused the collision." In addition, the jury was told in another instruction that if the plaintiffs were negligent and that negligence "proximately contributed in any degree in producing the accident and injury, if any, then in no event can the plaintiffs recover from the defendant W. P. Read." It is true that in an instruction proposed by plaintiffs and given by the trial judge upon the subject of burden of proof it was announced that it was incumbent on the defendant to show, or it must appear from the evidence adduced by the plaintiffs, that negligence on the part of plaintiffs, if any, "contributed directly and proximately to the accident," and that it was not necessary for the plaintiffs to establish as a prerequisite to their recovery their own freedom from fault. However, in construing the findings together, in order to determine whether the jury was misled, we find discussed in Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393, 396, the slight distinction between the words "directly" and "proximately." It is there said: "The court throughout the instructions on the subject used the phrase 'direct and proximate cause' in describing the necessary relation between the negligence proven and the injury. This occurs in the instruction regarding the negligence of the defendant, as well as in that regarding the contributory negligence of the plaintiff. While it may be that the word 'directly,' in that connection, if taken in some of its meanings, may not accurately describe the idea that the negligence charged and proven must be the proximate cause of the accident, and that it might be advisable, for that reason, not to use it, yet it has a meaning in strict harmony with the word 'proximately.' The word 'proximately' is defined as: 'That which in ordinary natural sequence produces a specific result, no independent disturbing agency intervening.' The word 'directly' is defined as follows: 'In a direct way, without anything intervening, not by secondary but by direct means.' (Webster's Dict.) The respective definitions are almost identical, and it is not reasonable to suppose that the jury would perceive the difference, when used in the connection in which they appear in the instruction. There is nothing in the character of the evidence which indicates that the jury had any difficulty in the matter." When we consider the language of this court used upon a former occasion, and the instructions as a whole, we are compelled to the conclusion that the jury was not confused nor misled. We do not want to be understood as approving the use of the word "direct" in the place of "proximate," but simply that in view of all the instructions and the slight difference in meaning, the jury in the instant case could not have been misled.

[3, 4] The question still remains whether the instruction under attack was a formula instruction which omitted the element of contributory negligence. As already indicated, the sole claim of appellant was that plaintiffs' car was being driven on the south or left-hand side of the road. We have carefully read the entire evidence adduced by defendant and can find no other suggestion of negligence on the part of plaintiffs. Undoubtedly the instruction should have contained a statement to the effect "and if you find that the plaintiff was free from contributory negligence," instead of "if you find that the plaintiff was driving on his right side of the highway and in a careful manner and as a reasonable and prudent man would drive." Also, the disjunctive "or" should not have been used. But, again, we come to the practical question of whether, as given, the instruction was misleading. If, in fact, the jury believed that the plaintiff's automobile was being driven on the right side of the road, there was no evidence from which they could conclude that there was any contributory negligence. The clause, therefore, is in effect the equivalent of saying "if you find plaintiff was not guilty of contributory negligence." Furthermore, it is not possible for us to believe, in view of all the other instructions, that the word "or" led the jury to understand that they should return a verdict for the plaintiffs in the absence of negligence on the part of defendant proximately contributing to their injuries.

[5] The trial judge gave an instruction upon the subject of compensatory damages, which in its body and when read as a whole correctly instructed the jury with respect thereto. Appellant has selected some cautionary words from the context and endeavored to predicate error thereupon. It is unnecessary to comment further upon this assignment of error.

Nor do we feel called upon to discuss the instruction which told the jury that the negligence of Robert E. Mathews or of Bertha L. Ward could not be imputed to Leontine Mathews. It is apparent that the jury did not believe that either of them was guilty of any negligence—hence there was none to impute.

[6] Complaint is made of the introduction of expert testimony concerning the possibility of tuberculosis resulting from a severe blow just below the left chest followed by a bruised spot, and a condition of pleurisy, where the evidence disclosed the blow and a subsequent case of tuberculosis developing in both lungs. Outside of the weakness inherent in the testimony, because it was confined to a possibility instead of a probability, we see nothing of which appellant may justly complain.

It is also contended by appellant that the court erred in telling the defendant when he was on the stand, testifying under section 2055, Code of Civil Procedure, not to evade the question, and striking out the answer previously given. We have examined the record and finding that the trial court was well within its discretion in admonishing him.

Nor do we discover anything which convinces us that the trial court abused its discretion in denying a new trial upon affidavits of newly discovered evidence which was cumulative and impeaching.

[7] The claim that the damages were excessive is supported by neither substantial argument nor citation of authority. Hence we are under no compulsion to make further examination of the point.

The judgments are affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

219 Cal. 135

GENTNER v. BOARD OF EDUCATION OF LOS ANGELES CITY HIGH SCHOOL DIST. et al.

L. A. 14141.

Supreme Court of California.
Oct. 2, 1933.

1. Appeal and error 🔑907(2).

Presumption exists that evidence supports trial court's findings, where evidence is not embodied in record.

2. Mandamus 🔑174.

Finding that teacher was successfully employed for eleven consecutive years *held* not inconsistent with finding that permanent teacher was unfit to teach for long time prior to dismissal hearing (Pol. Code, § 1609, subd. 5j).

3. Schools and school districts 🔑141(1).

"Dismissal," as used in teachers' tenure law providing for dismissal of permanent teachers, refers to action of board of education terminating status of permanent teacher (Pol. Code, § 1609, subd. 5j).

[Ed. Note.—For other definitions of "Dismissal," see Words & Phrases.]

4. Schools and school districts 🔑133.

Permanent teacher retains his tenure and rights incident thereto until dismissal (Pol. Code, § 1609, subd. 5j).

> "Tenure right" of permanent teacher is his right that the board of education shall either assign him to a class, or, on failure to assign him, promptly institute and carry through removal proceedings.
>
> [Ed. Note.—For other definitions of "Tenure," see Words & Phrases.]

5. Schools and school districts 🔑144(1).

Permanent teacher *held* not entitled to salary from date board of education refused to assign him to position in high school to date of formal dismissal (Pol. Code, § 1609, subd. 5j).

6. Mandamus 🔑187(9).

All intendments favor legality of permanent teacher's dismissal by board of education, and judgment denying writ of mandate to compel his reinstatement (Pol. Code, § 1609, subd. 5j).

7. Mandamus 🔑187(9).

Presumption exists that board of education refused permanent teacher's services because of his unfitness as charged, absent evidence on appeal from judgment denying writ of mandate to compel his reinstatement (Pol. Code, § 1609, subd. 5j).

8. Mandamus 🔑164(3).

Board of education did not lose right to contest salary claim of dismissed teacher seeking reinstatement, by failure to deny in amended return to alternative writ of mandamus his averment that salary was due, where salary claim was denied in answer to supplemental complaint which referred to matter.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Mandamus by John Gentner to compel the Board of Education of Los Angeles City High School District and others to reinstate him as a permanent teacher in the district. From a judgment denying writ of mandate, petitioner appeals.

Affirmed.

Prior opinion, 17 P.(2d) 756.

W. A. Alderson and Miller & Ellis, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, and C. B. Penn, all of Los Angeles, for respondents.

SEAWELL, Justice.

Petitioner, John Gentner, appeals from a judgment of the superior court of Los Angeles county denying a writ of mandate to compel the board of education of the Los Angeles city high school district to reinstate him as a permanent teacher in said district.

It is undisputed that petitioner had acquired the status of a "permanent" teacher in the Los Angeles city high school district under our Teachers' Tenure Law. The board of education of said district refused to assign him to a position for the school term commencing September 12, 1927. On October 24, 1927, Susan M. Dorsey, as superintendent of schools for the city of Los Angeles, filed with said board charges of petitioner's incompetence and evident unfitness for teaching, the charges were set for hearing on November 14, 1927, and on November 16, 1927, the board ordered petitioner dismissed. He thereafter applied to the superior court of Los Angeles county for a writ of mandate to compel his reinstatement, and upon denial of the writ appealed to the District Court of Appeal, Second Appellate District. Division 2 of that court affirmed the judgment.

[1] In petitioning for a hearing in this court, petitioner urged that the hearing be granted only as to the two propositions which the appellate court failed to discuss in its opinion, to wit, petitioner's right to salary from the opening of the fall term on September 12, 1927, to his formal dismissal on November 16, 1927, and his contention that the findings of the trial court were fatally contradictory. Except for his assertion of incon-

sistency in the findings, which we hereafter show to be without merit, petitioner has now virtually abandoned his claim to reinstatement. Aside from this, the grounds urged for reinstatement are insufficient. The charges filed against petitioner with the board of education of the city high school district, and embodied in the return filed to the alternative writ of mandate in the superior court, sufficiently allege incompetence and evident unfitness for service, which are statutory grounds for dismissal. Section 1609, subd. 5j, Pol. Code, now section 5.661 et seq. School Code. Although certain of the charges and findings relate to acts of petitioner more than three years before the filing of charges, which petitioner contends are too remote and are barred by the statute of limitations (section 338, subd. 1, Code Civ. Proc.), other charges and findings as to more recent conduct sustain the judgment. In view of the fact that the evidence adduced before the trial court and board of education is not embodied in the record on appeal, it must be presumed that the evidence supports the findings.

[2] Finding III as to petitioner's having been "successfully employed" as a teacher in the Los Angeles school for eleven years, and having "successfully rendered" continuous service under said employment during all of said period of eleven years, is not fatally inconsistent with the clear and unequivocal findings that petitioner was on November 14, 1927, and for a long time prior thereto had been, incompetent and unfit to teach. It is obvious from the findings as a whole that finding III, which follows the language of the petition and the terms of the statute defining a permanent teacher, was to establish that petitioner had tenure based on his years of continuous service. Petitioner had been "successfully" employed in the sense that he had been continuously employed for the period stated, and thereby had "succeeded" in acquiring tenure.

[3, 4] The question as to whether petitioner is entitled to be paid his salary from the commencement of the school term on September 12, 1927, to November 16, 1927, the date of the board's order of dismissal, presents a more serious problem. He was ready and willing to teach, and would have taught during this period but for the action of the board in refusing to permit him to teach. Section 1609, subdivision 5j, Political Code (now sections 5.660–5.670, School Code), authorized boards of school trustees and city and county boards of education to dismiss teachers for the causes listed therein only after a fair and impartial public hearing, had upon at least ten days' notice to the teacher charged. The trial must be concluded and the decision rendered within ten days after the beginning of the trial. It is apparent from the express language of the provision that a permanent teacher cannot be deprived of his status until after a hearing has been held. "Dismissal" as used in the tenure law refers to action of the board terminating the status of a permanent teacher. Until such dismissal the teacher retains his tenure and the rights incident thereto.

But in our view it is not an incident of such tenure that a teacher must be given active employment pending the conclusion of dismissal proceedings against him, or paid his full salary when it is determined upon hearing held that cause for removal existed. This may be illustrated forcibly by consideration of one of the several statutory grounds for dismissal—immoral conduct. It should be said that absolutely no charges of this nature were filed against petitioner herein. Where a board has good cause to believe that a teacher has been guilty of gross immorality or acts of perversion, it becomes the duty of the board immediately to remove him from contact with his classes and promptly to take steps to dismiss him. The welfare of the children is the paramount consideration. It follows from the fact that the authorities are not required to give active employment to a teacher pending his removal hearing, that, when his removal is subsequently ordered, he is not entitled to receive salary for the period during which he has not taught. The law does not contemplate that public funds shall be expended where no services are performed, and where not only is there no duty to accept services tendered, but the welfare of the children may require that they be dispensed with until a hearing can be held. The interests of the teacher receive a full measure of protection in the right to a hearing as provided by law, and the right to receive a salary for the entire period of unemployment in the event it should be determined that cause for removal did not exist. Saxton v. Board of Education of Los Angeles City School District, 206 Cal. 758, 276 P. 998.

[5] We conclude that the tenure right of a permanent teacher is not to teach, or, at least, to receive salary, up to the very day when his dismissal shall be ordered upon hearing held. Rather, it is his right that the board shall either assign him to a class, or, upon failure to assign him, promptly institute and carry through removal proceedings. If the board fails either to give him an assignment or to initiate dismissal proceedings promptly, or, having commenced a proceeding, fails to conclude it with reasonable dispatch, the teacher has his remedy by writ of mandate to compel the board to discharge its duty in the premises.

[6, 7] In the case herein the court found that petitioner was, on November 14, 1927, the date of the dismissal hearing, and for a long time prior thereto had been, incompetent and unfit to teach. Petitioner alleged that he

was notified that he would not be permitted to teach, but he does not state the grounds on which the notice was based. The evidence has not been brought up on this appeal. All intendments are in favor of the judgment and the legality of the action taken by the board. It must be presumed that the board refused his services at the opening of the school term on the ground of his incompetence and unfitness to teach.

[8] Respondents have not lost their right to contest petitioner's claim to salary by their failure to deny in their amended return to the alternative writ his averment that salary was due and owing to him from September 12, 1927. In addition to the petition for the writ, petitioner later filed a pleading denominated "supplemental complaint," which had particular reference to the matter of salary, and respondents filed an answer thereto, wherein they denied that petitioner was entitled to salary during the period he did not render services. This complaint and answer were not intended to be superseded by the amended petition for the writ and amended return later filed. That the case was tried on the theory that the right to salary was in issue is apparent from the court's finding that no salary was due and owing petitioner.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; CURTIS, J.

GIOMETTI et al. v. ETIENNE.

L. A. 13777.

Supreme Court of California.

Aug. 31, 1933.

Courts 🔑487(7).

Petition for hearing of cause in Supreme Court *held* denied by operation of law, where order granting hearing was not concurred in by necessary number of justices, and time expired within which court could make such order after judgment in District Court of Appeal.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by E. Giometti and others against Victor Etienne, Jr. From the judgment, defendant appealed to the District Court of Appeal, and, after judgment therein [23 P. (2d) 52], plaintiffs petition for a hearing in the Supreme Court.

Hearing denied.

Peter tum Suden and Richard tum Suden, both of San Francisco, and Frank Kauke, of Fresno, for appellant.

Carl E. Lindsay, H. J. Carling, and Lindsay & Gearhart, all of Fresno, for respondents.

WASTE, Chief Justice.

On suggestion by the appellant, and it appearing from the minutes of the court that the order of this court, made on the fourteenth day of August, 1933, purporting to grant a hearing of the above cause by this court after judgment in the District Court of Appeal, was not concurred in by the necessary number of justices of the court qualified to sit in said matter, and the time having expired within which this court could make such order, the petition for hearing was denied by operation of law.

It is therefore ordered that the order of August 14, 1933, assuming to grant the petition of the plaintiffs and respondents for a hearing in this court after decision in the District Court of Appeal of the Fourth Appellate District, is vacated and set aside.

We concur: SEAWELL, J.; SHENK, J.; LANGDON, J.; IRA F. THOMPSON, J.; TYLER, Justice pro tem.

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219 Cal. 198

CITY OF LOS ANGELES v. KLINKER et al.

SAME v. TIMES-MIRROR CO. et al.

L. A. 14272.

Supreme Court of California.

Oct. 4, 1933.

Rehearing Denied Nov. 2, 1933.

1. Eminent domain 🔑82, 95.

In condemnation proceedings, compensation must be allowed for fixtures on property taken and for depreciation of fixtures on part not taken (Code Civ. Proc. § 1248, subd. 1; Civ. Code, § 660).

2. Eminent domain 🔑133.

In condemnation proceedings, relation between parties is regarded as similar to that of vendor and purchaser in determining presence of irremovable fixtures.

3. Eminent domain 🔑133.
Fixtures 🔑6.

Manner and intention with which fixtures are annexed and purpose for which premises are used are to be considered in determining presence of irremovable fixtures in condemnation proceeding.

4. Eminent domain 🔑133.
Fixtures 🔑21.

Newspaper plant processing equipment *held* "fixtures" for which compensation was required to be made in condemnation proceedings (Code Civ. Proc. § 1248, subd. 1; Civ. Code, § 660).

[Ed. Note.—For other definitions of "Fixture," see Words & Phrases.]

5. Actions 🔑57(1).

Consolidation of proceeding to condemn fee of part of property for public buildings and grounds with proceeding between same parties to condemn easement over remainder of property for street purposes *held* not error (Code Civ. Proc. §§ 1048, 1244, subd. 5; § 1256).

6. Eminent domain 🔑202(1), 262(5).

In condemnation proceeding, generally, since evidence of structural value of building is inadmissible, owner could not complain because court limited purpose of such evidence to corroboration of evidence of market value and formation of basis for hypothetical questions regarding market value.

7. Eminent domain 🔑130.

In condemnation proceeding, generally compensation is to be determined by market value of land taken and improvements thereon, viewed as a whole.

8. Eminent domain 🔑107.

Net profit lost by owner of land condemned by reason of time required to remove machinery and set it up in new location *held* not proper element of damage.

In Bank.

Appeal from Superior Court, Los Angeles County; George K. Scovel, Judge.

Actions by the City of Los Angeles against L. W. Klinker, the Times-Mirror Company, and others, and against the Times-Mirror Company and others. From the judgment in each action, the Times-Mirror Company appeals.

Judgment reversed.

Hunsaker & Cosgrove, T. B. Cosgrove, and Frank B. Yoakum, Jr., all of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur W. Nordstrom and Arthur Loveland, Deputy City Attys., all of Los Angeles, for respondent.

PRESTON, Justice.

This appeal is from the interlocutory judgment in an eminent domain proceeding to appropriate to public use certain real property and the improvements thereon situated at the northeast corner of Broadway and First streets, Los Angeles, and owned by the appellant, the Times-Mirror Company, a corporation. It comprises the site and buildings used for the publication and distribution of the well-known daily newspaper, the Los Angeles Times; a site that at the time of this action had been utilized for the purpose for about forty-five years. Two proceedings were instituted by the city of Los Angeles to acquire distinct portions of this property of appellant—one action to acquire a part for public grounds and buildings; the other to acquire the remainder for street purposes. The two portions comprise in the aggregate the entire property of appellant at this location. The trial court, over appellant's objection, consolidated the proceedings as to appellant's property and later sat therein at the trial without a jury, rendering the interlocutory judgment in condemnation here involved. The Times-Mirror Company, a corporation, has appealed.

Voluminous and exhaustive briefs, aggregating in excess of 1,000 pages, face us in the determination of this cause. However, we need not give exhaustive consideration to all the points urged as the learned trial judge, in our opinion, excluded from consideration, after first admitting it, much material testimony respecting the market value of the property. This evidence should have been allowed to remain, and the error we deem of such far-reaching detriment to appellant as to compel a reversal of the judgment. Appellant states the question in this connection in long and short form as follows:

Long form: "In condemnation proceedings of premises continuously and successfully devoted for a period of over forty-five years to the publication of a metropolitan newspaper, does the processing equipment constitute fixtures and an improvement pertaining to the realty within the meaning of section 1248 of the Code of Civil Procedure, for which compensation must be made, when it appears that such processing equipment was especially designed for and installed in a steel and masonry building located upon the premises, the building itself being especially designed for the site and especially designed to accommodate the processing equipment, and the processing equipment being especially designed for installation in the building; the land, building, and processing equipment all having been acquired, constructed, and maintained as a permanent construction and installation for the purpose and used exclusively in the publication of a metropolitan newspaper of five daily editions totaling 175,000 copies and a Sunday edition exceeding 250,000 copies; said processing equipment consisting principally of eight large presses resting upon, embedded in, and permanently fastened to, huge concrete foundations especially designed for the building, and the building being especially designed to accommodate such press foundations, the plans for each having been prepared in contemplation of the plans for the other, the work of installation and construction of the building, the press foundations, and the presses having proceeded in unison, said foundations, although incorporated into concrete portions of the building structure, nevertheless, carrying the weight of the presses directly upon the ground surface, while other portions of the processing equipment of great weight and size are installed in portions of the building especially designed and constructed to carry this particular heavy equipment which, for the most part, is permanently attached to the building?"

Short form: "Within the meaning of subdivision 1 of section 1248 of the Code of Civil Procedure does the processing equipment of a plant given over to the publication of a metropolitan daily newspaper constitute an improvement pertaining to the realty where the plant equipment is especially designed for, and permanently installed in, a steel and masonry building particularly designed for the site and to accommodate such equipment?"

Respondent states this same issue as follows: "Within the meaning of subdivision 1 of section 1248 of the Code of Civil Procedure, does the processing equipment of The Times-Mirror Company's newspaper plant constitute an improvement pertaining to the realty, where the processing equipment is necessary to the business of The Times-Mirror Company, can be readily removed without injury to the realty or to the equipment, and has been assessed and taxed, carried on the books of The Times-Mirror Company, and treated in a proposed sale to the County of Los Angeles, as removable personal property?"

A glance at these questions discloses that we have presented the question of whether certain machinery known as "processing equipment" is to be classed as real or personal property. Appellant insists that it constitutes fixtures, a part of the improvements on the real property. Respondent insists that it is personalty, or, at any rate, that the evidence is in such condition that the decision of the court below that it is personalty cannot be disturbed. In this behalf it is to be noted that respondent's position rests upon the claim that the machinery may be removed without injury to the building, and, moreover, that appellant, by its acts and conduct, has shown that it now regards this equipment as personalty. Some of the pertinent facts may now be stated:

The site at the corner of First and Broadway streets was occupied from 1886 to 1910 by a building used for publication and distribution of appellant's metropolitan daily newspaper, the Los Angeles Times. In 1910, this original structure was dynamited and burned, but appellant soon purchased adjoining properties, and by October, 1912, it had completed the erection at said location of a larger edifice, which has since served continuously and exclusively as the main building of the permanent home of said newspaper. It consists of three stories underground and five stories above ground, and is designed to carry two extra stories. From time to time appellant has continued the enlargement of its property holdings by purchase of adjoining land and structures, so that now it also owns and uses, in connection with publication and circulation of said daily newspaper, the said main building, a northerly annex thereto constructed in 1921, and four so-called secondary buildings located on the north side of First street.

Within the main building and annex, and the basement of the most easterly of said secondary buildings are located the machinery and equipment referred to throughout the trial of this cause as the "processing equipment," which appellant contends passed with the freehold and constituted an improvement pertaining to the realty. In this behalf witnesses for appellant testified that the said main building and annex were especially designed and constructed to accommodate the permanent installation of the processing equipment therein. Certain floors were designed to carry heavy machinery and equipment not found in ordinary buildings of steel frame. One of the floors above ground surface was designed to carry a load of 275 pounds per square foot. Anticipating expansion, the building was also designed to carry two additional stories, namely, a fifth and a sixth story above ground surface. The annex, built in 1921, was the same type of construction as the main building, carrying also safety features with reference to load capacity. The preparation of plans to use the land on which the secondary buildings stand, for the construction of an addition to said main building and annex, were interrupted by these eminent domain proceedings.

Witnesses for respondent testified that said main building contained no unusual structural features save the fourth floor, which admittedly was designed to carry more than customary weight. They denied also that the building was so designed as to be capable of carrying two more floors without added strengthening in the columns.

In the construction of the main building, the foundations for the great presses were constructed independently of, but blending with, the foundations for the building, to prevent vibration which might have affected the stability of the building foundations. It further appears that, following custom, the press foundations were built according to plans of the press manufacturers, and that they extended from the basement floor of the building down through the subbasement to the ground. Five presses were installed during erection of the main building; two more were added about 1926. Installation of the latter required structural changes in the building and a tearing out of part of the mezzanine basement floor. The presses are from

23 to 42 feet in length, from 9 to 11 feet in width, and from 16 to 24 feet in height, weighing from 80 to 147 tons each. They are installed on the massive special press foundations, resting immediately upon the ground and containing some 13,331 cubic feet of reinforced concrete.

The so-called "processing equipment" may be classified to include, in addition to the above-described presses and the pressroom equipment, the following: Composing room equipment, stereotype equipment, and engraving equipment. Office equipment is not included.

The pressroom equipment consists of: The large presses above described on their massive masonry foundations. Presses Nos. 1 and 2 are two stories high, and are equipped with runways, ladders, and mezzanine landing for the workmen. Other presses are supported by cast-iron columns going through the floor to the concrete foundation and are anchored to the masonry bolts imbedded therein. The presses are operated by a drive mechanism under the floor, which connects, by gear system, to a series of vertical shafts which drive their individual cylinders. The drive shaft goes to a motor located on a specially constructed base in the subbasement. The heavy shafting is held on hangers fastened into the ceiling, and it comes through the floor and is geared into the press. Removal of the presses imbedded in concrete would leave open pits in the floor.

The stereotype department is located on the fourth floor, which, as above mentioned, was especially constructed to carry loads of 275 pounds per square foot as compared with lesser loads on other floors above ground level. This equipment is not as heavy or as large as the press equipment, but it appears that pieces weighing up to six tons are permanently imbedded in or attached to floors and walls and connected with power, gas, water, and plumbing lines. The equipment includes what is known as the autoplate machine, really a large furnace weighing five or six tons, with metal bath and casting boxes, having individual foundations grouted down, cemented into the floor foundation. It also includes other large furnaces used for melting metal connected with casting boxes in which the metal is cast into cuts or pigs; also melting or dross furnaces and sawing machinery bolted to the floor and connected with the power line. Similar machinery, but of lesser weight, is found in the monotype department.

While respondent contends that the bolting of a large part of this machinery to the floor proves it to be removable personal property, appellant claims that, where machinery is described as bolted to the floor, the bolts are either set into the slab of concrete itself or wood blocks are inserted in the concrete slabs and lag screws are driven down through the machine into the blocks set in the concrete.

In the composing division are forty linotype machines, each connected with the main power feed system by conduits attached to the ceiling coming up through the floor beneath and into the motors constituting a part of the machines. Sixteen of the machines are connected with water and drainage systems of the building; in addition this composing equipment includes proof presses, saw trimmers, imposing tables, steel cabinets, cases, etc.

The engraving equipment is located in the three-story building to the east of the main building, which was designed by the architect who planned the main building and annex. Much of this equipment is bolted to or built into the floors or walls, and is connected with the water and drainage system by special acid-resisting pipes.

[1] The rules that are to guide us in reaching a conclusion on this question are not in dispute, and are practically universal throughout the United States. It is in the application of these tests that conflicts are found in the decisions of the courts.

Section 1248 of the Code of Civil Procedure, subd. 1, provides: "The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: 1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed."

"Fixtures upon the property taken must be valued and paid for as part of the real estate, and any depreciation in the value of fixtures upon the part not taken is to be taken into consideration, the same as damage to the soil itself." Lewis on Eminent Domain, vol. 2 (3d Ed.) p. 1276, § 728.

"Where land is condemned for public uses, the value of buildings or other improvements and fixtures on the land must be considered in determining the owner's compensation." 20 Cor. Jur. p. 799.

"When fixtures become part of the realty, if the land on which the building stands is taken in whole or in part for the public use, the owner is entitled to have the fixtures considered in determining the amount of his compensation." 10 R. C. L. 142.

Section 660 of the Civil Code also furnishes some useful guides in the matter: "Definition of fixtures. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods."

All parties agree, however, in determining what are fixtures, that the rule announced in Lavenson v. Standard Soap Company, 80 Cal. 245, 250, 22 P. 184, 185, 13 Am. St. Rep. 147, is the correct rule: "In order to determine whether a thing is a fixture or not, we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used."

In Gosliner v. Briones, 187 Cal. 557, 560, 204 P. 19, 20, the rule is again stated: "As a general rule the intent of the parties is a controlling criterion in ascertaining whether property is permanently attached to the land or retains its identity as personalty; the character of the annexation to the land or other realty and the use made of the property are important considerations, but in most cases are subsidiarily employed for the purpose of testing the intention of the parties. [Citing many cases.]" See, also, Breyfogle v. Tighe, 58 Cal. App. 301, 208 P. 1008.

The rule is again illustrated in Oakland Bank of Savings v. California Pressed Brick Company, 183 Cal. 295, 298, 191 P. 524, 525, as follows: "The boilers in controversy were set in the building on the land on a concrete foundation made to receive them, and then bricked in by a wall, so as to retain the heat. The heavy machinery was set on concrete blocks built in the ground for that purpose, with large bolts or rods brought up through the concrete, by means of which the machines were fastened down. The machinery, engine, and boilers were connected together by pipes, rods, shafts, and belts, so that the engine would operate the machinery, and they were all attached for the purpose of using them permanently in the plant in the making of brick. There can be no doubt that they were affixed to the land, so as to become real property, under the definition given in section 660."

An engraving plant was held to be a fixture and a part of the realty in the case of In re Post Office Site (C. C. A.) 210 F. 832.

In White v. Cincinnati, etc., R. R., 34 Ind. App. 287, 71 N. E. 276, 278, the machinery of a paper mill was held a part of the realty. The court in that case set forth the three elements regarded as a true criterion of an immovable fixture in this language: "The united application of three requisites * * * is regarded as the true criterion of an immovable fixture: (1) Real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.'" Continuing, the court said: "'The same rule exists in proceedings to take land under the right of eminent domain, and the commissioners of estimate have no right to restrict the assessment to the simple value of the land, compelling the owner to retain the fixtures on the premises, and exempting the city from an obligation to take and pay for them as a part of the land.' * * * It is clear from the record that the improvement upon the real estate consists not simply of certain buildings containing various pieces of machinery, but of a paper mill—a thing complete within itself. * * * One machine essential in the manufacture of paper might be so annexed to or constitute such part of a building that it could not be removed, and another machine equally essential might be easily removed, and yet, when the two machines are separated, each is without value for the uses intended. In such case both of the machines should be considered as attached to the freehold—one by real and the other by constructive annexation. As the machinery is permanent in its character, and, being essential to the purpose for which the buildings are used, is a fixture, it must be regarded as realty, and goes with the buildings. The land, water power, buildings, and machinery constitute a paper mill plant—a unit. It has or has not a value as such, just as a building is valued, not by fixing a value on the different materials composing it, but as a building."

In Jackson v. State, 213 N. Y. 34, 106 N. E. 758, L. R. A. 1915D, 492, Ann. Cas. 1916C, 779, in a proceeding to condemn a factory for public use, the court below (160 App. Div. 110, 145 N. Y. S. 131) made no award covering the plant equipment, stating that, after appropriating the land and building, the condemnor had the right to refuse to pay for the fixtures therein. The Court of Appeal, in reversing this holding, said: "It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of secondhand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit all these elements of value. An appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures, and so it has frequently been held."

In Banner Milling Co. v. State, 240 N. Y. 533, 148 N. E. 668, 672, 41 A. L. R. 1020, the city of Buffalo took steps to condemn property used as a flour mill. Treating the question of fixtures, the court held that the plant as a unit should be considered, using the following language: " 'The claimant is entitled to recover the value of its physical property as it existed at the time of the appropriation. That does not mean that its value is to be arrived at by taking the value of the various elements and items making up the property separately, and considering them without reference to each other, and then adding together these sums. The claimant is entitled to compensation, not merely for so much land, so much brick, lumber, materials, and machinery, considered separately; but, if they have been combined, adjusted, synchronized, and perfected into an efficient functioning unit of property, then it must be paid for that unit, so combined, adjusted, synchronized, and perfected, as it existed at the moment of appropriation. In that limited sense, it is entitled to the "going value"—if such a term is permissible—of its physical property. In fixing the amount of award we will be guided by that principle.' "

To the same effect may be cited Mayor, etc., of Baltimore v. Himmel, 135 Md. 65, 107 A. 522; see, also, King v. Minneapolis Union Ry. Co., 32 Minn. 224, 20 N. W. 135; Yates, etc., Co. v. City of Memphis, 137 Tenn. 642, 194 S. W. 903; City of Chicago v. Farwell, 286 Ill. 415, 121 N. E. 795.

[2] It is worthy of note also in this connection that in eminent domain proceedings, which are in invitum, the relation between the parties is regarded as similar to that of vendor and purchaser rather than landlord and tenant, in testing the transaction for the presence of irremovable fixtures.

It should be noted also that respondent cites a number of cases, some of which on their surface seem to be at variance with the authorities referred to above, but we need not pause to compare or analyze them, for we are satisfied that the better holding is the one which we have adopted.

[3, 4] It is, of course, true that the manner in which the fixtures are annexed, the purpose for which the premises are used, and the intention of the persons who made the annexation, are all to receive weight in settling this issue. It is also true that the intention of the parties, where mutual rights are involved, is of controlling importance, such as in the case of a lessor and lessee, or vendor and vendee under a conditional sales contract. But where, as here, the owner's own conduct alone is to be reviewed, the nature and adaptability of the machinery and the manner of its installation would practically control the question of intent as against a vendor or a condemnor. Here we have not only the manner of annexation of the fixtures and the purpose for which the premises were used, but we have the acts and conduct of the owner in installing these fixtures and, when viewed as a whole, we are unable to escape the conclusion that so much of the fixtures as are denoted in the record by the term "processing equipment" are, actually or constructively, an improvement of the real property.

The chief items of this equipment are the several presses above described. For them, massive concrete foundations were constructed which, although independent, were connected both with the ground and with the foundation of the building itself. These foundations were especially designed to accommodate the presses, which were themselves especially designed and built to be used in this particular building. The presses were supported by and, in the main, embedded in these concrete foundations. Such acts as these on the part of an owner cannot be overthrown by equivocal circumstances from which a different purpose might be suspected. We therefore do not accord particular significance to the fact that this machinery was assessed, with the knowledge of appellant, by the county authorities as personal property, nor to the fact that on appellant's books it was styled "plant equipment." Still less weight do we attach to the fact that, after the intention to take this property for public use had been manifested, the owner negotiated with the public authorities upon a basis which contemplated the salvaging and removal of the equipment from the building to some other location.

Appellant offered the testimony of several witnesses who gave their opinions as to the market value of the property and the improvements thereon, including as an element the existence of this machinery as fixtures therein. The court at first admitted this testimony, but at the conclusion of the trial held that all machinery of the building was personal property; hence the testimony of all appellant's witnesses rested in part upon an erroneous foundation, and, accordingly, the whole thereof was stricken from the record. This left only the testimony of respondent's witnesses, three in number. The court thereupon followed the testimony of one of them and fixed the market value of appellant's property, excluding the machinery, at $1,021,345. As the processing machinery should have been regarded as fixtures, it is manifest that prejudicial error was committed as against the rights of appellant.

[5] It is contended that error was committed by the order of the court consolidating the two actions, in so far as they applied to appellant's property. It is contended that, under subdivision 5 of section 1244 of the Code of Civil Procedure, consolidation may take place only where different properties are

being condemned for the same public use, whereas the situation here is that a part of appellant's property is being taken for public buildings and grounds and the remainder for street purposes. As to the former, the fee is sought; as to the latter, an easement only. However, it is our view that, under sections 1256 and 1048 of the Code of Civil Procedure, the court had the discretion to make the order of consolidation. This is true because in legal contemplation no injury can be done the appellant, for the two actions cover the whole of its property. The full market value of the entire property is the extent of the right of appellant. By consolidation this market value could be ascertained as a whole, thereby merging into the value of the entire property, tedious questions relating to severance damages. Appellant may not complain; the whole is equal to the sum of its parts and no more. The measure of damages applied was as though the fee were being taken in both instances. The reversionary interest in the part taken for street purposes, if of any value, still remained to appellant. Appellant may not be allowed to say that injury has resulted to it because, perchance, if the actions had not been consolidated, its severance damages, plus the market value of the individual portions of the tract, might have exceeded the market value of the tract as a whole.

[6, 7] Neither is appellant in a position to question the ruling of the court in allowing the so-called structural value of the building to be shown by it, and, after so doing, limiting its purpose to corroboration of the evidence of market value and the formation of a basis for hypothetical questions to be propounded to experts upon the question of market value. The general rule is against the admission of this class of evidence for any purpose. The market value of the land, together with the improvements thereon, viewed as a whole and not separately, is the general rule. Vallejo, etc., v. Home Savings Bank, 24 Cal. App. 166, 140 P. 974. Exceptions to this general rule might be allowed where, under peculiar circumstances not here present, as by reason of the nature of the improvement itself, no other criterion would be appropriate for establishing the market value of the property other than the structural value or the reconstruction cost. The case of Joint Highway Dist. No. 9 v. Ocean Shore R. Co. (Cal. App.) 18 P.(2d) 413, seems to be an illustration of the exception.

The observations just made dispose also of appellant's further contention that the land should be viewed, valued as vacant property alone, its market value determined, and it should then be ascertained to what extent, if any, the improvements enhance such value. Clearly this is not allowable under our decisions construing section 1248, subd. 1, of the Code of Civil Procedure.

We also deem it unnecessary to pass upon the fifth question urged by appellant, that it was error to strike out all of the testimony of a witness on market value, upon a showing that such testimony was based in part on an element not proper to be considered by him in forming his expert opinion. This is so because we have held that error was committed in holding that the element referred to should not be considered; hence the question becomes immaterial at this time.

[8] Question 6 relates to the qualification of an expert on reproduction cost of the "processing equipment," a subject of doubtful materiality and, moreover, a matter over which the trial court had a wide discretion. We need not express an opinion upon this particular situation. Question 7 relates to the offer of proof of the net profits that may be lost to appellant by reason of the time that will be taken to dismantle and remove the machinery from the building and set it up again in the new location. This is not a proper element of damage and, furthermore, under the ruling we have made, the question practically loses its significance. Question 8, relating to a failure to find on alleged material issues tendered by the pleadings, is answered by our holding that it was proper for the court to make the order consolidating these causes.

The judgment is reversed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

SEAWELL, J., being absent, does not participate herein.

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219 Cal. 193

HOWE v. TUCKER et al.

Sac. 4774.

Supreme Court of California.

Oct. 3, 1933.

Venue ⚷4.

Action for cancellation, for fraud and undue influence, of note and accompanying trust deed, or for determination of trust therein, where trustee named in deed is person other than payee of note, is transitory action, so that cause should be transferred to county of defendants' residence; proper motion and demand having been made therefor (Code Civ. Proc. §§ 392, 395; Civ. Code, § 1642).

THOMPSON and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Action by George W. Howe against Mrs. May E. Tucker and another. From an order denying a motion for change of venue, defendants appeal.

Reversed, with directions.

Vinetz & Gitelson and A. Gitelson, all of Los Angeles, for appellants.

George W. Howe, of Crescent City, in pro. per.

PRESTON, Justice.

For a chronological statement of the facts herein reference is hereby made to the opinion of this court on a petition for supersedeas in the cause entitled Tucker v. Howe, 17 P.(2d) 103.

Appellants properly state the sole legal question involved as follows: "Is an action for the cancellation, upon the grounds of fraud and undue influence of, or for the determination of a trust in, a note and a deed of trust securing the note, in which deed of trust the trustee therein named is a person other than the payee of the note, a transitory action so that venue of the trial thereof should be transferred to the county of the defendants' residence, a proper motion and demand having been made therefor?"

The court below answered the question in the negative and made its order accordingly. We are led to answer it in the affirmative.

The promissory note may exist alone, without the aid of the deed of trust; cancellation or reformation of the latter would not affect the integrity of the note secured by it. The complaint here essays to have canceled not alone the deed of trust, but the promissory note as well. Under the prayer of the complaint, this twofold relief is permissible. But, upon reason as well as authority, an action to cancel or reform a promissory note secured by a deed of trust is a transitory action, and must follow the person of the defendant (section 395, Code Civ. Proc.; Jacobs v. C. H. Smith Lumber Co., 206 Cal. 128, 273 P. 571).

It may be conceded also that a complaint having for its sole and exclusive object the cancellation of a deed or a deed of trust for fraud is a local action. Eckstrand v. Wilshusen (Cal. Sup.) 18 P.(2d) 931; State v. Royal Consolidated Min. Co., 187 Cal. 343, 351, 202 P. 133; Booker v. Aitken, 140 Cal. 471, 74 P. 11. But here we have united in one complaint allegations and a prayer authorizing relief in both transitory and local causes of action. In such situation we must be guided by the doctrine so well announced in Smith v. Smith, 88 Cal. 572, 576, 26 P. 356, 358, as follows: "When, however, the subject-matter of the action is local, and the judgment which is sought is to operate directly upon that subject-matter, it is provided that the action shall be tried in the county where the subject-matter of the action is situated. This being an exception to the general rule, the conditions under which the exception is claimed must be clearly and distinctly shown. The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those 'other cases' provided for in section 395, which the defendant is entitled to have tried in the county of his residence."

The above doctrine has been uniformly followed in this state. A few of the many authorities which might be cited are: Eckstrand v. Wilshusen, supra; Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977; Jacobs v. Smith Lumber Co., supra; Sheeley v. Jones, 192 Cal. 256, 219 P. 744; Booker v. Aitken, supra; Warner v. Warner, 100 Cal. 11, 34 P. 523; LeBreton v. Superior Court, 66 Cal. 27, 4 P. 777. Said doctrine is not to be set aside because the deed of trust and the note are parts of one and the same transaction. Section 1642, Civ. Code; Phelps v. Mayers, 126 Cal. 549, 58 P. 1048; Meyer v. Weber, 133 Cal. 681, 65 P. 1110. Nor because under the recent case of Bank of Italy v. Bentley (Cal. Sup.) 20 P.(2d) 940, an independent action on a promissory note, secured by a deed of trust, will not lie until the security has been exhausted or becomes valueless.

Appellants admittedly are not residents of Del Norte county. It is clear also that a proper application for transfer of the cause to the proper county for trial has been made and supported by an affidavit of merits and of residence. It is also without substantial conflict that appellants reside, and have resided at all times here material, in Los Angeles county.

The order denying a transfer is reversed, with direction to transfer the cause to the superior court of Los Angeles county for trial.

We concur: CURTIS, J.; LANGDON, J.; SEAWELL, J.

IRA F. THOMPSON, Justice.

I dissent. A reading of the complaint in this case discloses that the primary object of the action is to remove the lien created by the deed of trust upon the property, and that the cancellation of the note is a mere incident to that relief. Without repeating in detail the allegations of fraud, it is well to note that the plaintiff alleges facts indicating the relation of special confidence between the parties prior to the execution of the note and deed of trust; that, in order to assist the defendants, who were then in reduced financial circumstances, all of the parties conceived the plan of selling the property involved; that the plaintiff undertook, if the property were sold, to make a gift of $10,000 from the profits to the defendants; and that, at the earnest solicitation of the defendants and to evidence his desire, plaintiff executed the note and deed of trust upon the express declaration, promise, and representation of the defendant May E. Tucker "that she would not record said papers in any public office without the written consent of the plaintiff so to do, except upon his death and for her protection in that event." Another paragraph of the complaint sets forth that, notwithstanding the declarations, promises, and representations just mentioned, defendant May E. Tucker caused the trust deed to be recorded, and it concludes with a prayer for judgment in the following language: "That defendant Mrs. May E. Tucker and Dorothy Tucker be declared the constructive trustees of said trust deed and note for the use and benefit of plaintiff; that the proper reconveyance be decreed; that said trust deed be ordered cancelled and all rights thereunder annulled; that said defendants and all others claiming through or under them or either of them, be enjoined from further treating said deed of trust and note as effective obligations and from claiming any right, title, interest, lien or encumbrance thereby; and for such other relief as may be proper."

Section 392 of the Code of Civil Procedure reads in part as follows: "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code: 1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property." Considering the complaint in this case as I have outlined it above, together with the obvious fact that to determine that the note which is secured by the deed of trust was given as the result of fraud and lacks any consideration, is to adjudicate that the defendants have no right or interest in or lien upon the real property. The ultimate object of the action is a decision that the defendants have no such lien and that the apparent lien ought to be canceled. This view of the case is strengthened by our ruling in Bank of Italy v. Bentley, 20 P.(2d) 940, 945, wherein we determined that "the holder of a note secured by a deed of trust must first exhaust the security before resorting to the personal liability of the trustor." From this decision it is patent that the note and deed of trust are to be treated as one instrument, and that they cannot be separated as is attempted by the majority opinion in this case.

The case of Jacobs v. C. H. Smith Lumber Co., 206 Cal. 128, 273 P. 571, relied upon in the majority opinion, is not controlling for two reasons: First, the object of the action there was to reform the note so as to purge it of its usurious contents and not to cancel the lien created by the deed of trust; and second, it was not established at the time of that decision that the note and deed of trust were in effect one instrument, and that foreclosure of the deed of trust must precede recovery on the note.

I concur: SHENK, J.

219 Cal. 141

PETERS v. BINNARD et al.

BINNARD v. PETERS.

L. A. 12697.

Supreme Court of California.

Oct. 3, 1933.

Rehearing Denied Nov. 2, 1933.

1. Appeal and error ⟹959(1).
Pleading ⟹236(5).

Allowance or refusal of permission to file amendments to pleadings to conform with proof rests in trial court's discretion, and its exercise ordinarily will not be disturbed in absence of gross abuse.

2. Pleading ⟹248(2).

Change by amendment to complaint from one kind of relief to another is not change in cause of action if transaction is the same.

3. Appeal and error ⟹1041(2).

Order authorizing plaintiff to file third amended complaint for cancellation of note or damages to conform to proof introduced on issues framed by answer to second amended complaint for damages for failure to cancel note *held* not prejudicial because changing cause of action, where further evidence was introduced after answer to new complaint.

4. Appeal and error ⟹1046(1).

Consolidation of maker's action against payee assignor to cancel note with assignee's action against maker to collect amount of note *held* not to prejudice assignee (Code Civ. Proc. § 1048).

5. Action 🔑59.

Setting aside submission of causes and taking further evidence after consolidation of maker's action against payee assignor to cancel note with assignee's action against maker to collect amount of note *held* not error (Code Civ. Proc. § 1048).

6. Action 🔑46.

Plaintiff may blend with an action at law a petition for ancillary equitable relief.

7. Action 🔑46.

Whole matter should be litigated and finally settled in same action, where party is entitled to legal and equitable relief.

8. Specific performance 🔑121(11).

Evidence showed that plaintiff performed his promise to secure third party's consent to sell notes to defendants who bought them and refused to perform their promise to pay plaintiff sum therefor and cancel his note to one defendant, entitling plaintiff to damages at law for breach of contract and equitable relief of cancellation in same action.

9. Contracts 🔑53.

Acceptance of consideration agreed on in contract constitutes waiver of claim of inadequacy.

10. Bills and notes 🔑525.

Facts showed that payee assigned note after maturity, without consideration, and in bad faith, precluding assignee from recovering thereon against maker.

11. Appeal and error 🔑994(3).

Credibility of witnesses is for trial judge.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer and William C. Doran, Judges.

Actions by D. L. Peters against B. Binnard and another, and by Gussie Binnard against D. L. Peters. From a judgment in favor of D. L. Peters, defendants in the first action and plaintiff in the second action appeal.

Affirmed.

For prior opinions, see 17 P.(2d) 797, and 18 P.(2d) 977.

William Ellis Lady, of Los Angeles (H. C. Millsap, of Los Angeles, of counsel), for appellants B. Binnard and National Thrift Corporation.

J. C. Higgins, Jr., and Walker Eden, both of Los Angeles, for defendant California Title Ins. Co.

H. W. Chase, of Glendale, for defendant Louisa G. Wood.

Tanner, Odell & Taft, S. W. Odell, and Garrett B. Sargent, all of Los Angeles, for respondent.

PER CURIAM.

The above two cases, over the protests of appellants, were consolidated by the trial court and a single judgment rendered therein, from which judgment this appeal has been taken. The facts developed at the time of the trial are as follows:

In the year 1928 one Louisa G. Wood was the owner of four promissory notes aggregating $24,200 secured by deeds of trust on certain pieces of real property, which notes had been executed by the Peters-Rhoades Company as maker. Peters, respondent in both actions, owned substantially all of the stock in this company.

On April 3, 1928, Mrs. Wood entered into a written contract with one of the appellants, B. Binnard, as evidenced by certain escrow instructions filed with the California Title Insurance Company, whereby she agreed to sell and B. Binnard agreed to buy these notes for the sum of $20,000. B. Binnard agreed to pay this sum within ten days after the completion of a certain trustee's sale then pending, and to pay interest in the event of a delay. This trustee's sale had nothing to do with the trust deeds and notes executed by the Peters-Rhoades Company.

On December 7, 1928, Mrs. Wood entered into a written contract with the El Merrie Del Corporation whereby she agreed to sell and the corporation agreed to buy the Peters-Rhoades Company notes for the total sum of $15,000. $2,500 in cash, and the balance in monthly installments of $1,000 each, starting January 7, 1929. Interest at the rate of 7 per cent. on the deferred installments was provided for. This agreement was expressly made subject to the B. Binnard-Wood agreement of April 3, 1928, it being provided that should B. Binnard complete his contract Mrs. Wood would pay to the El Merrie Del Corporation all sums in excess of the $15,000 provided for in the agreement of December 7, 1928. On December 10, 1928, the agreement of December 7, 1928, was slightly modified, but such modification did not affect the terms above set forth. It should be noted that respondent Peters is president and owns substantially all of the stock of the El Merrie Del Corporation. There is no dispute but that the El Merrie Del Corporation paid Mrs. Wood $2,500 on the execution of the above contract, and paid her an additional $1,000 on January 7, 1929. The corporation defaulted in the payment of the $1,000 installment falling due February 7, 1929, but Mrs. Wood did not elect to then cancel the contract as she could have done. She continued to deal with the El Merrie Del Corporation through

Peters, and it was not until some time in May, 1929, that she attempted to cancel the contract. On February 26, 1929, the El Merrie Del Corporation assigned to Peters all of its interest in the agreement with Mrs. Wood.

All during this period B. Binnard and Peters were associated together in various business enterprises. Prior to February 26, 1929, Peters approached B. Binnard and asked him if he would not just as soon buy the Peters-Rhoades Company notes from him (Peters) for $20,000, as from Mrs. Wood. Binnard responded that he would if he could raise the cash, and that he would see what he could do. Binnard then reported back to Peters that he had been able to interest appellant National Thrift Corporation of America in the deal, and that that corporation had agreed to finance the transaction. The evidence clearly shows that the thrift corporation and Binnard entered into the deal as a joint enterprise, the thrift corporation agreeing to put up $12,500 and Binnard agreeing to advance the balance, both to share in the profits. Peters, B. Binnard and one Pingree, an employee of the thrift corporation, had various conversations, and finally worked out the terms of the deal as follows: B. Binnard and the thrift corporation agreed to pay Peters $20,000 for the notes in the following manner: $3,500 in cash to Peters (this sum was to refund to Peters the amount paid by the El Merrie Del Corporation to Mrs. Wood); $11,500 to Mrs. Wood ($2,000 in cash and $9,500 in monthly installments of $1,000 each); and Binnard agreed to cancel a $5,000 note which Peters had executed in favor of B. Binnard on September 28, 1928, and which note was then in default, having fallen due January 21, 1929. The thrift corporation and B. Binnard also agreed to waive any deficiency judgment against the Peters-Rhoades Company in the event of foreclosure. It is to be noted that the $2,000 cash payment to be made to Mrs. Wood was the amount necessary to pay the February 7, 1929, installment on the El Merrie Del Corporation-Wood contract, then in default, and the March 7, 1929, installment shortly to become due. The balance of $9,500, payable at the rate of $1,000 a month, was the balance called for and the rate of payment provided for in that contract. The $5,000 note which B. Binnard agreed to cancel is the note involved in the second of the two actions; that is, the action of Gussie Binnard v. Peters. Gussie Binnard is the wife of B. Binnard, and claims to be a holder in due course of the note.

All of the interested parties on February 26–27 met at the office of the escrow officer of the California Title Insurance Company, Mr. Howland, to straighten out some of the details and to draw escrow instructions. The title company already had possession of the Peters-Rhoades Company notes upon the Binnard-Wood escrow. At first the parties intended to have Peters assign to B. Binnard and the thrift corporation his interest under the El Merrie Del Corporation contract, and thus to substitute these appellants for that corporation. Some one, possibly Mr. Howland, suggested a short cut, whereby the contract was to be between Mrs. Wood on one side and Binnard and thrift corporation on the other. Under the contract as finally agreed to, the purchasers were to pay Mrs. Wood a total of $11,500, $2,000 in cash and $9,500 in installments, and were to pay Peters $3,500 in cash. B. Binnard also agreed to cancel the $5,000 note and to deliver the same to Peters outside the escrow. Every one admits that it was also agreed that no deficiency judgment would be taken against the Peters-Rhoades Company on the notes. Although according to the first agreement no interest was to be paid to Mrs. Wood, the evidence on behalf of respondent shows that this was subsequently amended and that B. Binnard and the thrift corporation agreed to pay the interest to Mrs. Wood if she demanded the same. There can be no doubt that all of the parties to the agreement orally assented to all of the above terms before the escrow instructions were drawn. Peters secured escrow instructions from Mrs. Wood on March 2, 1929, which were deposited with the title company, and which called for the payment of interest. B. Binnard and the thrift corporation objected to the interest, but Peters pointed out to them that Mrs. Wood was entitled to interest under the El Merrie Del Corporation contract, and could not be expected to waive it. In a conversation with B. Binnard and Pingree on or about March 5, Peters testified that these parties then agreed to pay the interest. Peters left on a business trip to New York, and while he was away B. Binnard and the thrift corporation conceived the idea of treating the transaction as a purchase of the notes from Mrs. Wood alone, and leaving Peters out of the deal entirely, without paying him the $3,500 already advanced and without canceling the $5,000 note. They thereupon accepted Mrs. Wood's instructions of March 2, which had been secured by Peters, and paid her the amounts called for by those instructions, and refused to have any further dealings with Peters. It should be mentioned that B. Binnard and the thrift corporation paid all installments called for by the March 2d instructions until at the time of trial only $2,500 remained to be paid to Mrs. Wood. Some time in May, 1929, Mrs. Wood, at whose instigation it does not appear, purported to cancel the El Merrie Del Corporation contract, but this was not done until some time after B. Binnard and the thrift corporation had accepted all the benefits of the contract which Peters had worked out.

On this state of facts the trial court held that a contract existed between Peters and B

Binnard and the thrift corporation, and that the latter two had breached the same. The court granted judgment against these two appellants for the $3,500 and interest; ordered the cancellation of the $5,000 note; and held that the Peters-Rhoades Company notes were held by these two appellants without recourse against the maker. The court also held the $5,000 note had been assigned to Gussie Binnard after maturity, in bad faith. Her rights to this note will be hereafter discussed. It is to be noted that this judgment is in exact accord with the agreement between the parties, and simply compels B. Binnard and the thrift corporation to live up to the contract entered into by them with Peters. From this judgment B. Binnard, the thrift corporation and Gussie Binnard have appealed.

Originally there were two separate actions filed by the parties herein. The first action, hereafter referred to as the Peters case, was brought by Peters against B. Binnard and the thrift corporation for breach of contract. The second action, hereafter referred to as the Binnard case, was brought by Gussie Binnard against Peters to collect the amount due on the $5,000 note, she claiming to be a holder in due course thereof.

The Peters case was filed May 20, 1929. This action went to trial on the issues framed by a second amended complaint and the answer thereto. This complaint alleged the facts substantially as set forth above, except that it was therein alleged that the agreement between Peters and B. Binnard and the thrift corporation was to sell and buy respectively the rights of Peters in the El Merrie Del Corporation contract with Mrs. Wood. It it alleged that plaintiff has fully performed and that defendants have not. The prayer was for $8,646 damages, that amount including the $3,500 paid by Peters to Mrs. Wood, and $5,000 damages with interest for failing to cancel the note. The defendants in the Peters case, after their demurrers had been overruled, answered the second amended complaint, denying the allegations thereof and affirmatively alleging that the $5,000 note involved was the property of Gussie Binnard. Before trial these defendants filed an amendment to their answer, alleging that if any contract had existed between the parties it had been rescinded.

The complaint in the Binnard case was filed in June, 1929, and alleges the execution of the $5,000 note, setting it forth in hæc verba. The note shows on its face that it was payable to B. Binnard. It is alleged that he was merely acting as trustee for his wife, plaintiff in this action. The complaint also alleges that the note was assigned by B. Binnard to Gussie Binnard. Peters denied the allegations of this complaint and alleged that the note had been paid.

Both actions came on for trial in November, 1929. At the outset it was stipulated that the two cases should be tried together, and that the evidence received in one, so far as pertinent, should be admitted as being evidence in the other. At the conclusion of the plaintiff's evidence in the Peters case, defendants therein moved for a nonsuit, which motion was denied. Defendants then introduced their evidence and the cases were submitted. While the cases were under submission the trial court made an order that Peters should have leave to file a third amended complaint to conform to the proof in the Peters case, and further ordered that the two cases should be consolidated under the number of the Peters case. Pursuant to the permission thus granted, Peters filed his third amended complaint. The complaint alleges the facts substantially as set forth in the second amended complaint, except that the real contract as disclosed by the evidence already introduced is here alleged, namely, that Peters agreed to relinquish his rights under the El Merrie Del Corporation-Wood contract, and to procure Mrs. Wood's consent to enter into a contract with B. Binnard and the thrift corporation to sell them the Peters-Rhoades Company notes for $11,500, and that in consideration therefor Peters was to receive $3,500, B. Binnard was to cancel the $5,000 note, and a waiver of personal liability on the part of the Peters-Rhoades Company to be executed. The plaintiff alleged the fairness of the contract and closed with a prayer for the relief granted by the trial court. After the filing of this complaint the defendants therein named moved to vacate the order permitting the filing of the third amended complaint, and moved to strike it out. They likewise demurred to the complaint and moved to vacate the order consolidating the two cases. The motions were denied and the demurrer overruled, and the defendants answered denying the allegations of the complaint. Later the trial court set aside the order of submission, and ordered the taking of further evidence. Defendants strenuously objected to the taking of further evidence, but their objections were overruled, and further evidence, both oral and documentary, was introduced by all the parties. Later the judgment above outlined was rendered. Subsequently appellants unsuccessfully sought to disqualify the trial judge from passing on the motion for a new trial on the ground of bias and prejudice. After the denial of the motion for a new trial this appeal was perfected.

[1-3] Most of appellants' contentions are highly technical and all of them are without merit. It is contended that the trial court erred in its order authorizing the filing of the third amended complaint. This contention is largely based on the apparent change of remedies found in the third amended complaint, and on the ground that new

issues were brought in by this complaint. Appellants point out that the second amended complaint in the Peters case had asked for $5,000 damages for failure to cancel the note, while the third amended complaint prayed for the cancellation of the note or damages. It should be noted that when this last complaint was filed the Binnard case had been consolidated with the Peters case, and that in the former case the issue as to payment of the note was involved. It is, of course, elementary that the allowance or refusal of the trial court of permission to file amendments to pleadings to make them conform with the proof is a matter largely in the discretion of the trial court, and its exercise ordinarily will not be disturbed in the absence of gross abuse. Armstrong v. Lassen Lumber & Box Co., 204 Cal. 529, 269 P. 453. The third amended complaint did not bring in any new cause of action. A change by amendment from one kind of relief to another is not a change in the cause of action if the transaction is the same. Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038. Other than the change in remedy, the only new matter inserted in the third amended complaint was the change in the nature of the contract between Peters and the appellants, and that had been fully developed on the trial. Moreover, just how appellants were injured by permitting the new complaint to be filed does not satisfactorily appear. Assuming that new issues were thus introduced into the case, the trial court, after the new complaint had been filed and appellants had answered, permitted the taking of further evidence, and both sides introduced further evidence at some length. Appellants, therefore, had ample opportunity to present their evidence on any of these issues.

[4] Appellants also complain of the order consolidating the actions. There was no error in ordering the two cases consolidated. Section 1048 of the Code of Civil Procedure, as amended in 1927, p. 531, confers on the trial court, in its discretion, power to sever or consolidate actions "whenever it can be done without prejudice to a substantial right." Appellants complain that the rights of Mrs. Binnard were substantially affected by the consolidation, but this contention is without merit. One of the issues involved in the Binnard case was whether Mrs. Binnard was a holder in due course of the Peters note. If she were not, then the same evidence that proved that Peters was entitled to a cancellation of the note in the Peters case proved that the note had been paid in the Binnard case. If she were a holder in due course then none of that evidence affected her.

[5] Appellants likewise complain of the action of the trial court in setting aside the submission of the causes, and taking further evidence after the cases had been consolidated. While the action of the trial court may have been unusual, it certainly expedited and furthered a complete hearing on the merits in the trial court, and for that reason was not error.

[6-9] Appellants also contend that their demurrer to the third amended complaint should have been sustained. This contention is largely based on the theory that this complaint was for specific performance, and that the allegations contained therein are not sufficient to grant that relief. Some objection also seems to be made to the joining of a request for relief addressed to the law side of the court with a request for equitable relief. Under our system of Code pleading it is elementary that a plaintiff may blend with an action at law a petition for ancillary equitable relief. It is also quite clear that where a party is entitled to legal and equitable relief the whole matter should be litigated and finally settled in the same action. We are of the opinion that the facts of this case clearly warranted the granting of both legal and equitable relief. Appellants' objections to the sufficiency of the pleading in alleging the fairness of the contract are without merit. This point was in issue in the trial court, and on adequate evidence it has found in favor of Peters. Moreover, assuming the allegation as to adequacy of the consideration was not sufficient, it is well settled that where the consideration agreed on in a contract has been accepted, the acceptance constitutes a waiver of any claim of inadequacy. Fleishman v. Woods, 135 Cal. 256, 67 P. 276; Nicholson v. Tarpey, 70 Cal. 608, 12 P. 778. The evidence shows that all that appellants desired was to purchase the Peters-Rhoades Company notes. Through the efforts of Peters they have purchased these notes on terms negotiated by Peters. Appellants have enjoyed the benefits of the efforts of Peters in obtaining the notes at the agreed price, but simply refuse to pay Peters the $3,500 advanced by him, or to cancel the $5,000 note. Even if this were an action for specific performance, appellants are in no position to urge the inadequacy of the consideration.

Appellants also attack some of the findings as being unsupported by the evidence. In so far as these findings particularly relate to the issues raised in the Peters case they find ample support in the evidence above summarized. We think, as above set forth, that the evidence amply shows that the parties came to a definite agreement, and that Peters has performed and appellants have not. Appellants contend that Peters did not perform because Mrs. Wood canceled the El Merrie Del Corporation contract some time in May, 1929. The evidence shows that through the efforts of Peters, Mrs. Wood, on March 2, 1929, deposited her escrow instructions agreeing to sell the notes to B. Binnard and the thrift corporation for $11,500. This offer was approved and accepted by appellants, and in fact some time in March, 1929, appellants paid Mrs. Wood the first $2,000 called for by the contract, and also paid her the May installment. It was not until after all this was done that Mrs. Wood attempted to rescind the El Merrie Del Corporation contract. This attempted rescission did not affect the true contract between Peters and appellants, which was to secure Mrs. Wood's consent to a direct sale to appellants of the notes. This was all done long before the purported cancellation by Mrs. Wood.

[10, 11] The only other point necessary to discuss is the sufficiency of the evidence to support the findings particularly applicable to the Binnard case. The trial court found that the note upon which this action was predicated had been assigned and transferred to Gussie Binnard after maturity and without consideration and in bad faith. The facts warranted this finding. It appears that this note was in effect a renewal note of a former note in the same amount, payable to the order of Pingree. Although Pingree and the Binnards testified that the $5,000, which was advanced to Peters by Pingree and which advance was evidenced by the note, had come from the funds of Mrs. Binnard, the fact also appears that Pingree assigned this note to Mr. Binnard. Some time after the execution of the Pingree note, Peters paid by check $327.64 interest on the note, and paid the same to Mr. Binnard in the presence of Mrs. Binnard. Mr. Binnard signed a receipt for the interest. Subsequently the note which is the subject of this action was executed by Peters, and Mr. Binnard was made payee. There is an undated assignment on the back of this note by Mr. Binnard to Mrs. Binnard. The two Binnards testified that this assignment was made before maturity, but this testimony is in conflict with statements made by Mr. Binnard before these actions arose. Mr. Sargent, one of the attorneys for Peters, testified that in the conversations had with Binnard and Pingree on February 26–27, 1929 (after the maturity date of the Peters note), he asked B. Binnard the direct questions as to whether he then owned the Peters note and whether it had been assigned, and that Binnard replied that he then owned the note and it had not been assigned. This is directly contrary to the testimony of the Binnards at the time of trial. Moreover, Mrs. Binnard first testified that the note at all times was in her safety deposit box and that her husband did not have access thereto. Later the bank records were introduced showing that early in 1927, long before the present controversy, Gussie Binnard received two keys to the box in question and specifically authorized the bank to permit Mr. Binnard to have access to the box. Mrs. Binnard also testified that she authorized her husband to surrender the Pingree note and accept the new note. The trial judge had the opportunity of seeing these witnesses and observing their demeanor on the witness stand. He chose to disbelieve the testimony given by the Binnards at the time of trial, and to believe Mr. Binnard's statements made before trial. Such a determination rests peculiarly within the province of the trial judge. We are clearly of the opinion that the findings applicable to the Binnard case find substantial support in the record, and cannot, for that reason, be disturbed.

The other contentions of appellants are so unsubstantial as not to require comment.

For the foregoing reasons the judgment that appealed from is affirmed.

219 Cal 184

CRYSTAL PIER AMUSEMENT CO. et al. v. CANNAN et al.

L. A. 12382.

Supreme Court of California.

Oct. 3, 1933.

Rehearing Denied Nov. 2, 1933.

1. Fraud 🔑29.

False representations, to be actionable, need not be directly made to parties seeking recovery.

2. Fraud 🔑29.

Both corporation to whose officers contractors misrepresented quality of materials used in construction of amusement pier, and holding company subsequently organized and to which corporation transferred title to pier on which company built ballroom, had cause of action against contractors for fraud.

3. Appeal and error 🔑877(6).

Defendants cannot complain of apportionment of damages between plaintiffs jointly awarded damages for misrepresentations to them.

4. Appeal and error 🔑932(1).

Supreme Court must uphold trial court's findings, if possible, where evidence warranted more damages than was awarded.

5. Evidence 🔑113(8).

Original cost is some evidence of replacement cost when determining damages for misrepresentations of quality of materials used in construction of amusement pier.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Action by the Crystal Pier Amusement Company and another against Arnold M. Cannan, as administrator with the will annexed of the estate of Emil F. Cykler, and others, wherein defendants filed a cross-complaint against plaintiffs Earl Taylor and others. From a judgment in favor of plaintiffs, defendants appeal.

Affirmed.

For prior opinion, see 19 P.(2d) 855.

J. A. Kennedy, of Oakland, and Stanley W. Guthrie and Victor Ford Collins, both of Los Angeles, for appellants.

Cooper & Collings, Amos Friedman, and Lewis D. Collings, all of Los Angeles, for respondents.

LANGDON, Justice.

This is an action to recover damages for false representations. In March, 1926, plaintiff Crystal Pier Amusement Company (hereinafter called amusement company) decided to erect an amusement pier at Pacific Beach, San Diego county. Earl Taylor, president of the company, entered into negotiations with defendants, who formed a partnership under the name of California Creosoting & Timber Company. The defendants made representations to Taylor as to the material necessary for the pier, and agreed on April 3, 1926, to furnish creosoted piling of a certain quality, and also to drive, cap, and brace the same, representing themselves to be experts in pier construction. The material was furnished and the pier was constructed by July 5, 1926. During the period of construction, Neil Nettleship was president of the amusement company, and after April 22, 1926, B. W. Tye was secretary and treasurer, both likewise being directors. While the construction was in progress, and thereafter, up to August, 1926, similar representations were made by defendants to those parties.

In March, 1927, Nettleship, Tye, and others incorporated plaintiff Crystal Pier Holding Company (hereinafter called holding company), and became officers and directors of this company while retaining their positions with the amusement company. The amusement company transferred title to the pier to the holding company, which proceeded to carry out the original project of building structures, including a ballroom, on the pier. Of the $165,000 of issued stock of the holding company, the amusement company owned $146,000.

In August, 1927, plaintiffs discovered that the piling, caps, and braces were not creosoted, but were treated with another and inferior substance. Other representations of defendants were found to be untrue, and the pier was closed as unsafe. This action was then brought, and after an extended trial, the lower court made findings in favor of plaintiffs on all material issues. Judgment was given canceling the construction contracts and awarding damages in the sum of $91,961.63. Defendants bring this appeal.

The record amply sustains the findings of the court on the essential issue of fraudulent representations, and the attack thereon is without substance. The only points which require consideration are: First, that plaintiff holding company has no cause of action; and, second, that the court applied an erroneous theory of damages.

The first contention is based upon the following facts: The amusement company built the pier. Thereafter the holding company was organized and it built the ballroom. The representations upon which recovery is sought were made to officers of the amusement company, before the holding company was organized. Hence, defendants argue, the holding company has no cause of action because no representations were made to it, or relied upon by it, in connection with the building of the ballroom. They conclude that since the amusement company did not build the ballroom, and the holding company was not defrauded, there can be no recovery by either party for the loss incurred as a result of the construction of the ballroom, the damages recoverable being limited at most to those suffered in building the pier.

It would indeed be remarkable if the law proved so barren that legal principle could not be found to avoid such a result. It is, of course, obvious that the whole matter would have been settled by an express assignment of the cause of action for fraud by the amusement company to the holding company, at the time of the transfer of title to the pier. Swallow v. Tungsten Products Co., 205 Cal. 207, 270 P. 366. At the time of the transfer, however, the defects in the material, and hence the existence of the cause of action, were not disclosed. At the present time, the statute of limitations would undoubtedly bar any new action, and it would be useless to attempt an assignment now. The question is, therefore, whether either of the plaintiffs may maintain the action under the existing circumstances.

Plaintiffs suggest, among other theories, that the holding company was incorporated for convenience by the same persons who organized the amusement company, to carry out the projects planned by the amusement company; that the stock ownership and control of the two corporations is practically identical, and that the separate corporate entities may be disregarded for the purpose of this action. This is an unusual situation for the application of this doctrine, since the corporations themselves seek to deny their separate existence. We do not think it necessary or desirable to consider the application of the doctrine, for the facts support the judgment on much simpler grounds.

The defendants have argued that as the representations were made before the holding company was created, they were made not to it, but solely to the amusement company. We should not be led astray by such figurative expressions, for in truth no representations were made to any "corporation" as such. They were made in this case, as always, to individuals—to Taylor, Nettleship, and Tye. They were made to the corporation by virtue of the fact that these individuals were agents of the corporation. Nettleship and Tye relied upon the representations when they acted on behalf of the amusement company in erecting the pier. They relied upon them when they acted on behalf of the holding company in building the ballroom. At all times the representations were in the minds of the executive officers of both corporations. The misstatements would not have more fully accomplished their fraudulent purpose if they had been repeated to Tye and Nettleship on the day the holding company was created, and on every day thereafter that the work continued.

[1, 2] With the situation thus reduced to simple terms, there is authority to support the trial court's conclusion. In order for representations to be actionable, it is not necessary in all cases that they be directly made to the parties seeking recovery. "A representation made to one person with the intention that it shall reach the ears of another, and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly." Henry v. Dennis, 95 Me. 24, 49 A. 58, 60, 85 Am. St. Rep. 365. In the instant case we may say that the representations were reasonably intended to be relied upon by such persons as were concerned with the construction of the pier *and its improvements*, for without the ballroom and other such structures, the pier would be useless; and when, as appears here, those persons (the two corporations) actually did through their officers receive and rely upon the representations, there can be no valid objection to recovery by each.

In Henry v. Dennis, supra, the plaintiff Henry had been engaged in business under the name of W. S. Henry, Jr., & Co., and thereafter formed a partnership with another party, under the name of Henry & Parsons. Both firms engaged in the same business, and both continued to operate. Henry wrote a letter in the name of the individual business, making inquiries as to the financial condition of Gardiner Woolen Company, and defendant replied, making the misrepresentations for which the action was brought. These misstatements were acted upon both by the individual business and the partnership. The defendant had no knowledge of the existence of the partnership. In holding him liable to both firms, the court said (49 A. 58, 60):

> "* * * he must have contemplated that the contents of this letter would either be communicated to other members of any firm of which Henry was a partner, in that business, and be acted upon by the firm, or that Henry, acting for a firm, would be induced by his letter to give credit to the woolen company. The letter was not only intended for Henry, but as well for those associated with him in that business.
>
> "It is of no consequence that the letter was directed to W. S. Henry & Co., when it was in fact relied upon by Henry as a member of the firm of Henry & Parsons. It is not necessary, in order for a defendant to be liable for the consequences of his misrepresentations, that he should know the names of the persons to whom the misrepresentations may be communicated, provided he contemplated that they should be communicated to others and be acted upon by them."

In Iowa Economic Heater Co. v. American Economic Heater Co. (C. C.) 32 F. 735, defendants made misrepresentations to certain individuals with respect to the merits of a heating device manufactured by defendants, and these individuals, in reliance thereon, organized plaintiff corporation, which paid $15,000 for the right to sell the heater in the state of Iowa. It was held that the corporation could recover damages for the fraud. With respect to the objection that the plaintiff had no corporate existence at the time the representations were made, the court said (32 F. 735, 736): "A corporation cannot be said to know anything except through its members or agents, and representations made to individuals, by reason of which such individuals are induced to form a corporation, may be said to be made to the corporation. The statements made were the moving cause of the organization of the corporation, and it was formed to act upon the information given to those who promoted its organization; and if this information was false and fraudulent, and the corporation was damaged thereby, it may have its action for such resulting damages."

In Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 40 A. 1046, the facts were similar to those of the preceding case; that is to say, misrepresentations concerning a mechanical appliance were made to individuals who afterwards formed plaintiff corporation to purchase defendants' patents and plant, and carry on the business. The court said (71 Conn. 14, 40 A. 1046, 1049):

> "The plaintiff sues for an injury to its corporate interests. This could clearly be a result of false representations made to its managing agents. Could it also be due, and due alone, to false representations made to its promoters, in order to induce them to proceed

to its organization, with a view of its making a contract with the party from whom the declarations came? The superior court was right in giving an affirmative answer to this question. * * *

"A corporation comes into existence, as an artificial person, at a particular moment of time, but its rights and liabilities are largely dependent upon prior events. It springs out of a previous contract between its shareholders, which determines its objects and purposes. It takes advantage of subscriptions which they have made to its capital stock, in contemplation of its formation. It may also take advantage of offers which they have received from third parties to enter into contracts with it after it comes into being. Such offers, while made to individuals who have no authority to speak for any but themselves, are made to be communicated by them to the corporation, when it is capable of acting, and, of course, to be communicated with such statements of the attending circumstances as may be necessary to put it in possession of all facts material to aid it in deciding whether or not to close with the proposal.

"If, therefore, the defendant fraudulently told the five individuals named in the complaint what is there alleged, in order to induce them to form the plaintiff corporation, and procure the execution by it of the contract which was the subject of their negotiation with him, and if, thereupon, in reliance on his statements, they did the very things which his representations were designed to promote or secure, the fact that the last step —the execution of the contract—was, in form, the act of a party with which he never had any direct communication, cannot relieve him from responsibility for all the damage naturally resulting from his fraud. * * * It would have been an idle ceremony for these five men, after becoming the sole shareholders and directors of the plaintiff, to recount to themselves, as such, the representations made to them as individuals, a few weeks before, in contemplation of their occupying this very position. Whatever had been thus said to them to influence the action of the projected corporation was, in legal effect, known to the corporation as soon as it was formed."

[3] We are satisfied that these authorities fully support the theory upon which recovery by the holding company has been justified in the earlier part of this opinion. If, therefore, both the holding company and the amusement company are parties to which the misrepresentations may be considered to have been made and relied upon, the apportionment of the damages between them is a matter with which defendants can have no concern; and where, as here, the court has given a judgment in favor of both plaintiffs jointly, defendants are not prejudiced and cannot complain.

With respect to the right of the amusement company to maintain the action, we think the same observations apply. It is conceivable, although we express no opinion on the point, that had the amusement company sued alone for damages suffered in constructing the pier, defendants would have had a valid objection to recovery on the ground that it had transferred the property and hence had either transferred its right of action, or by being paid full value had been made whole as to any damage suffered. The theory of defendants' objection would thus have been that they might be compelled to account again for the damages to the transferee. However, it might have been shown that by reason of warranties or other contractual stipulations, the amusement company would be liable to the holding company for any defects in the pier, which liability would undoubtedly be a proper showing of damage. In such case, while the amusement company could maintain the action, the court would normally compel the joinder of the holding company as a party necessary to "a complete determination of the controversy." Cal. Code Civ. Proc. § 389. Upon such joinder, defendants' objection would be met, for a judgment would be rendered which would protect them from any further liability for their fraud. See Wiseman v. Sklar, 104 Cal. App. 369, 285 P. 1081. So here, where all parties concerned are before the court, the defendants are fully protected. Whether the holding company is entitled to all the damages, or whether the amusement company shall retain that part resulting from the defective pier, are questions which depend upon the contractual and other relations between these two companies, and do not affect defendants' rights in any respect.

[4, 5] The contention of defendants that the trial court applied an erroneous theory of damages may be disposed of briefly. A great deal of testimony was taken, and the estimates of cost, salvage, usefulness of present equipment, etc., varied greatly. There was sufficient evidence to warrant a much greater sum as damages than that actually awarded by the court. Under these circumstances, our duty is to uphold the findings if it is possible to do so upon any sound theory. The principal finding is "that the said pier is now unsafe for use as an amusement pier or *any other purpose*, and three-fourths of said pier will have to be torn out and replaced, and said ballroom and structures thereon will have to be torn down and replaced, to plaintiffs' and cross-defendants' damage in the sum of sixty-five thousand dollars, the *cost* of said ballroom, and the further sum of thirty thousand, seven hundred fifty ($30,750.00) dollars, the cost of three-fourths of the length of said pier, less the sum of three thousand, seven hundred eighty-eight and 37/100 ($3,788.37) dollars, the amount unpaid by plaintiffs and cross-defendants to defendants

* * *." Defendants assert that the court has adopted as its theory of damages the *original cost* of building the structures, instead of their *replacement cost.* It may be conceded that replacement cost is the proper measure of damages in a case of this sort, but it is by no means clear that the court disregarded it. The term "cost" does not mean "original cost" any more than it means "replacement cost," when the evidence which led to the finding is considered. Evidence was introduced by plaintiffs' witnesses to show that the actual cost of constructing the pier was $41,000, and the cost of constructing the ballroom was $93,000. Allowing for one-fourth of the pier which was above high-water mark and could be left standing, the sum of $91,961.63 awarded by the court was still considerably below the actual cost as testified by these witnesses. In support of the court's findings, we may therefore conclude that it did not use the original cost as its measure of damages, but merely as evidence of possible replacement cost, which was perfectly proper. See Divani v. Donovan, 214 Cal. 447, 6 P.(2d) 247. It might be added that if the extreme rule of damages for fraud (the difference between the actual value of the property and its value had it been as represented) had been applied (see Hines v. Brode, 168 Cal. 507, 143 P. 729), the evidence would have warranted still greater recovery. As to the complaint that salvage value was not taken into consideration, there was evidence to show that the cost of wrecking the structures would exceed the resale value of any materials recovered. On the whole, we think that while the court's findings might have been more explicit on this issue, defendants have failed to establish reversible error in its final award.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; THOMPSON, J.; SEAWELL, J.

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134 Cal.App. 597

McDANIEL v. McDANIEL.

Civ. 9010.

District Court of Appeal, First District, Division 2, California.

Oct. 11, 1933.

Rehearing Denied Nov. 10, 1933.

Hearing Denied by Supreme Court Dec. 7, 1933.

1. Divorce 🔑156.

In interlocutory divorce decree, court could determine property rights placed in issue by pleading not involving homestead.

2. Husband and wife 🔑278(1).

Settlement whereby wife, after alleged desertion, was allotted almost all property without consideration, representing that she was taking property to hold in trust for husband and herself and that she would soon return, *held* invalid (Civ. Code, § 2228).

3. Husband and wife 🔑259.

Where lot was purchased after marriage out of earnings of both spouses and dwelling thereafter built was also paid for out of such earnings, that title was taken in wife's name *held* not to convert property into separate property of wife (Civ. Code, §§ 162–164).

4. Husband and wife 🔑4.

Husband was not bound to maintain wife while she was willfully living apart from him.

5. Divorce 🔑249(1).

In divorce action, where wife had, after allegedly deserting husband, obtained practically all property under property settlement, but settlement was invalid and husband had not disposed of any property, court properly disposed of funds as existing on date of separation, not as of date of trial.

6. Divorce 🔑179.

Plaintiff appealing in divorce action could not, for first time, complain as to finding that there was no consideration supporting deeds.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Divorce action by Frances McDaniel against Charles A. McDaniel, in which defendant filed a cross-complaint. From those portions of the interlocutory decree determining the property rights of the parties, plaintiff appeals.

Affirmed.

Bartlett, Marion & Lillie, and Roy A. Linn, all of Los Angeles, for appellant.

Maynard J. Givens, of Los Angeles, for respondent.

STURTEVANT, Justice.

The plaintiff commenced an action against the defendant to obtain a decree of divorce on the grounds of cruelty. In her complaint she alleged that there was no community property. The defendant filed an answer denying the allegations of cruelty and denying that there was no community property. He also filed a cross-complaint in which he asked for a divorce on the grounds of desertion and alleged that there was a large amount of community property which he specifically itemized. He further alleged that there was outstanding a document which purported to be a contract settling the property rights of the parties; however, he alleged that it was invalid because it was obtained by the fraudulent acts of the plaintiff. The plaintiff answered the cross-complaint and all of the issues were tried. The trial court made full and complete findings in which, among other things, it found that the allegations of the complaint were untrue and that the allegations of the cross-complaint were true. From those portions of the interlocutory decree determining the property rights of the parties, the plaintiff has appealed.

The controversy arises out of the following facts: The parties were married January 9, 1922. Both of them were industrious and frugal. Although they had very little property when they were married, they both went to work and accumulated very rapidly. On February 7, 1929, the plaintiff willfully deserted the defendant. She went at once to an attorney and had him prepare the purported contract settling the property rights. That document specifically mentions each of the properties owned by the parties or either of them. The properties enumerated in the defendant's cross-complaint are described in the same specific terms. After the contract had been prepared the plaintiff induced the defendant to go with her to the attorney's office and sign the purported contract, which in brief awarded to the wife all of the property except a coupé automobile, which was awarded to the defendant. Further facts will be set forth as occasion requires.

[1] The plaintiff contends that it is not proper practice to insert in an interlocutory decree of divorce passages disposing of the property rights. She cites Remley v. Remley, 49 Cal. App. 489, 193 P. 604. That case involved the disposition of a homestead. In the case before us no homestead was involved. As to the properties involved it was quite the proper practice for the trial court to proceed and dispose of the issues that were made by the pleadings. Newell v. Superior Court, 27 Cal. App. 343, 149 P. 998.

[2] It is next contended that the cross-complaint did not state sufficient facts to sustain a rescission of the property settlement hereinabove mentioned. County of San Diego v. Utt, 173 Cal. 554, 160 P. 657. That case was an action between parties dealing at arm's length. The instant case is a controversy between two parties standing in a highly fiduciary relation one to the other. In his cross-complaint the defendant had alleged the marital relation existing, the conveyance of the property without any consideration whatsoever, and the express promise of the plaintiff that she was taking the property to hold in trust for the defendant and herself, and that in the near future she would return to the defendant if he executed the contract. The cross-complaint was not insufficient. Civ. Code, § 2228; Yordi v. Yordi, 6 Cal. App. 20, 91 P. 348. On the trial the defendant introduced an abundance of evidence supporting the allegations mentioned. The trial court did not err in finding that the purported contract was invalid.

[3] The plaintiff contends that the real property was at all times her separate property. There is not a particle of evidence that the real property was owned by the wife before marriage or that it was acquired by gift, bequest, devise, or descent. On the other hand, there is hardly any conflict in the evidence to the effect that the lot was purchased after the marriage of the plaintiff and the defendant; that it was paid for out of the earnings of the parties; that thereafter a dwelling was built thereon; and that the dwelling was paid for out of the earnings of the parties. The mere fact that the title was taken in the name of the wife did not convert it into separate property. Civ. Code, §§ 162–164.

[4, 5] The plaintiff contends that the evidence does not sustain the findings. Thereunder she contends that the trial court should not have divided the property as of the date of the separation, but as of the date of the trial. In the instant case, the point is entirely without merit. After the plaintiff willfully separated from the defendant on February 7, 1929, he was not bound to maintain her while she was living separate and apart from him. On the other hand, the trial court was entirely right in disposing of the fund as it existed on the date of the separation. After that date, the defendant had not in any way disposed of any of the property. The trial court was entitled to assume that the plaintiff had held it intact and at the time of the trial that she still held it in trust for both parties. All other contentions made under this point are but a different method of stating the points that have been discussed above.

[6] At the time the property settlement was made the attorney retained by the plaintiff prepared a deed which purported to convey to Mr. Grant, the plaintiff's brother, the interests of the plaintiff and defendant in the real property. At the same time he prepared another deed by the terms of which Mr. Grant at once conveyed the property to the plaintiff. The first deed recited a consideration of $10. She produced in court, but did not introduce in evidence, the deed from Mr. Grant deeding the property back to her. The evidence was introduced without objection because we may assume both parties believed the pleadings presented the issue. When the findings were prepared the plaintiff interposed certain written objections, but she did not therein state any objection to the finding that there was no consideration supporting either deed. Mr. Grant was not a party to the action and he is not making any complaint. At this time and in this court the plaintiff may not for the first time complain. 24 Cal. Jur. 981.

We find no reversible error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

134 Cal.App. 524

GIALDINI et al. v. RUSSELL et al.

Civ. 4852.

District Court of Appeal, Third District, California.

Oct. 7, 1933.

Hearing Denied by Supreme Court Dec. 4, 1933.

1. Courts 🔑70.

Where judge was disqualified and parties failed to agree upon trial judge, general assignment of judge of other county, to try cases in county where judge was disqualified, made by Chief Justice as chairman of judicial council, *held* to confer jurisdiction upon assigned judge to try personal injury case, though disqualified judge did not request assignment of other judge (Code Civ. Proc. § 170; Const. art. 6, § 1a, subd. 6).

2. Automobiles 🔑244(34, 36).

Evidence *held* to sustain finding that driver of defendant's automobile failed to give arm signal, which negligence proximately caused collision (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a).

3. Trial 🔑139(1), 140(1).

Credibility of witnesses and weight of their evidence are for jury.

4. Automobiles 🔑245(80).

In automobile collision case, where defendant's automobile turned across path of plaintiff's automobile, whether plaintiff was contributorily negligent *held* for jury.

5. Evidence 🔑586(2).

Positive evidence that arm signal was given by driver of defendant's automobile *held* not conclusive, where negative evidence of plaintiff was that arm signal was not given (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a).

6. Trial 🔑404(1).

Findings should be construed to uphold judgment, if reasonably possible.

7. Negligence 🔑142.

Finding purporting to absolve plaintiffs of negligence and also charge them with negligence *held* not irreconcilable, where finding was seriatim denial of each of alleged charges of negligence, as appeared in defendants' answer and cross-complaint.

> Defendants' answer and cross-complaint charged that plaintiff and his son were engaged in joint enterprise, and that their negligence proximately caused accident. Finding stated that it was not true that at the time and place set forth in complaint plaintiff failed to use due or any care for the protection of his own safety, and that plaintiff's son at that time carelessly operated the automobile of plaintiff, and that the act of the son directly or proximately contributed to or caused the damages sustained by the plaintiff. Court construed that the words "it is not true" should be added before "that son at that time carelessly operated," etc.

8. Negligence 🔑142.

Finding that allegations of complaint and answer to cross-complaint, denying negligence on part of plaintiffs, were true, *held* not irreconcilable with other finding, which seemed to find plaintiffs negligent, but which actually, were a seriatim denial of each of alleged charges of negligence against plaintiffs.

Appeal from Superior Court, Mendocino County; T. H. Selvage, Judge.

Action by Angelo Gialdini against A. M. Russell and others, and cross-complaint by named defendant and his wife against plaintiff and his son. Judgment for plaintiff, and defendants appeal.

Affirmed.

Charles Kasch and Wayne P. Burke, both of Ukiah, for appellants.

Henry C. Spurr and Frank W. Taft, both of Ukiah, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

From a judgment of $704.85 which was rendered in favor of the plaintiff as compensation for personal injuries sustained, together with damages to his machine as the result of an automobile collision, the defendants and cross-complainants have appealed. It is contended the judgment is not supported by the evidence, and that the findings are in irreconcilable conflict. A motion was also made to this court to vacate the judgment on the ground that the visiting judge who tried the cause was without jurisdiction, for the reason that he was not requested to preside as judge therein as required by the provisions of section 170 of the Code of Civil Procedure.

[1] The complaint was filed February 27, 1931, in the superior court of Mendocino county, by M. H. Iversen, as attorney for the plaintiff. Before the cause was tried, Mr. Iversen was appointed and qualified as judge of the superior court of that county. As former attorney of record in this case, he was disqualified to try the cause as a judge of that court. Section 170, Code Civ. Proc. During the time the case was pending, the late Honorable Thomas H. Selvage served as the duly elected and qualified judge of the superior court of Humboldt county. Pursuant to article 6, § 1a, subdivision (6), of the Constitution of California, the chairman of the judicial council of California made a general assignment and authorization for the Honorable Thomas H. Selvage to sit and act as judge in the trial of

cases in the superior court of Mendocino county for the period of one year from and after January 2, 1931. This assignment was made in the following language:

"January 2, 1931,
"No. 260-31

"To: Hon. Thomas H. Selvage, Judge of the Superior Court, Humboldt County, Eureka, California.

"Good cause appearing therefor, you are hereby assigned to sit as a Judge of the Superior Court in and for the county of Mendocino, beginning January 2nd to and including December 31st, 1931, and thereafter to act as such until all matters heard or partially heard or submitted to you therein shall have been completed and disposed of by you, and also for the purpose of hearing and determining any motion after judgment in a case decided by you.

"This order you will have spread in full on the minutes of the court in which you are to sit.

"William H. Waste
"Chief Justice of the State of California
and Chairman of the Judicial Council.
"Attest: B. Grant Taylor,
"Clerk of the Supreme Court
and Secretary of the Judicial Council.
[Seal]."

Without further specific designation to try the cause, the Honorable Thomas H. Selvage was present in the superior court of Mendocino county on September 28, 1931, when the cause was regularly called upon the calendar, and proceeded, without objection, to try the case as judge of said court. The cause was tried, argued, and submitted without objection to the jurisdiction of the judge. Findings were subsequently adopted and signed by him, and judgment for the plaintiff was accordingly rendered.

It is urged that the judgment is void, for the reason that Judge Selvage was not duly authorized to try the cause in the manner provided by section 170 of the Code of Civil Procedure.

We are of the opinion the foregoing general assignment of Judge Selvage to try causes in Mendocino county, made by the Chief Justice of the state of California, as chairman of the judicial council, conferred jurisdiction upon him to try this cause. Article 6, § 1a, of the Constitution, provides that:

"The judicial council shall from time to time: * * *

"(6) Exercise such other functions as may be provided by law. The chairman shall seek to expedite judicial business and to equalize the work of the judges, and shall provide for the assignment of any judge to another court of a like or higher jurisdiction to assist a court or judge whose calendar is congested, to act for a judge who is disqualified or unable to act, or to sit and hold court where a vacancy in the office of judge has occurred."

The foregoing constitutional provision furnishes authority for the chairman of the judicial council to assign judges to sit in superior courts of counties other than those for which they are elected. This constitutional provision confers authority concurrent with the provisions of section 170 of the Code of Civil Procedure to designate another judge in the event of the disqualification of the resident judge.

Section 170 of the Code of Civil Procedure disqualifies a judge from trying a case when it appears that he has previously acted as an attorney for either party to the action. That section then specifies the procedure by means of which the disqualification of a judge may be established when the question is in controversy. In the present case Judge Iversen conceded his disqualification to try the cause. He did not attempt to try the action as a judge. The last-mentioned section of the Code further provides: "If it shall be determined after hearing that he [the resident judge] is disqualified, the action or proceeding shall be heard and determined by another judge not disqualified, who shall be agreed upon by the parties, or, in the event of their failing to agree, appointed by the chairman of the judicial council."

The appellants contend that it was necessary for the disqualified judge to request the assignment of some judge to try the cause who had been "agreed upon by the parties." We are of the opinion the above-quoted portion of section 170, supra, may not be so construed. In the present case there was no agreement between the parties regarding the selection of a trial judge. The question of the disqualification of the trial judge did not arise until after the appeal had been perfected. There was no objection to the qualification of the Honorable Thomas H. Selvage to try the case. When the parties fail to agree upon a trial judge, as they did in this case, the above-quoted portion of the Code section specifically authorizes the appointment "by the chairman of the judicial council." That is exactly what occurred in the present case.

It is unnecessary for the chairman of the judicial council to specify a particular case in which a visiting judge shall sit, in order to qualify him. The constitutional provision above referred to authorizes the assignment of a judge from another county "to assist a court or judge whose calendar is congested, to act for a judge who is disqualified or unable to act." Under the general assignment of Honorable Thomas H. Selvage, as above set out, he was qualified to sit as judge of the superior court of Mendocino county, at any time from January 2, 1931, to December 31, 1931, for the trial and determination of any and all actions or proceedings which might be assigned to him, including the case at bar. He was therefore not disqualified to try and determine this cause.

The appellants contend that the judgment is not supported by the evidence, chiefly for the reason that there is no substantial evidence showing that the driver of defendant's automobile was guilty of negligence in failing to give the arm signal required by section 130 of the California Vehicle Act (as amended by St. 1925, p. 412, § 15a), before attempting to turn his machine across the pathway of plaintiff's automobile. It is asserted the evidence in support of this alleged omission on the part of defendant's chauffeur is purely negative in its nature and inadequate to overcome the positive testimony of disinterested witnesses to the contrary.

The collision occurred between the Ford automobile of the plaintiff and the motor vehicle ambulance belonging to the defendants, in broad daylight, on an open, unobstructed paved street in the city of Ukiah. The plaintiff was riding northerly in his machine, which was being operated with his consent by his minor son, Pete Gialdini. The defendants' ambulance was approaching along the same street from the direction opposite to that in which the plaintiff was proceeding. There was no other traffic in that vicinity. The plaintiff claimed, and, in effect, the court found, that the defendants' automobile when in close proximity, suddenly and without warning turned across the highway in front of plaintiff's machine so that it was impossible for the plaintiff to avoid the collision which followed. The driver of the defendants' ambulance was in plain view of both the plaintiff and his son for a considerable time before the accident occurred. They had an unobstructed view of the approaching ambulance and the driver thereof. Apparently they had an opportunity to see and absolutely know whether the driver of the approaching machine did or did not execute the arm signal before he turned his vehicle across their pathway. Pete Gialdini testified in that regard:

"Q. When it [the ambulance] turned in front of you how far did you travel before you hit the hearse? A. Just about twenty feet, I guess.

"Q. Did you endeavor to stop after you saw the hearse turn? A. Yes.

"Q. Did you endeavor to avoid hitting the hearse? A. Yes. * * *

"Q. Did you see any hand signal before the hearse turned? A. No. * * *

"Q. Did you hear any horn blown? A. No.

"Q. You saw the hearse before it turned? A. Yes.

"Q. And you saw no hand signal? A. No. * * *

"Q. How fast were you traveling? A. About twenty miles an hour."

On cross-examination the same witness further testified regarding that subject:

"Q. You say the driver didn't give any hand signal at all of his intention to turn? A. No.

"Q. How far was the ambulance from you when you first saw it? A. About Mill Street, * * * about two hundred feet northerly of the point of collision. * * *

"Q. And you saw the ambulance during all of the time it was coming down State Street? A. Yes. * * *

"Q. And at no time before the collision did you see a hand signal? A. No, sir.

"Q. Were you looking? A. Yes. * * *

"Q. Did you see the ambulance when it first started to turn? A. Yes.

"Q. Well, how far away were you from it when it first began to turn? A. About twenty feet, I guess. * * *

"Q. Don't you know, as a matter of fact, that Mr. Russell had his hand out signalling a turn for two hundred feet before he made that turn? A. I didn't see any.

"Q. Were you looking for it? A. I saw the car, but not that.

"Q. If he had his hand out and you were looking would you have seen it? A. I should have.

"Q. There was nothing to obstruct your vision? A. No.

"Q. Will you swear that the hand signal was not out and that you were looking in the direction of the ambulance? A. Yes."

Regarding the alleged absence of an arm signal on the part of defendants' driver of the ambulance, the plaintiff testified to substantially the same evidence as that which was given by his son as above quoted.

[2-4] Although the foregoing evidence may be said to be negative in its nature, it nevertheless furnishes substantial proof of an absence of an arm signal on the part of the driver of defendants' vehicle, sufficient to support the finding of the court to the effect that the defendant was guilty of negligence in failing to give the arm signal required by the provisions of section 130 of the California Vehicle Act, which omission became the proximate cause of the collision. The question of the credibility of the witnesses and the weight of their evidence upon that subject were solely problems for the determination of the jury. The question as to whether the plaintiff was guilty of contributory negligence in that regard, or whether the sudden turning of the defendants' ambulance across the pathway of the plaintiff's machine, without warning, so surprised him that he was unable to avoid the collision, are also questions for the jury to decide. From the record in this case, we are unable to say, as matters of law, either that the plaintiff was guilty of contributory negligence or that the defendants were not guilty

of negligence which proximately contributed to the accident.

[5] Regarding the weight and sufficiency of negative testimony to establish the failure to give the statutory signals which are required to be given upon the approach of a railway train to a crossing, it is said in Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 752, 134 P. 709, 711: "But we think it must be held that there was enough in the evidence to justify the jury in finding that the motorman was negligent in not giving proper warning, by bell or whistle, of his approach. It is true that the only evidence that he did not give such warning was negative, consisting of the statements of the people in the automobile that they heard no signal. But, if they were so situated, as they undoubtedly were, as to have been able to hear a bell or whistle sounded from the motor car, their failure to hear is some evidence that no such signal was given. 1 Wig. Ev. § 664; Stotler v. Chicago & A. Ry. Co., 200 Mo. 107, 98 S. W. 509; Cotton v. Willmar, etc., Ry. Co., 99 Minn. 366, 116 Am. St. Rep. 422, 9 Ann. Cas. 935, 8 L. R. A. (N. S.) 643, 109 N. W. 835. That there was positive testimony to the contrary does not conclusively establish that a warning was given. It creates merely a conflict of testimony, which is finally resolved, so far as this court is concerned, by the verdict of the jury. This circumstance alone supports the finding of negligence."

This is the uniform rule respecting negative testimony established by an unbroken line of California authorities. The findings of the court in the present case, respecting the proof of negligence on the part of the defendants and the absence of contributory negligence on the part of the plaintiff or his son, are adequately supported by the evidence.

[6, 7] The findings are not in irreconcilable conflict. In both the answer of the defendants and in their cross-complaint it is alleged that the plaintiff was the owner of the machine in which he was riding at the time of the accident, and that it was then being driven by his son Pete Gialdini, as his agent, and that they were then engaged in a joint enterprise. It was further alleged the defendants were guilty of no negligence, and, upon the contrary, that the collision resulted solely from the negligence of the plaintiff and his son. It is contended the language of finding No. 10, which was adopted by the court is in irreconcilable conflict, since the first portion thereof affirmatively declares that neither the plaintiff nor his son was guilty of negligence, and, upon the contrary, in an effort to negative the charges of carelessness on their part which are alleged in the answer and cross-complaint, the court found, in the latter portion of finding No. 10, that they were guilty of negligence. The alleged contradictory portion of this finding is in the following language:

"That it is not true that at the time and place set forth in said complaint, the said Pete Gialdini failed to use due or any care or caution for the protection of his own safety, and that the said Pete Gialdini at said time carelessly and/or negligently operated the said Ford automobile of plaintiff, and that the acts of the said Pete Gialdini directly or proximately contributed to and/or caused the damages sustained by the plaintiff Angelo Gialdini."

The language of this latter portion of the tenth finding is not as clear as it might have been. However, it may be reasonably construed as a seriatim denial of each of the alleged charges of negligence against the plaintiff and his son as they appear in the answer and cross-complaint. Findings should be construed so as to uphold rather than to defeat a judgment, if reasonably possible. Ensele v. Jolley, 188 Cal. 297, 303, 204 P. 1085; Metcalf v. Hill, 97 Cal. App. 597, 275 P. 994. It is apparent that, in attempting to refute each of the specific charges of negligence against the plaintiff and his son, the challenged finding inadvertently omitted to repeat the words "it is not true" as applied to the last two denials therein contained. It is apparent from a reading of this entire finding that the above-quoted language is understood and intended to have been used. It is reasonable to construe the challenged finding which was adopted by the court in the sense conveyed by the following quotation to which the language enclosed in brackets is added, to wit:

"That it is not true that at the time and place set forth in said complaint, the said Pete Gialdini failed to use due or any care or caution for the protection of his own safety, and (it is not true) that the said Pete Gialdini at said time carelessly and/or negligently operated the said Ford automobile of plaintiff, and (it is not true) that the acts of the said Pete Gialdini directly or proximately contributed to and/or caused the damages sustained by the plaintiff Angelo Gialdini."

Any other construction of the language which was employed in this finding, in view of the use of the alternative words "and/or" would render the finding uncertain, meaningless and absurd. We are therefore of the opinion the finding as it was adopted is not irreconcilable.

[8] Finally, it is contended there is an irreconcilable conflict between the challenged language in the last-mentioned finding and the first general finding to the effect that all of the allegations of the complaint and answer to the cross-complaint are true, "except as hereinafter set forth." The fourteenth finding declares that: "All the allegations contained in paragraphs five and six of the cross-

complaint * * * are true." Paragraphs 5 and 6 of the cross-complaint, last above referred to, merely determine that Pete Gialdini, the minor son of the plaintiff, was licensed to drive the motor vehicle with the consent of his father, and that he was actually driving the Ford automobile at the time of the accident as the agent of plaintiff, and that they were then engaged in a common enterprise. This is not in conflict with the challenged instruction, as we have heretofore construed it, which finds that neither the plaintiff nor his son was guilty of negligence which proximately contributed to the accident. All of the other material allegations of the answer and cross-complaint were found to be untrue.

We are of the opinion the findings may be reasonably reconciled in support of the judgment.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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134 Cal.App. 591

SHANNON v. MT. EDEN NURSERY CO., Inc., et al.

Civ. 8811.

District Court of Appeal, First District, Division 1, California.

Oct. 11, 1933.

1. Evidence 🔑**598(1).**

Jury must be controlled by weight of evidence, in determining preponderance of evidence, as indicated by credibility of witnesses, rather than numerical preponderance (Code Civ. Proc. § 2061, subds. 2, 5).

2. Automobiles 🔑**244(11).**

Evidence justified verdict for defendants, in action for injuries in automobile collision at intersection.

3. Trial 🔑**133(6).**

In personal injury action by police officer, argument respecting plaintiff's eligibility to pension, if error, *held* not prejudicial in view of instruction to disregard it.

4. Appeal and error 🔑**978(2).**

Trial judge's determination whether verdict is due to misconduct of counsel will not be disturbed, unless plainly wrong.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Michael J. Shannon against Mount Eden Nursery Company, Inc., and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Jesse Nichols and D. W. Brobst, both of Oakland, for appellant.

Ernest T. Hall and Bronson, Bronson & Slaven, all of San Francisco, for respondent Haiden Auto Rental Service, Ltd.

Lynn W. Culp, Sr., and Crozier C. Culp, both of Oakland, for respondents Mt. Eden Nursery Company, Inc., and Ishido Yoshio.

PER CURIAM.

Action for personal injuries and damage to an automobile, arising out of a collision at a street intersection. Trial was had before a jury, which resulted in a verdict in favor of the defendants. Motion for a new trial was made and denied. From the judgment and order plaintiff has appealed.

Appellant bases his appeal upon two contentions: First, that counsel for defendant Haiden Auto Rental Service, Ltd., hereinafter designated as the Haiden company, made certain remarks to the jury which it is claimed constituted misconduct; second, insufficiency of the evidence to warrant the verdict. Appellant does not seriously urge the point that there is insufficient evidence in the record to support the verdict; his claim being that, such evidence being weak, the claimed misconduct might have been and in all probability was largely, if not absolutely, responsible for the verdict rendered, for which reason the error complained of warrants a reversal of the judgment even though the misconduct alone would not compel a reversal.

[1] It may be said at the outset that in our opinion the evidence going in support of the verdict is not weak. The record shows a substantial conflict on material matters incumbent on the plaintiff to prove, and there was also substantial evidence adduced by the defendants which, if believed by the jury, prevented plaintiff's recovery. Appellant's contention that the evidence is weak is based upon the fact that a greater number of witnesses testified in support of his allegations. The settled and generally understood rule stated in the Code of Civil Procedure, § 2061, subdivision 5, which directs that when the evidence in a civil case is contradictory the decision must be made upon its preponderance, contemplates that the jury will be controlled by the weight of the evidence, as indicated by the apparent credibility of the witnesses, rather than by their mere numerical preponderance. Witnesses are not counted, but rather their testimony is weighed. By section 2061, subdivision 2, juries are instructed that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce con-

viction in their minds, against a less number. 10 Cal. Jur. § 361. As there was a substantial conflict, the verdict of the jury is conclusive upon the issue of the sufficiency of the evidence.

[2] With reference to the question of negligence, two factors were involved; the speed of each vehicle as it entered the intersection, and which vehicle entered the intersection first. The evidence upon these questions was as follows: Plaintiff was riding in his own car, which was being driven by his son in a westerly direction on Fourteenth street in the city of Oakland. Defendant Yoshio was driving a motor truck in a generally southerly direction along Madison street. The place of the accident was the intersection of these streets. The truck was owned by the defendant Haiden company and had been rented from it by the defendant Yoshio. The complaint alleged that the latter defendant was operating the truck as an agent of, and within the scope and course of his employment with, defendant Mt. Eden Nursery Company in delivering flowers to retail dealers in Oakland. It developed that defendant Yoshio had hired a truck from the Mt. Eden Nursery Company, for the use of which he was to make deliveries for such company of ten baskets of flowers, if required, which service was the agreed rental value of the truck. Yoshio was to keep the truck in repair at his own expense. On the day the collision involved occurred, the hired truck was out of repair and Yoshio hired another truck from defendant Haiden company with which to make deliveries, and it was this latter truck that was involved in the collision when defendant Yoshio was making deliveries of flowers for five different nurseries, including defendant Mt. Eden Nursery Company. All of the defendants denied the alleged negligence of defendant Yoshio as being the proximate cause of the injury and damage, and set up that the negligence of the driver of plaintiff's car was the sole cause of the accident, and contributory negligence was also alleged. Mt. Eden Nursery Company denied the agency of Yoshio.

The plaintiff called five witnesses, who testified that they had observed the collision. Of these witnesses one was the plaintiff himself, and another his son. The others were a police officer who testified he was standing near the curb, and two persons who were occupants of other moving vehicles. There was a definite conflict between the various witnesses as to the speed of the two automobiles upon entering the intersection, and upon the question as to which entered the intersection first. Defendant Yoshio testified that he entered first at a certain speed. The witnesses for plaintiff testified to the opposite effect, but upon cross-examination the testimony of plaintiff's witness, the police officer, showed that Yoshio had the right of way. As we have hereinabove stated, the evidence upon the question of negligence is conflicting, but it is amply sufficient to support the verdict in favor of all the defendants.

[3] The alleged misconduct of counsel for defendant Haiden company arose as follows: Plaintiff was a police officer, and upon his cross-examination by counsel for defendant Yoshio he was asked whether or not he had received full pay for lost time due to the accident. The question was objected to as not being cross-examination, and for the further reason that no relief was prayed for in this connection. The objection was sustained, whereupon counsel for plaintiff made a statement to the effect that he did not want to conceal anything; that the city of Oakland had a pension fund out of which it paid officers during the time they might be disabled; that during the time plaintiff was away from work, due to the accident, he had received what would have been his regular pay if he had been at work. Counsel for plaintiff then agreed to stipulate that this statement was correct. Opposing counsel then stated that he would assume such fact to be correct. In his argument to the jury, counsel for defendant Haiden company stated in effect that plaintiff was not damaged, as he had passed the age limit and was subject to a pension, and could quit his position as a police officer without any loss. Plaintiff objected to the statement, assigned the same as misconduct, and asked that the jury be admonished to disregard it. The trial judge was of the opinion that the statement of plaintiff's counsel concerning the matter, made during the course of the trial as above indicated, justified the argument, but he nevertheless admonished the jury to disregard the statement, and in his instructions to the jury at the close of the case he again instructed it to distinguish between the facts testified to by the witnesses and the statements made by the attorneys in their arguments, as to what facts had been proved. The jury was further instructed that if there was a variance between the two in arriving at its verdict it could consider only the facts as testified to by the witnesses, or admitted facts, and that statements of counsel in their argument were not evidence in the case and should be given no weight whatsoever. Even conceding the remarks to have been error, it is manifest that the error was thoroughly cured by the instructions given during the course of the trial and at the conclusion of the evidence.

[4] It is only in the most extreme cases where an instruction to the jury, if given, will not remove the effect of improper remarks. Tingley v. Times-Mirror Co., 151 Cal. 1, 89 P. 1097, Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393. Moreover, the alleged misconduct related to the amount of damages only, and by its verdict the jury concluded

that plaintiff was entitled to nothing, either for himself or for the damage to his automobile. Then again, a trial judge is in a better position than an appellate court to determine whether a verdict is probably due wholly or in part to misconduct of counsel, and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong. The trial court passed upon the matter upon the motion for a new trial, and held the claimed error was not prejudicial. Counsel for appellant has cited us to several cases in support of the alleged misconduct as constituting reversible error. Nothing contained therein is opposed to the views herein expressed, and a review of the authorities would answer no useful purpose.

The judgment is affirmed.

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134 Cal.App. 340

WILLIAMS v. SPAZIER et al.

ORR v. SAME.

Civ. 8422.

District Court of Appeal, First District, Division 2, California.

Sept. 27, 1933.

Hearing Denied by Supreme Court Nov. 24, 1933.

1. Appeal and error 🔑882(3).

Cause having proceeded in trial court on theory that certain matters were in issue, respondent could not raise point on appeal that certain allegation in his complaint must be treated as admitted.

2. Fraud 🔑58(2).

In action for fraud in sale of stock, evidence did not support finding that defendant knew that representations respecting financial condition of corporation were false (Civ. Code, § 1710, subd. 1).

3. Conspiracy 🔑19.

In action for fraud charging conspiracy in sale of corporate stock, evidence did not show conspiracy among several defendants to defraud.

4. Fraud 🔑13(2).

Disbelief in truth of statement or lack of reasonable ground for believing it are elements made necessary by statute to support action for fraud (Civ. Code, § 1710, subds. 1, 2).

5. Fraud 🔑50.

In action for fraud in sale of corporate stock, plaintiffs were bound to introduce proof, not merely of falsehood, but of falsehood and fraud or deceit (Civ. Code, § 1710, subds. 1, 2, and § 1572, subd. 2).

6. Fraud 🔑58(1).

In action for fraud in sale of corporate stock, evidence did not show that defendant's misstatements of financial condition of corporation were made willfully or with intent to deceive, or that he did not believe them to be true, or that he had no reasonable ground for believing them to be true (Civ. Code, § 1710, subds. 1, 2, and § 1572, subd. 2).

7. Evidence 🔑60.

In action for fraud in sale of stock, there was presumption of defendant's innocence of crime and of his innocence of fraud (Civ. Code, § 1710, subds. 1, 2, and § 1572, subd. 2).

8. Trial 🔑142.

Where there are two inferences equally reasonable and equally susceptible of being drawn from facts, court or jury must draw inference favorable to fair dealing rather than one favoring corrupt practice.

Appeals from Superior Court, Monterey County; Maurice T. Dooling, Judge.

Actions by Oliver J. Williams and by Calvin M. Orr against M. Spazier and others. From judgments for plaintiffs, named defendant appeals.

Reversed.

Prior opinion, 21 P.(2d) 470.

Anthony Brazil, of Pacific Grove, and Francis Gill and Philip Selig, Jr., both of San Francisco, for appellant.

Harry G. McKanny, of San Francisco, for respondent Williams.

Wyckoff, Gardner & Parker, of Watsonville, for respondent Orr.

NOURSE, Presiding Justice.

The plaintiffs each sued defendants for damages for fraud. The actions were consolidated for trial and were tried by the court without a jury, and each plaintiff had a judgment. The defendant Spazier alone prosecutes these appeals upon typewritten transcripts, and both appeals are presented on the same record.

[1] The plaintiffs charged a conspiracy on the part of the defendants to induce them to purchase fifty shares each in the Peninsula Title Guarantee Company at the price of $5,000; that defendant Spazier represented that he planned to incorporate a title insurance company which would take over all the plant of the title company and that the stockholders of the title company would take three shares of stock in the new corporation for one held in the title company; that defendant Spazier, "pursuant to and in furtherance of the said conspiracy," made representations to the plaintiffs as to the value of the stock and

plant of the title company which were untrue, and which, if true, would have made the stock of the title company worth $400 a share; that said shares "were and now are worthless and of no value whatever"; and that each plaintiff was therefore damaged in the sum of $5,000. To the Williams complaint the defendant Spazier denied generally and specifically all the allegations relative to value and damages. To the Orr complaint he answered denying specifically that said shares of stock "were and/or now are worthless and/or of no value whatever." At the close of plaintiff's case counsel for plaintiff Orr stated to the court that he desired to amend his complaint by alleging a different amount of damages, that the measure of damages in cases of this character is the actual value of the property—the difference between the actual value of the property and what it would have been had the representations been true, and that on that basis "the actual value of the property as shown at the present time—the maximum is the book value of approximately $88 a share and the value of which it would have had had the representations been true is something over $400 a share." He then asked leave to amend to conform to the proofs by alleging damages of $16,000 instead of $5,000. Counsel for plaintiff Williams joined in the request, and it was granted without objection. In his opening statement counsel for plaintiff Orr in outlining the issues to the court referred to the allegations in his complaint that the shares of stock were of no value, and that by reason thereof plaintiff was damaged in the sum of $5,000, and said to the court, "the allegation as to damage is denied by all the defendants." Thereafter he proceeded at great length to prove the actual value of the shares at the time of the transaction, and concluded his case with the admission that "the maximum is the book value of approximately $88 a share." At no stage of the proceeding was it contended by any party that the specific denial that the stock was worthless and of no value was a negative pregnant and as such an admission that the stock was of *approximately* no value. Relying upon the explanation by counsel of the issues involved, upon his admission in open court, and upon the conduct of all the parties throughout the trial, the court treated the issue as properly joined and found in accordance with the evidence offered by plaintiffs and the admissions of counsel that the stock had an actual value of $88 a share. On this appeal counsel for respondent Orr argues that as to him the answer must be treated as a negative pregnant, and that the allegation that the stock was worthless and of no value must be treated as admitted. But the cause proceeded upon the theory that these matters were in issue and the respondent is not permitted to raise the point at this time. Eastern Hotel v. Miller Bros., 101 Cal. App. 241, 244, 281 P. 661; Lopes v. Bruns, 92 Cal. App. 691, 693, 268 P. 928.

The issues thus framed and tried were that the defendants conspired to defraud the plaintiffs through the sale of corporate stock which was of no value. There is little conflict in the evidence. The defendant Spazier admitted having made some of the representations charged, but defended on the ground that they were mere matters of opinion the source of which he disclosed to the purchasers. The plaintiffs admitted that they made no investigation of the properties of the title company, though they had frequent opportunities to do so, but both contended that they relied implicitly upon the representations made by appellant. The parties were casual acquaintances, having met on a golf course maintained by a club of which they were members and operated in connection with a new suburban tract in which they had purchased homesites.

The representations of which the plaintiffs complain were: (1) That the title company had earned a net profit of $10,000 during the previous twelve months; (2) that it was free of liabilities and had a surplus of $7,500; (3) that its plant had a value of $150,000 and the company could pay a dividend of 30 per cent. The trial court found that the defendant Spazier made said representations positively and as statements of fact, that when made they were known by said Spazier to be false and without any foundation of fact, and that at the time he had no information upon the subject of said representations sufficient to warrant the making thereof. It was then found that the actual value of the 50 shares was $4,350 and that had the representations been true these would have had a value of $10,550. Judgment in each case went for the difference in these two valuations.

[2-6] There is evidence sufficient to sustain the finding that the representations were made as statements of fact at a time when the appellant had no knowledge of or information on the subject sufficient to warrant the making of the representations. There is also evidence to support the finding that appellant did not disclose to either plaintiff the source of his information, although from their own testimony it appears unmistakably that before they entered into the transaction they *knew* that the source of the appellant's information was his codefendant Warren, an officer in the title company. There is no evidence to support the finding that the appellant knew that the representations were false and without any foundation in fact.

The evidence discloses that the parties were dealing at arm's length; there was no confidential or fiduciary relation between them. There is no evidence of malice, oppression, or bad faith on the part of appellant. The evidence is that he believed all that had been told him about the property, had purchased fifty shares in the title company for $5,000, and had passed his information on to the respondents urging them to buy on the same terms. His carelessness in not seeking the truth of the representations must be conceded. That the representations of the value of the title company were highly excessive must have been evident to all, and the negligence of the respondents in failing to make any investigation cannot be denied. The whole setup discloses unmistakably that the parties were not dealing in terms of shares in the title company, but that they were concerned solely with the proposed plan to organize a title insurance company for which purpose the title company was to be used only as a means of organization. The evidence coming from the lips of the respondents is that they were not investing in the stock of the title company, that their interest was in the organization of a *title insurance* company only, and this was their excuse for not investigating the value of the title company. This insurance company was organized in accordance with the agreement, but the consolidation failed because of the defalcation of the manager of the title company. The organization of this title insurance company was the primary and sole purpose of all the negotiations. The stock in the title company was being taken solely for the purpose of its use in organizing the title insurance company. There is not a word of evidence tending to show that any of the parties at any time treated the value of the shares in the title company in terms of dollars and cents, nor that they treated those shares in any other terms than as a means of forming the title insurance company. There is no evidence of any character tending to prove that the appellant at any time investigated the physical plant or the book values of the title company or that he had any knowledge of its value other than the information which had been given him by Warren and which he passed on to the respondents. There is no evidence of any character tending to prove the allegation of a conspiracy on the part of appellant. All the evidence shows unmistakably that he had been deceived by Warren and that he did not know that he had been deceived until long after this transaction was completed. There was no proof of agency on the part of appellant; the evidence is all to the contrary. The undisputed evidence is that when the appellant paid $5,000 for fifty shares of the title company stock he expected to receive fifty shares of treasury stock. The manager of the title company fraudulently sent him fifty shares of his own stock and appropriated the proceeds. When appellant delivered to the title company the two checks which he received from the respondents he expected them to receive treasury stock. The manager fraudulently delivered to them fifty shares each of his own stock and appropriated the proceeds. Knowledge of these frauds did not come to the appellant until after the manager of the title company had decamped with the proceeds of these sales.

In both cases respondents rest their cause on a conspiracy among the several defendants to defraud. Having wholly failed to prove the conspiracy, their case against this appellant rests either in willful deceit within the provisions of sections 1709, 1710 of the Civil Code, or in tort for negligence. Deceit is defined in section 1709 as a willful act with intent to induce another to alter his position to his injury. Section 1710 contains four subdivisions further defining deceit. These actions could have arisen under the first two only. Subdivision 1 reads: "The suggestion, as a fact, of that which is not true, by one who does not believe it to be true." Subdivision 2 reads: "The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." Here there is no allegation, proof, or finding that any of the acts complained of were *willfully* done with intent to induce respondents to alter their position to their injury. The pertinent finding is that all the representations made by Spazier "were and are false and when made were by said Spazier * * * known to be false and without any foundation in fact; that the defendant M. Spazier made said representations and each of them positively and as statements of fact, and at the time had no information upon the subject of said representations and/or statements sufficient to warrant the making thereof." The finding is a mixture of language found in section 1710 and in subdivision 2 of section 1572. The latter section defines actual fraud committed *by a party to the contract* as including "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." It will be noted that it is nowhere found that appellant did not have reasonable grounds for believing the statements to be true. The inconsistencies in the finding are apparent, though probably not material. A fact is a fact no matter what a person may believe as to its truth or falsity. If a statement is made as of a fact, which statement is known by the maker to be false, and the fact is nonexistent, then there is no reasonable ground for believing it to be true. But there is a wide difference between belief as to its truth or falsity and knowledge thereof. A person may believe a statement to be true after a thorough examination thereof, whereas another will believe it without examination. Disbelief in the truth of the statement or lack of reasonable ground for believing it are the elements made necessary by these subdivisions of section 1710. What information upon a subject may be sufficient to *warrant* a statement thereon is a purely academic inquiry wholly outside the statutory elements necessary in an action for deceit. The importance of this finding lies in the fact that there is not a word of evidence supporting the first part of the finding —that the appellant knew the statements were false when he made these representations to the respondent. The undisputed and uncontradicted evidence is that the appellant was deceived by Warren, that he first consulted his banker and was given a favorable report of Warren and of the title company, that the statements which he made to the respondent were based on information given him by Warren, that he purchased from Warren stock in the company of like amount and at the same price as the respondents paid, and that he did not discover the falsity of Warren's representations until long after the transactions herein were completed. The case must rest, therefore, upon the second portion of the finding covering appellant's lack of information. As to this point the evidence is that appellant believed Warren after the recommendation of his banker and that he made no investigation of and had no information upon the financial standing of the title company other than what he had received from Warren. Now, whether these facts were sufficient to warrant the making of the statements or whether they formed reasonable ground for appellant's believing the representations to be true presents two entirely different lines of inquiry. What may be necessary to warrant the making of a statement depends upon all the circumstances under which the statement is made—the confidential or fiduciary relation between the parties, the mental capacity and business acumen of those to whom the statements are made, and the knowledge on the part of the maker as to the manner in which they will be received—whether with or without investigation on the part of those to whom the statements are made. But whether a party has a reasonable ground for believing a statement to be true depends wholly upon the conditions under which he has formed that belief. Thus the fact depends upon the conditions existing prior to the making of the statement and does not depend, as in the other case, upon the circumstances under which, or the parties to whom, it is made. Hence if the appellant believed these statements to be true, and the evidence shows that he did so believe, then the inquiry is, Did he lack reasonable ground for believing them? Upon this issue there was no finding.

Here the evidence showed that appellant made numerous misstatements of the financial condition of the title company, but there is no evidence that said misstatements were made (1) willfully, (2) with intent to deceive, (3) that he did not believe them to be true, or (4) that he had no reasonable ground for believing them to be true. The respondents were bound to introduce proof not merely of a falsehood, but of falsehood and fraud or deceit. The rule is clearly set forth in 2 Pomeroy's Equity Jurisprudence, §§ 884 and 885. The rule had been distinctly announced in Behn v. Kemble, 7 C. B. Rep. (N. S.) 97 Eng. Com. Law Rep. 264; Addington v. Allen, 11 Wend. (N. Y.) 374, 389; Zabriskie v. Smith, 13 N. Y. 322, 330, 64 Am. Dec. 551. When the Codes were adopted the rule, as announced in those cases, was adopted in framing the provisions of sections 1708–1710, inclusive. See Commissioners' Code, 1872. The decisions of this state are to the same effect. Newman v. Smith, 77 Cal. 22, 26, 18 P. 791; Daley v. Quick, 99 Cal. 179, 185, 33 P. 859; Filipini v. Trobock, 134 Cal. 441, 443, 62 P. 1066, 66 P. 587. In Camm & Hedges Co. v. Bank of Covelo (Cal. App.) 275 P. 828, the majority of this court, in a case involving the same point of law, held that it was error to grant a nonsuit because the jury might *infer* willful intent to deceive. Justice Sturtevant dissented and pointed out the difference between an action for fraud by a party to the contract and an action of deceit under section 1710, Civil Code. The foregoing cases were cited by him as to the necessity of proof of the elements specified in the Code section. The cause was transferred to the Supreme Court and, though the reasoning of the dissenting opinion was not adopted, the rule was followed, the Supreme Court saying: "There is no liability, therefore, on the part of these defendants on the theory of breach of contract, nor is there a liability under section 1709, Civil Code, for there is no proof of any of the conditions enumerated in section 1710, Civil Code." 208 Cal. 246, 250, 280 P. 962, 963.

[7, 8] We are unable to distinguish this case from the rule followed in Camm & Hedges Co. v. Bank of Covelo, supra. In that case the majority thought the evidence was sufficient to support an inference that the statements were *known* to be untrue. The reasonableness of ground for defendants' believing them to be true was not considered. Here the direct evidence is all to the effect that the appellant did not *know* that the statements were untrue at the time they were made. Taking this evidence with the observation that if he did know them to be untrue he was guilty of a fraud (which might also have been a crime if he had profited by it), we are confronted with the presumption of innocence of crime and a presumption that one is innocent of fraud. Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26; Hoffman v. Superior Court, 151 Cal. 386, 391, 90 P. 939; Simonton v. Los Angeles Trust & Savings Bank, 205 Cal. 252, 257, 270 P. 672. Hence it was said in Ryder v. Bamberger, 172 Cal. 791, 799, 158 P. 753, 756, "For, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the

other favoring corrupt practice, *it is the express duty of court or jury to draw the inference favorable to fair dealing.*" (Italics ours.)

The judgments are reversed.

We concur: STURTEVANT, J.; SPENCE, J.

CONLEY v. HAWLEY et al. *

Civ. 9012.

District Court of Appeal, First District, Division 2, California.

Oct. 11, 1933.

Hearing Granted by Supreme Court Dec. 7, 1933.

1. **Municipal corporations** 🔑**293(1).**

Street improvement proceedings in city of sixth class *held* not defective because resolution of intention did not specify statute under which proceedings were taken, where statutes did not require such specification (St. 1885, p. 147).

2. **Municipal corporations** 🔑**294(3).**

Post card notice, to lot owners, of street improvement proceedings, *held* not defective because designating specified statute as authority for proceedings, and because inserting word "West" in name of street (St. 1885, p. 147).

3. **Municipal corporations** 🔑**543.**

Recital, in published notice of sale for nonpayment of street improvement bond, that written demand to sell had been made on previous day, *held* conclusive on appeal (St. 1893, p. 36, § 5).

4. **Municipal corporations** 🔑**543.**

In notice of sale for nonpayment of street improvement bond, possible error in calculating interest for portion of leap year, amounting to difference of 4 cents, *held* too trivial for consideration (St. 1893, p. 33).

5. **Municipal corporations** 🔑**543.**

That affidavit of publication of notice of sale under street improvement bond did not state that copy attached was true copy of original notice did not invalidate deed following it, where verity of published notice of sale was not questioned (St. 1893, p. 33).

6. **Municipal corporations** 🔑**577, 581, 582.**

Treasurer's deed issued upon sale for nonpayment of street improvement bond, and notice to owner of right to redeem and recitals in sale certificate could not be held confusing, where they complied with statute (St. 1893, p. 33).

7. **Taxation** 🔑**814(1).**

Purchaser, under tax deed, *held* not entitled to reimbursement of moneys he expended for delinquent taxes, where property was taken from him for nonpayment of subsequent street improvement bond (Pol. Code, § 3898).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Oliver Cram Conley against Gertrude Hawley, T. A. Davis, and others. From the judgment, T. A. Davis appeals.

Affirmed.

Winslow P. Hyatt, of Los Angeles, for appellant.

A. E. Briggs, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

The issues involved on this appeal are correctly stated by appellant as follows: "This action is one to quiet title to real property. The defendant Davis denies plaintiff's title, and asserts title in himself. Respondent's claim of title is based solely upon a treasurer's deed, issued upon a sale for nonpayment of a street improvement bond. Appellant claims title under another treasurer's deed to the same property, issued upon a sale for nonpayment of a street improvement bond of earlier date; and also upon a tax deed issued for nonpayment of general state and county taxes. Respondent does not attack or question the validity of the deeds to appellant, otherwise than to claim that they were foreclosed by the sale and deed to him based upon a later assessment lien having priority."

[1] The street improvement bond upon which respondent founds his title was issued pursuant to the Bond Act of 1893 (Stats. 1893, p. 33), following street improvement proceedings initiated under the Vrooman Act (Stats. 1885, p. 147) by the city of Inglewood, a municipal corporation of the sixth class. Primarily the appellant contends that the street improvement proceedings were all defective because the resolution of intention did not specify the statute under which they were taken. Cases are cited requiring strict compliance with statutory requirements in proceedings of this nature. No one has any application here because no one of the statutes covering street improvements required the council to specify in its resolution of intention that it proposed to proceed under any particular act. Cases holding that the "mode is the measure of the power" are not applicable to a case where there is no departure from the mode prescribed which measures the power exercised. As the city of Inglewood was one of the sixth class, all general laws gov-

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*For subsequent opinion see 38 P.2d 408.

erned its proceedings and this distinguishes the case from those involving a chartered city which is given the right to select and adopt some general state statute of procedure or to prescribe a method of its own.

[2] The city clerk mailed a postal card notice to each of the owners of lots included in the proposed improvement. This card stated that the council was proceeding under the "Vrooman Act" in the improvement of "West Kelso Street between Grevilla Avenue and Ash Avenue." The appellant complains that the notice is defective because it assumes to designate the Vrooman Act as authority for the proceedings and inserts the word "West" in the name of the street. But the notice meets all the requirements of the statute and the description of the street to be improved is not shown to be uncertain or confusing. Rice v. Hanrahan Co., 210 Cal. 625, 634, 293 P. 57.

[3] The published notice of sale recited that written demand to sell had been made on the previous day. Section 5 of the Bond Act of 1893 provides that on the day following written demand to sell the whole bond shall become delinquent. The first publication occurred on December 18, 1928. The recital that demand had been made on the 17th is conclusive here and the statute, in this respect, was strictly followed.

[4] It is objected that the notice of sale incorrectly designated the amount of principal and interest due as $799.07, whereas the correct amount was $799.11. The difference arises in the method of estimating the interest for the portion of the year 1928, a leap year. The respondent took this year as including 366 days and estimated according to the number of days of that year that the bond was delinquent. The appellant insists that the proper method is to treat the period as a portion of a regular calendar year. The difference of 4 cents is in favor of appellant and the point is too trivial to merit consideration.

[5] The affidavit of publication of notice of sale of the bond stated that attached thereto was a "printed" copy of the notice. Appellant argues that the affidavit is insufficient because it did not state that the copy attached was a "true" copy of the original notice. But the verity of the published notice is not questioned and a trivial defect in the affidavit does not invalidate the deed which followed.

[6] It is argued that there is some confusion between the treasurer's deed and the notice to the owner of his right to redeem. But both comply with the statute. The same may be said as to the recitals in the certificate of sale relating to the period of redemption and to the amount due. Tasker v. Nieto, 108 Cal. App. 135, 144, 291 P. 688.

[7] Finally, it is argued that the trial court erred in failing to find appellant's title as a purchaser under a tax deed, and in failing to award to him the sums paid by him for delinquent taxes. Appellant's rights as such purchaser were not in issue. They were admitted, but respondent contended that such rights were subordinate to his lien arising from the improvement bond. The reimbursement to a purchaser under a tax deed of the moneys expended by him for delinquent taxes (Pol. Code, § 3898) is permissible only where the judgment deprives him of the property because of some defect in the tax sale. The section does not apply where the property is taken to extinguish some superior lien; it is a special statute covering a special state of facts which are here nonexistent.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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134 Cal.App. 574

GUARDIA v. JOHNSON, State Treasurer, et al.

Civ. 8012.

District Court of Appeal, Second District, Division 2, California.

Oct. 10, 1933.

1. Courts ⚷125.

Superior court had jurisdiction of action which, though cast in form of action at law, by its allegations showed conclusively that relief sought was mandate to state officers to return tax.

2. Licenses ⚷34.

Gasoline retailer *held* entitled to refund of tax paid upon gasoline which leaked out, under act taxing gasoline used as fuel in vehicles propelled upon highways (St. 1923, p. 575, § 11, as amended).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by G. Guardia against Charles G. Johnson, State Treasurer of the state of California, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

U. S. Webb, Atty. Gen., and H. H. Linney and John L. Flynn, Deputy Attys. Gen., for appellants.

Gordon A. Goodwin, of Los Angeles, for respondent.

STEPHENS, Justice.

[1, 2] Plaintiff below, respondent here, retails gasoline to motorists and purchased a large quantity thereof for resale, and paid the tax thereon. It leaked out of his tanks. The law provided that those "who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles operated * * * upon the public highways," etc. (St. 1923, p. 575, § 11, as amended) may have the tax refunded by applying to the state controller under certain conditions. The conditions have been complied with. The superior court overruled demurrers to the complaint, and, as no amendment was proffered, judgment was entered in favor of plaintiff. The appeal is upon the judgment, and the points raised are: (1) The complaint is one at law and the municipal and not the superior court has jurisdiction; (2) the refund is limited to fuel not only bought but actually used, and that leaked gasoline has not been used.

There is nothing in either contention. While the action is cast in the form of an action at law, its allegations show conclusively that the relief sought is a mandate to the state officers to do their duty and return the tax. The second contention is based upon detached words of the tax act and not upon its plainly expressed intention. The act provides for a tax upon gasoline used as fuel in vehicles propelled upon the highways. The tax goes to construct and maintain these highways. The rational of this case is covered by Oswald v. Johnson, 210 Cal. 321, 291 P. 579.

Judgment is affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

134 Cal.App. 545

POMETTI v. LARAIA et al.

Civ. 4745.

District Court of Appeal, Third District, California.

Oct. 9, 1933.

1. Husband and wife 🔑273(12).

In action by surviving husband to quiet title to land which he conveyed to his deceased wife and which wife reconveyed, evidence sustained finding that reconveyance was made voluntarily.

2. Appeal and error 🔑1011(1).

Trial court's finding on conflicting evidence, after having heard all witnesses, will not be disturbed on appeal.

3. Executors and administrators 🔑315(5).

Decree of distribution distributes only such title as testator had at time of his death.

4. Quieting title 🔑1.

Action to quiet title is proper method by which to settle question whether testator owned property which decree of distribution in his estate purports to distribute.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Frank Pometti against G. N. Laraia and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Wellborn & Wellborn and Stephen Monteleone, all of Los Angeles, for appellants.

C. E. Heidingsfelder, of Houston, Tex., and E. M. Torchia, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem., delivered the opinion of the court.

Henrietta Pometti was the mother of five children at the time of her marriage to Francesco Pometti in 1891. Of this second marriage there were five children, and these ten children were raised as one family. Considerable property, or at least numerous separate pieces or parcels of real estate, were accumulated during the years that elapsed between their marriage and the death of Mrs. Pometti in 1923.

This is an action to quiet title to certain pieces of real estate in the city of Los Angeles. The action is brought by (Francesco) Frank Pometti, and the five children of Mrs. Pometti's former marriage are named as defendants. The complaint was filed April 27, 1928.

Certain undisputed facts are as follows: In December, 1915, Frank Pometti executed to his wife, Henrietta Pometti, a deed of gift of the two pieces of property involved in this action. April 27, 1922, Henrietta Pometti redeeded this same property to her husband, Frank Pometti. On the 29th day of April, 1922, Frank Pometti made his will, and at the same time and in the same place Henrietta Pometti made her last will and testament. The wills were nearly identical; the husband giving all to the wife during her lifetime, and at her death to be distributed among the ten children in certain portions. In the same manner the wife gave to her husband, for life, "all my interest into the community and separate property, both real and personal, of every kind, * * * the remainder of said property to vest at his death as follows:" (Then follows the same distribution that is made in the will of Frank

Pometti.) The two properties affected by this action were to be distributed to the children of the first marriage, the defendants and appellants herein. Henrietta Pometti died in July, 1923. Her will was duly admitted to probate.

Frank Pometti, the plaintiff and respondent, was the executor of his wife's will. In the final account and petition for distribution signed and verified by said Frank Pometti, he states: "That all of the said property mentioned in said will is community property and was purchased by the said petitioner, Frank Pometti, after marriage." In the prayer of said petition the petitioner asks: "That a decree be made for the distribution of said estate, and that all of the said estate be distributed to your petitioner herein."

In December, 1925, a decree of distribution was made and entered in the estate of Henrietta Pometti, deceased, by which decree the property was distributed according to the terms of the will, and not according to the prayer of the petition for distribution.

November 10, 1926, a petition to modify the decree was filed. Said petition was signed and verified by Frank Pometti. This petition alleges a mistake in the decree, and sets forth the minute order of the court upon the hearing of the final account and petition for distribution, as follows: "Account settled; distribution ordered." There is nothing in the record to show what, if any, action was taken on this petition to modify it.

[1] Appellants contend that the evidence fails to support the finding of fact, that on the 29th day of December, 1915, while the plaintiff herein was sick, he unknowingly executed a deed of gift to the property described in the complaint to his wife, Henrietta Pometti, now deceased; that the evidence fails to support the finding that on the 27th day of April, 1922, the said Henrietta Pometti, voluntarily, without menace, duress, or undue influence on the part of the plaintiff or any one else in his behalf, after being fully advised of her rights in the premises, in consideration of the love and affection, and for the better maintenance, support, protection, and livelihood of the plaintiff, redeeded said property to the plaintiff. We think there is ample evidence in the record to sustain these findings.

Witness Vincent Giorgio, testified that he visited Frank Pometti during the month of December, 1915, twice, and that he (Pometti) was very, very sick in bed. Witness Jo Longo testified that he visited Mr. and Mrs. Pometti in December, 1915; "He was very bad sick the first time I went to see him;" that he visited him several times; he remembered the date because it was close to Christmas. Frank Pometti testified that he was very sick during the month of December, 1915; that he had typhoid fever; that he was sick for thirty-five days; that he does not remember signing anything during the month of December, 1915; that he found out afterwards, about 1922; that he got a lawyer and went to the records; after that he talked to his wife about it, and "she told me she didn't know a thing about it"; further, that his wife said, "If you think I done something wrong, I go to the lawyer and get the thing straightened out again"; that they went to Mr. Torchia's office; that his wife said, "'My husband, Frank, said I have done something that was not right so I want to fix it right again.' She said: 'I want him to be entitled to it because he worked for it.'" Witness was questioned about her coming to make the deed. "Q. Did you force her, or did you use any force, or did you compel her by words to come, or did she come voluntarily? A. She came with good willing." Mr. Torchia testified that he explained fully to Mrs. Pometti in the Italian language the effect of the deed, that he asked if she understood, and she said that she did not know how it came about, and that she said, "I want that to come back to him." He further testified that she made the deed voluntarily without any suggestion from Mr. Pometti; that he explained to her the effect of the will; that he explained it all to her in the Italian language, which she spoke very well; that he did not misrepresent anything to her; that he explained that, if she died first, she could not will the property, but that, if he died first, she would have her community interest; that they discussed the matter that she had no interest unless Mr. Pometti died first.

[2] There is evidence contradictory to the foregoing, but the court, having had all of the witnesses before him, was in a better position to judge of the truth or falsity of the evidence, and therefore the findings, under well-settled principles of law, will not be disturbed on appeal.

Appellants contend that a constructive trust existed in connection with this property, and that respondent was an involuntary trustee. Such contention is based upon their claim that the deed from husband to wife was given in good faith, but that the deed by the wife to her husband reconveying said property to him was fraudulently obtained, and that the wife was deceived in that she believed she could still will the property, even though she died first. But, the findings of the court being sustained, this contention must fail.

It is admitted that the property described in said complaint was community property, and that the said Henrietta Pometti, deceased, had no interest in said property at the time of her death of which she could make testamentary disposition. The property having been acquired prior to the year 1923, the law vested in the husband, on the death of the wife, the title to the community property.

[3, 4] Appellants further claim that respondent is barred to assert any right except a life estate in the property, by virtue of the decree of distribution of the estate of Henrietta Pometti, deceased. The decree of distribution distributed only such title as the testatrix had at the time of her death. If the testatrix does not own the property, obviously the decree of distribution passes no title, and an action to quiet title is the proper method by which to settle the question of ownership, and record title.

We find no merit in the appeal.

The judgment is affirmed.

We concur: **PLUMMER, Acting P. J.; R. L. THOMPSON, J.**

134 Cal.App. 580

Ex parte WOOFTER.

Cr. 1285.

District Court of Appeal, Third District, California.

Oct. 10, 1933.

Hearing Denied by Supreme Court Nov. 8, 1933.

1. Statutes ⚿107(3).

Statute relating to terms of imprisonment and how they may be determined, fixed, and shortened *held* not invalid as including more than one subject not included in title (Pen. Code, § 1168, subds. 2, 3, as amended by St. 1929, p. 1930, § 1).

The title of St. 1929, p. 1930, reads: "An act to amend section 1168 of the Penal Code, relating to terms of imprisonment, credits to prisoners for good behavior and parole of prisoners; and to repeal sections 18, 18a and 1588 of the Penal Code, relating to terms of imprisonment."

Constitutional law ⚿250.
Escape ⚿13.

Statute punishing escape by imprisonment to begin at end of original term was not unconstitutional because applicable only to prisoners sentenced for less than life (Pen. Code, § 106).

In the matter of the application of Francis Woofter for a writ of habeas corpus prayed to be directed to the Warden of Folsom State Prison to secure release of petitioner on the ground of illegal detention.

Writ denied.

Francis Woofter, in pro per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

On the 8th day of October, 1929, an information was filed in the superior court of the county of Butte, charging the prisoner with the crime of escape, in that the petitioner, on or about the 27th day of March, 1929, in the county of Butte, who had theretofore been committed to the state prison at San Quentin, for a term less than life, did escape while engaged in road work at camp 17, in Butte county, in violation of section 106 of the Penal Code. After trial, the petitioner was on the 16th day of October, 1929, found guilty and sentenced to the state prison at Folsom.

Upon this application, the petitioner contends that at the time of his trial, and on the date of pronouncing judgment and sentence, there was no section of the Penal Code providing for the punishment of such an offender in the state prison. This contention is based, first, upon the act of the Legislature approved June 19, 1929, purporting to repeal sections 18, 18a, and 1588 of the Penal Code (St. 1929, p. 1930).

The further contention is made that the offense of which the petitioner is found guilty, and for which he was sentenced, is only a misdemeanor, in that no penalty was provided by the Codes for the offense of which the petitioner is found guilty. Section 177, Penal Code, reads as follows: "When an act or omission is declared by a statute to be a public offense, and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor." Prior to August 14, 1929, the time of taking effect of the act of the Legislature just referred to, section 18 of the Penal Code was worded as follows: "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment in any of the state prisons, not exceeding five years." Section 18a of the same code read as follows: "Except in cases where a different minimum punishment is prescribed by any law of this state, for every offense declared to be a felony and punishable by imprisonment in the state prison, the minimum punishment shall be imprisonment in any of the state prisons for not less than six months." Section 106 of the Penal Code, at the time of the commission of the offense charged against the petitioner, read as follows: "Every prisoner committed to a state prison for a term less than for life, who escapes or attempts to escape while being conveyed to or from or while confined within such prison or while at work outside such prison under the surveillance of prison

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

guards is guilty of a felony and on conviction thereof the term of imprisonment therefor shall commence from the time such convict would otherwise have been discharged from said prison."

The act of the Legislature approved June 19, 1929, and becoming effective August 14, 1929, contained the following: "Sec. 2. Sections 18, 18a, and 1588 of the Penal Code are hereby repealed." The same act, purporting to amend section 1168 of the Penal Code, contained the following: Subdivision 2: "*Maximum Penalty, Generally.* Except in cases where a different punishment is prescribed by this code, every offense declared to be a felony is punishable by imprisonment in any of the state prisons, not exceeding five years." Subdivision 3: "*Minimum Penalty, Generally.* Except in cases where a different minimum punishment is prescribed by this code, for every offense declared to be a felony and punishable by imprisonment in the state prison, the minimum punishment shall be imprisonment in any of the state prisons for not less than six months." These two subdivisions of section 1168, supra, as amended, include, in substance, all of sections 18 and 18a as they read prior to August 14, 1929.

[1] The contention of the petitioner is to the effect not only that sections 18 and 18a, supra, have been repealed, but that subdivisions 2 and 3 of section 1168, supra, as amended, are ineffective, in that the Constitution requires only one subject to be included within the title of an act, and that more than one subject is included within the act of the Legislature becoming effective August 14, 1929, and not properly included in the title. The title of the act reads as follows: "An act to amend section 1168 of the Penal Code, relating to terms of imprisonment, credits to prisoners for good behavior and parole of prisoners; and to repeal sections 18, 18a and 1588, of the Penal Code, relating to terms of imprisonment."

Section 1588 of the Penal Code, on August 14, 1929, related to credits and allowances for good behavior that might be awarded prisoners, and also forfeiture thereof for misconduct or violation of rules. While it may be admitted that the title used by the Legislature in 1929 amending section 1168 of the Penal Code refers to several particulars, that does not necessarily enforce the conclusion that different subject-matters are contained therein, or that different subject-matters are set forth in the act and not specified in the title. The whole act and the title thereto refers in fact to only one subject, and that is, terms of imprisonment and how those terms of imprisonment may be determined, may be fixed, and may be shortened by the conduct of the prisoners while incarcerated. On the other hand, if the petitioner's contention should be held well taken that the act is void because it violates a constitutional provision, then and in that case the purported repeal of sections 18 and 18a of the Penal Code would necessarily fall with the act, with the result that said sections were in full force and effect at the time of the commission of the offense charged against the petitioner, and also at the time sentence was pronounced upon him.

[2] The contention is also made that section 106 is violative of the constitutional rights of the petitioner, in that there is no just reason for classifying prisoners as those who are sentenced for less than life, and fixing an additional penalty upon them for escaping or attempting to escape, when no such penalty is provided for life-termers. The mere statement of the contention shows its fallacy, as no additional term of imprisonment could be imposed upon a life-termer, to begin at the expiration of his term of sentence.

The contention based upon the case of In re Heath, 49 Cal. App. 657, 194 P. 68, is without merit, as both minimum and maximum penalties are prescribed in the Code to which we have referred.

The writ is denied.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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134 Cal.App. 473

In re ESCOLLE'S ESTATE.

PYBURN et al. v. WHITE et al.

Civ. 9141.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1933.

Hearing Denied by Supreme Court Nov. 27, 1933.

1. Statutes ⚷212.

Legislature in re-enacting statute regarding embezzlement and surrender of property to estate in substantially same language in Probate Code *held* presumed to have done so in view of construction previously placed on such statutes and to have adopted construction as part of re-enacted law (Code Civ. Proc. §§ 1459–1461; Probate Code, §§ 613–615).

2. Executors and administrators ⚷85(4).

In proceeding to require decedent's brothers and sisters to turn over to estate stocks claimed as gift causa mortis, probate court *held* without jurisdiction to determine title to stock (Probate Code, §§ 613–615).

3. Executors and administrators ⚷469(1).

In proceeding to settle administratrix' final account, probate court can determine disputed questions of title between administratrix and estate.

4. Executors and administrators 🔑510(11).

Trial court's determination in favor of administratrix on conflicting evidence in settlement of account bound reviewing court to consider evidence most favorable to administratrix, resolving all conflicts in support of trial court's order.

5. Gifts 🔑62(1, 6).

Gift causa mortis requires delivery of subject of gift, but such delivery may be symbolic.

6. Gifts 🔑62(6).

Decedent's delivery of safe deposit box key to donee constitutes sufficient symbolical delivery of contents of box to sustain gift causa mortis, unless circumstances were such that contents could then be delivered into donee's actual possession (Civ. Code, § 1149).

7. Gifts 🔑62(5).

Symbolic delivery of subject of gift causa mortis may be made to third person for benefit of donee.

8. Gifts 🔑62(6).

Decedent's giving of safe deposit box key to one of donees, with written order to allow her access thereto and direction that donee get stock in deposit box, hold it, but return it in case donor did not die, *held* sufficient delivery of stock to constitute gift causa mortis (Civ. Code, § 1149).

9. Gifts 🔑62(6).

Where there is inconsistency between written order creating gift causa mortis and later expressed intention, later expressed intention coupled with symbolic delivery must control (Civ. Code, § 1149).

10. Wills 🔑90.

That document by which decedent made gift causa mortis of stock constituted also holographic will *held* not inconsistent with gift, so as to require donees to take under will where decedent dated document at attorney's suggestion.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceeding in the matter of the estate of Adelaide L. Escolle, alias A. Escolle, Adelaide Escolle, deceased. From an order overruling objections to the final account of Alice E. White, administratrix, and settling the same, and from an order denying a petition for an order directing Marie E. Lucke and others to turn over certain stock to the estate, Julia Pyburn and others appeal.

Affirmed.

James M. Thomas, of San Francisco, for appellants.

Robert L. Mann, of San Francisco, for respondents.

DOOLING, Justice pro tem.

Two appeals are herein presented, one from an order of the superior court, sitting as a court of probate, overruling objections to the administratrix' final account and settling the same, and the other from an order denying appellants' petition for an order directing respondents to turn over to the estate certain shares of stock claimed by appellants to be the property of such estate. The latter order was made on the ground that the court, sitting as a court of probate, had no jurisdiction to adjudicate and determine the subject-matter alleged in said petition.

The decedent, Adelaide Escolle, died on August 27, 1929, aged seventy-one years. After her death respondent Alice E. White, a sister of decedent, was duly appointed administratrix of her estate. During her lifetime the decedent had been the owner of 20 shares of the capital stock of respondent the Escolle Estate Company, a corporation, and it is the question of title to this stock which was sought to be determined in the proceedings leading to the two orders herein appealed from. It is appellants' contention that this stock was the property of decedent at the time of her death. It is respondents' contention, on the other hand, that by virtue of a gift causa mortis made by decedent on August 24, 1929, this stock became the property of respondents Alice E. White, Marie E. Lucke, Charles B. Escolle, Joseph Escolle, Henrietta E. Atkinson, and Victoire M. Mercer, in equal shares. The named respondents are brothers and sisters of the decedent, and the appellants are the children of a predeceased sister.

We shall first take up the consideration of the appeal from the order denying appellants' petition for an order directing respondents to turn over to the estate the shares of stock. It is urged by respondents that this is not an appealable order, but we do not feel called upon to decide that question, since we are satisfied that the order was correctly made and must be affirmed. The petition leading to this order was filed pursuant to sections 613, 614, and 615 of the Probate Code. These sections are a re-enactment in substantially the same language of sections 1459, 1460, and 1461 of the Code of Civil Procedure as they existed prior to the adoption of the Probate Code. To the petition respondents filed an answer in which they severally claimed title to 3⅓ shares of the disputed stock apiece, and upon the hearing of such petition these claims were supported by evidence of a gift causa mortis hereinafter to be noticed.

In Koerber v. Superior Court, 57 Cal. App. 31, at page 34, 206 P. 496, 497, the court expressly held that in a proceeding under sections 1459, 1460, and 1461 of the Code of Civil Procedure the superior court, sitting as a court of probate, cannot try and determine questions of title to personal property, the court saying:

"The main question, presented by this proceeding, is whether or not the court, sitting in probate, in the exercise of its jurisdiction, pursuant to sections 1459, 1460, and 1461 of the Code of Civil Procedure, may try and determine questions of title to personal property. The trial court expressed grave doubts about it, and, in view of the decisions of the Supreme Court of this state, there can be no question that such power does not exist, and that any attempt to exercise such authority is in excess of the probate jurisdiction. [Citing cases.]

"It has also been held in other jurisdictions, in construing statutes similar to ours, that the power of the probate court ends with the discovery of the property and the enforcement of the remedial provisions of the statute, and does not extend beyond that, so as to allow the court to adjudicate the title to disputed property."

[1] In re-enacting sections 1459, 1460, and 1461 of the Code of Civil Procedure in substantially the same language as sections 613, 614, and 615 of the Probate Code, the Legislature is presumed to have done so in view of the construction previously placed on those sections of the Code of Civil Procedure by the courts and to have adopted that construction as a part of the re-enacted law. 23 Cal. Jur. pp. 795, 796, § 173.

[2] Appellants attempt to distinguish the case on appeal from Koerber v. Superior Court, supra, on its facts. No such distinction is logically possible. Both cases follow the same pattern and it is immaterial that in this case the claim of title adverse to the estate is based on a claimed gift causa mortis and in the Koerber Case the claim adverse to the estate was grounded on a gift inter vivos. The essential feature in both cases is the claim of title adverse to the estate. It was squarely held in the Koerber Case that the probate court is without jurisdiction to determine the question of title in the statutory proceeding formerly provided for in section 1459 et seq. of the Code of Civil Procedure, now superseded by section 613 et seq. of the Probate Code. It seems clear that the court properly denied appellants the relief sought by their petition on the ground of lack of jurisdiction.

[3, 4] Turning to the appeal from the order overruling appellants' objections to the final account of the administratrix and settling her account, it is the law that on the settlement of such account the probate court can determine disputed questions of title between the administratrix and the estate. In re Estate of Roach, 208 Cal. 394, 281 P. 607. The administratrix failed to include the disputed stock in her account and appellants objected to the account on that ground. On the issue thus made evidence was introduced, some of it conflicting. In view of the trial court's determination of the issue in favor of the administratrix we are bound on appeal to consider the evidence most favorable to the administratrix, resolving all conflicts in the evidence in support of the order of the trial court. Treating the evidence in this fashion we find competent evidence to support the following statement of facts:

On August 24, 1929, the decedent was confined to bed in the French Hospital awaiting a capital operation. She summoned Mr. Robert L. Mann, who was her attorney, to her bedside. Mr. Mann arrived at the hospital between 12:30 and 1 o'clock in the afternoon. At that time Mr. Mann testified as to the decedent's mental condition: "Her mind was extremely clear. She knew just what she wanted to do. She discussed her affairs with me fully and comprehensively." Decedent had prepared, in her own handwriting, prior to Mr. Mann's arrival, two documents, to which we shall hereinafter refer as document 1 and document 2. Document 1 read as follows:

"Saturday, August 24, 1929.

"Bank of Italy Safe Deposit.

"Be sick at the hospital. I have given orders to my sister, Mrs. White, to go to my safe deposit box and get me a few papers, so please allowed her to go in my box vault. Kindly oblige,

"Adelaide Escolle."

Document 2, which was on two separate sheets of paper, read, omitting the printed letterhead of the French Hospital:

"August 24, 1929.

"I Adelaide Escolle say that if anything happen to me, I leave the Escolle State stock to all my Sisters and Brothers, share and share alike—all of the Escolle state Holders—that is Marie Lucke, Alice White, Victoire Mercer, Henrietta Atkinson, Charles Escolle and Joseph Escolle.

"Adelaide L. Escolle.

"Those are my orders—all the rest dispose as you all think best. I trust in you all—I sign this myself—

"Adelaide Escolle."

And on the second sheet:

"August 24, 1929.

"I adelaide Escolle if anything happen to me I leave them my stock of the Escolle State Company

"Adelaide L. Escolle."

The dates on the two sheets of document 2 were added by decedent after the arrival of Mr. Mann, under circumstances to be hereafter related. When Mr. Mann arrived at the bedside of decedent, she handed Mr. Mann the two sheets composing document 2, which were then undated, and handed document 1 to respondent Alice E. White. At the same time, according to Mr. Mann's testimony, "she handed her the key to the safe-deposit box, and said to me that she was making a gift of her stock in the Escolle Estate Company to her six brothers and sisters who had stayed in the estate, and hadn't sold out, and that we were to go down and obtain access to that box and get that stock, and Mrs. White was to hold it." When the two sheets constituting document 2 were handed to Mr. Mann, he noticed that they were not dated. He testified as to this: "I said to Miss Escolle, 'Why don't you make a will? You told me you are going to be operated on this afternoon on a major operation. I should advise making a will.' She said, 'I don't wish to make a will, nor I don't wish to have my estate in probate, because my brother Leon's estate went into probate and it was so expensive and troublesome that I want to avoid that if I can. Therefore, I am making a gift now of this stock to those who stayed in the Escolle Estate Company and here is a writing which sets out a memorandum of that gift.' I said, 'Miss Escolle, you told me that some of your relatives, the Pyburns, are liable to attack this gift and this memorandum of gift,' and I said I would advise that this document be put in the form of a holographic will, so that in case they should be successful in attacking it as a memorandum of gift, it could still stand as a will. Whereupon she dated both sheets of paper in her own handwriting, and the rest of it is, as I know, also in her own handwriting. She was also careful to sign each sheet with her signature. * * * Her instructions were to me that it was not to be offered as a will unless the gift should be upset. I am endeavoring to carry out those instructions."

Armed with the key to the safe deposit box and document 1, respondent Alice E. White and Mr. Mann went to the bank on Saturday afternoon but were unable to gain access to the box. Mrs. White returned to the bank on Monday, got the certificates of stock, which had some time previously been indorsed in blank, and left them in Mr. Mann's office. Some time after decedent's death the certificates were canceled and certificates for 3⅓ shares each issued to the six respondents in lieu thereof.

On the same Saturday afternoon, after Mr. Mann and Mrs. White had left the hospital, decedent told respondent Victoire Mercer that she had "given us the stock of the Escolle Estate Company, to her six brothers and sisters. * * * She told me, 'give my stock to the two boys and the four girls.' * * * Mrs. White had left with Mr. Mann to go to the safe-deposit box to get the papers which she had authorized Mrs. White to do so. * * * She told me so herself. * * * She said that she made a gift, that she gave us the stock of the Escolle Estate Company to her two brothers—to the six of us—the four sisters; and she said that Mr. Mann insisted on her making a will. She said, 'I don't want a will. I told Mr. Mann I didn't want any will,' and she seemed kind of put out about it, that Mr. Mann should mention it about a will. * * * She told me, 'Remember,' she said, 'if I don't die, I want my stock back', and I said, 'Oh, Adelaide, don't talk that way.' 'Well,' she said, 'you know I am pretty old to be operated.'"

[5-8] Appellants claim that there is an essential element of a gift causa mortis absent from the evidence in that "there is not a scintilla of evidence throughout the whole record that delivery of said stock had been made and that she intended to make delivery of said stock." In order to constitute a gift causa mortis there must be a delivery of the subject of the gift (13 Cal. Jur. p. 44), but the delivery may be symbolic and "delivery by decedent of the key to his safe deposit box to the donee constitutes a sufficient symbolical delivery of the contents of the box to sustain a gift, unless the contents were of such a nature, and the conditions and circumstances were such, that they could then and there be delivered into his actual possession." 28 C. J. pp. 692, 693, § 106. Such delivery may be made to a third person for the benefit of the donee. 28 C. J. p. 94, § 109; Coward v. De Cray, 38 Cal. App. 290, 176 P. 56; Ruiz v. Dow, 113 Cal. 490, 45 P. 867; Beals v. Crowley, 59 Cal. 665. Applying these rules to the facts, there is ample evidence to support a finding of delivery and of intent to make delivery. Decedent gave the key of her safe deposit box to Mrs. White with a written order to allow her access to it, and she at the same time said that Mrs. White was to go down and get that stock and "was to hold it." Afterwards she told Mrs. Mercer that she had made a gift to her and the other sisters and brothers of the stock and that Mrs. White had left with Mr. Mann to go to the safe deposit box to get the papers which she had authorized Mrs. White to do and that "if I don't die I want my stock back." She gave Mrs. White the power and authority to get the stock and hold it. This was sufficient under the circumstances to constitute a delivery to Mrs. White for her benefit and that of the other donees. That decedent intended a delivery is clear from her statement to Mrs. Mercer: "Remember, if I don't die I want my stock back." Unless she had intended a present delivery to Mrs. White that statement would have been superfluous. As it is, it consti-

tutes a fair statement of the effect of a gift causa mortis, i. e., "one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver." Civ. Code, § 1149.

[9] Appellants' argument that the language of document 1, "I have given orders to my sister, Mrs. White, to go to my safe deposit box and get me a few papers," indicates an intent that Mrs. White should bring whatever papers she should get to decedent and negatives an intent that Mrs. White should take and hold the stock, is answered by Mr. Mann's testimony that after document 1 was written decedent told Mrs. White to get the stock and hold it. It was decedent's intention existing and expressed at the time the key and document 1 were delivered to Mrs. White which is controlling, and if there is any inconsistency between the written order and the later expressed intention, which we need not decide, the later expressed intention coupled with the symbolic delivery must control. Ruiz v. Dow, supra, 113 Cal. at page 497, 45 P. 867.

[10] Appellants further argue that document 2, being in form a good holographic will, is inconsistent with the intention to make a gift causa mortis and that respondents must take, if at all, under the will and hence could only take through the probate of that document. But the evidence is clear that decedent intended and made a gift causa mortis and that document 2 was only dated so as to make it valid as a holographic will at the insistence of the attorney and that decedent expressed a desire that the document be offered for probate only in case the gift should for some reason be held invalid. A not dissimilar case on its facts is Darling v. Emery, 74 Vt. 167, 52 A. 517, where, after a gift causa mortis, the attorney suggested the making of a will to the same effect. The will was defective and it was argued that the transaction was entire and the will having failed there could be no gift. The court held that there was nothing inconsistent between the gift and the will either in fact or in law and sustained the gift, although the will failed. That case is quite apposite here. The evidence makes plain that decedent intended to make a gift causa mortis and the will was only an added precaution to accomplish the same result in case the gift for any reason failed. The gift having been effective, the title to the stock passed to respondents thereby and the will could not become operative in so far as the stock was concerned.

Appellants make some further arguments which depend upon the weight and construction of the evidence. Finding sufficient evidence to support the trial court's order, this court may not weigh, or inquire into, the evidence further.

The orders appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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134 Cal.App. 584

FISCHER v. HAVELOCK et al.

Civ. 4850.

District Court of Appeal, Third District, California.

Oct. 10, 1933.

Hearing Denied by Supreme Court Dec. 7, 1933.

1. **Automobiles** ⚷244(26).

Facts *held* to show that sales agent for oil company was agent of company in driving his own truck, for whose negligence company was liable, not "independent contractor," where company had right of control.

> Facts showed that driver of truck was sales agent for company authorized to sell its products for cash and credit to customers whose rating had been approved by the company; that he did not purchase any of the products made by the company, but simply received and made sales thereof; that the route he should travel was left optional by the company; that his duties were fixed; and that he was subject to rules and practices of the company.
>
> [Ed. Note.—For other definitions of "Independent Contractor," see Words & Phrases.]

2. **Master and servant** ⚷316(1).

Where one sells its products to person distributing them, and exercises no further control, relation is not of "principal and agent," but buyer is "independent contractor."

> [Ed. Note.—For other definitions of "Agent" and "Principal," see Words & Phrases.]

3. **Master and servant** ⚷318(1).

In determining whether independent contractor relationship exists, right of control is a governing principle, and whether control is exercised is immaterial.

4. **Automobiles** ⚷193(3).

That agreement for sale of oil products called for five days' notice before discharge of agent, and that agent owned truck he was driving at time of injury to plaintiff, did not relieve oil company of liability where agent was not independent contractor.

Appeal from Superior Court, Mendocino County; M. H. Iversen, Judge.

Action by Antonie Fischer against E. W. Havelock and another. From an adverse judgment, defendant the Texas Company appeals.

Affirmed.

Charles Kasch, of Ukiah, for appellant.

Mannon & Brazier, of Ukiah, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment for damages against the defendants in an action tried by the court sitting without a jury, on account of injuries received in an automobile collision with a truck driven by the defendant Havelock, found by the court to be acting as the agent of the Texas Company. No issue is raised as to the liability of Havelock, nor as to the amount of damages awarded by the court. The Texas Company bases its appeal on the theory that Havelock, at the time of the collision, was an independent contractor.

The record shows that at all the times referred to in this appeal Havelock had charge of the distribution and sale of Texaco products, including gasoline, kerosene, oils, etc., kept by the company at Ukiah, whether in tanks belonging to the company or belonging to Havelock does not appear. The gasoline, kerosene, oils, etc., belonged to the Texas Company, none of which was purchased by Havelock, but he was authorized to make sale thereof for cash and on credit to purchasers whose credit rating was first approved by the company. In the event that Havelock made any sale on credit to any one not so approved by the company, he became personally liable. The prices at which sales of products could be made were at all times fixed by the Texas Company. Havelock was authorized to make collections and remit the same from time to time to the company. He was not allowed to retain any amount collected by him, for and as his compensation. Havelock was paid on a commission basis, with a guaranteed compensation of $200 a month. Havelock furnished his own truck, which was lettered so as to show he was delivering Texaco products. On the day of the injury, Havelock had gone to Willetts to deliver gasoline for the Texas Company, to a purchaser by the name of Hall. Hall was a customer of the company, buying on credit, who had been obtained as a customer prior to the appointment of Havelock as its distributing agent at Ukiah. The collision occurred as Havelock was returning after making delivery of gasoline to Hall.

The agreement entered into between Havelock and the Texas Company, by which Havelock was employed as distributing agent for the company, was and is in writing, and among other things contained the following: "First: The Company hereby appoints the agent (and the agent hereby accepts the appointment), as agent for the Company, at Ukiah, California. The agent's surety bond will be $1,500.00. Second: The agent's duties are fixed by this agreement, the rules and practices of the Company, and by instructions issued by the Company from time to time. Third: The agent shall strictly observe and obey the Company's instructions, and faithfully perform all duties connected with his agency. Promptly, correctly and in strict accordance with Company's instructions, account for all Company moneys, goods, products, equipment, etc., in his possession, or coming into his custody, and pay the Company for any shortages which may develop at any time. Sell the products of the Company for cash, or on credit properly authorized, and not exchange or agree to exchange the Company's products for property or merchandise for private use or account; personally pay the Company on demand (a) the sum due on any account opened by him without authority, and (b) any portion of any credit account which has been sold in excess of the credit limit placed thereon by the Company. The Company shall not be under any obligation to make any attempt to collect such accounts nor to assign any part of such accounts to agent until the Company shall have received full settlement thereof. Neither (a) sell the Company's products, directly or indirectly, at less than Company's authorized prices, nor (b) enter into any secret agreements, contracts, or understandings with any customer or competitor for the purpose of reducing the prices of the product or controlling business."

The agreement further provided that the agent was not to use the company's goods, nor funds for his own private purposes, and not to cash, out of the company's funds, personal checks for customers or others. The agent was not to retain his compensation out of the sales made by him, but all moneys were to be remitted to the company. It was further provided in the agreement that the agent should furnish a truck or trucks and employ his own assistants. The agent was also required to furnish a bond, covenanted to "indemnify and save the Company harmless from loss arising out of, or by virtue of all damage to property, or injury to persons * * * occasioned by the acts of the agent, his assistants or employees." The agent was also required not to employ any assistant who was not of mature age, etc., to handle, ship, or deliver any gasoline, etc. The company paid all freight and charges on the goods shipped, and covenanted to pay the agent a certain commission guaranteed to equal the sum of $200 a month. The agreement specified that it was to continue in full force and effect until terminated by either party on five days' written notice.

[1-4] The foregoing summary of the testimony and of the agreement shows that Havelock was the sales agent for the Texas Company at Ukiah, authorized to make sale of its

products for cash, and also upon credit, to customers whose credit rating had been first approved by the company. Havelock did not purchase any of the products belonging to the Texas Company, but simply received and made sales thereof. His duty was to sell and deliver the products of the company to all cash customers, and to credit customers approved by the company. The route that he should travel was left optional by the company. Havelock was required to obey the company's instructions and faithfully perform all duties connected with the agency. Havelock's duties were fixed, and he was subject "to the rules and practices of the Company and instructions issued by the Company from time to time." What rules and instructions were issued by the company governing the acts of Havelock do not appear in the record.

The trial court held Havelock to be the agent of the company and acting for the company in the distribution of gasoline at the time of the collision, and therefore entered judgment against the appellant on the principle of respondeat superior. The correctness of this holding is the only question for us to determine.

In its appeal, the appellant has cited a number of cases holding similarly to the conclusions reached in the case of State Compensation Insurance Fund, Petitioner, v. Industrial Accident Commission of the State of California and Auguste Marc, Respondents, 216 Cal. 351, 14 P.(2d) 306, opinion filed September 16, 1932. Most of the cases cited by appellant are therein set forth and considered, and need not be listed here. A review of the cases cited by the appellant discloses that there is a distinct principle or dividing line between the cases holding the person charged with the commission of the tort as an independent contractor, and as an agent, and by this principle we think our decision must be determined. It is this: Where the one sought to be charged as principal has sold its products to the person distributing those products, and exercises no further control, the relationship is not one of principal and agent, but the person to whom the products are sold is an independent contractor. This is fully illustrated in the cases where it has been sought to charge newspaper publishing companies where they have sold their papers outright to persons controlling and operating routes for the distribution of such papers. In such cases the relationship of principal and agent is denied. When, however, a person is simply appointed as a sales agent, acting under the instructions and directions of the person owning the products, the products to be sold for cash, or to authorized credit customers, routes selected by the agent, the relationship of principal and agent is held to exist. The right to control is one of the governing principles. Whether that control is exercised or the directions given is immaterial. In the case at bar, Havelock owned none of the products belonging to the appellant; his duties were fixed by the agreement, the rules and practices of the company, and instructions issued from time to time. Whether these rules and practices or instructions were given or furnished to Havelock is wholly immaterial. The right to do so is specifically given, and the cases are uniform to the effect that the right to direct and control is all that is necessary to support the conclusion that the relationship of principal and agent exists where one is simply a sales agent selling goods of another, whether upon commission or upon a fixed salary. The fact that the agreement called for a five days' notice before the discharge of Havelock by the Texas Company does not in anywise limit or change the relationship existing between the parties. The fact that Havelock owned the truck which he was driving at the time of the collision and at the time of the injury to the plaintiff does not relieve the Texas Company, as principal, from liability. Cook v. Sanger, 110 Cal. App. 90, 293 P. 794.

The circumstances surrounding the instant case are almost identical with those presented to the Circuit Court of Appeals for the Eighth Circuit, in the case of Standard Oil Co. v. Parkinson, 152 F. 681, 682. The only difference between the two cases is that Havelock owned the truck involved in the collision, and in the Parkinson Case Parkinson owned the team he was driving, and the company owned the truck. The language of the circuit court, in its opinion, is so pertinent here that we set forth the following quotation as conclusive upon this appeal: "The test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the causal act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maxim, 'respondeat superior,' in the absence of the right and power in the former to command or direct the latter in the performance of the act or omission charged, because in such a case there is no superior to respond. Brady v. Chicago & Great Western R. Co., 114 F. 100, 107, 52 C. C. A. 48, 55, 57 L. R. A. 712; Atwood v. Railway Co. (C. C.) 72 F. 447, 454, 455; Byrne v. Railroad Co., 9 C. C. A. 666, 61 F. 605, 608, 24 L. R. A. 693; Hilsdorf v. City of St. Louis, 45 Mo. 94, 98, 100 Am. Dec. 352; Town of Pawlet v. Rutland & W. R. Co., 28 Vt. 297, 300; Miller v. Railroad Co., 76 Iowa, 655, 659, 39 N. W. 188, 14 Am. St. Rep. 258; Wood, R. R. § 388; Donovan v. Construction Syndicate (1893) 1 Q. B. Div. 629; Rourke v. Colliery Co., 2 C. P. Div. 205. But a master is liable for damages caused by the negligence of his agent or servant within the scope and in the course of his employment, although he neither directs nor is aware of his acts. Philadelphia

& Reading R. Co. v. Derby, 14 How. 468, 486, 14 L. Ed. 502; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 522, 10 S. Ct. 175, 33 L. Ed. 440. In the light of these rules of law, let us see whether or not there was any substantial evidence in this case that Perry was the agent of the oil company in the act of driving his team upon the track of the railroad company. There was testimony to the existence of these facts: The oil company had storage tanks at Aurora, in the state of Nebraska, whence its oil was hauled by Perry's team to its customers in neighboring towns. The company owned the wagon and Perry the horses. The company fixed the prices of the oil and gasoline. Perry took them from the storage tanks, hauled and delivered them to the customers of the company in neighboring towns, sold all that he could in lots of 50 gallons each to others, collected all the money for these deliveries and sales, remitted it to the company weekly, and once a month the company paid him one cent for each gallon so delivered and sold. He devoted the principal part of his time to this occupation. He was not engaged for any specific length of time, and he was free to abandon the work, and the oil company was at liberty to discharge him at any time. The company directed him to keep its customers in four towns supplied with oil and gasoline, but it did not direct him when or by what routes he should draw these articles to them. He went to the customers whenever they needed the oil or gasoline which he supplied. Some time after Perry entered upon his work the company directed him to deliver oil to its customers at another town, Phillips, and he did so. He was on his way to Phillips when the accident which caused this suit occurred. By means of the horses and wagon he kept the customers in the towns it specified supplied with oil and gasoline pursuant to its direction. But he determined when, how, and by what roads he would drive his team to each town and customer."

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

DABNEY-JOHNSTON OIL CORPORATION v. HITCHCOCK et al.

Civ. 9007.

District Court of Appeal, First District, Division 2, California.

Oct. 4, 1933.

Rehearing Granted Nov. 3, 1933.

1. Quieting title 🔑44(2).

In suit to quiet title, evidence that expression "land owners royalty" used in assignments of interest in hydrocarbon substances had technical meaning as interest in perpetuities and that assignors had declared intention of conveying interest in perpetuities *held* properly admitted (Civ. Code, §§ 1645, 1647; Code Civ. Proc. § 1861).

2. Mines and minerals 🔑74.

Assignments of interest in hydrocarbon substances discovered in lands under lease conveyed interest in land though leases contained words to effect that royalty would be paid in money.

3. Mines and minerals 🔑74.

Assignments of interest in hydrocarbon substances produced from lands conveyed interest in lands though assignments contained no right of entry upon lands.

4. Mines and minerals 🔑79(1).

Owners of fractional interests in oil and gas in place under assignments *held* entitled to judgment for gross percentages of oil and gas produced without deductions for cost of development and production.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Suit by the Dabney-Johnston Oil Corporation against H. H. Hitchcock and others. From the judgment, plaintiff appeals.

Affirmed.

Lawler & Degnan, Robert M. Pease, and Roy P. Dolley, all of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Hewlings Mumper, of Los Angeles, of counsel), for respondent A. E. Walden and others.

R. F. Bailey, of Los Angeles, for respondent D. D. Dunlap.

Eugene C. Campbell, of Long Beach, for respondents Alex and Elizabeth McMurchie.

A. E. Garten, of Long Beach, for respondents R. C. and Irene Pollock.

Sidney N. Bachtell, of Los Angeles, and N. B. Bachtell, of Lancaster, for respondent Hite.

G. M. Spicer and W. O. Wanzer, both of Long Beach, for respondent Double A Oil Corporation.

STURTEVANT, Justice.

The plaintiff sued to quiet title to certain oil lands. The defendants answered, and the trial court made findings in favor of the plaintiff on many issues but in favor of the defendants relative to their asserted rights based on certain assignments. The plaintiff has appealed from all those portions of the judgment which are in favor of the defendants.

On November 14, 1922, the then owners executed an oil lease. It was canceled, and another was executed in its place January 9, 1923. Under the first lease no drilling whatever was done. Under the second lease drilling was commenced, but on December 7, 1923, the derrick and equipment were destroyed by fire. Pursuant to authorization obtained from the public authorities, the well was abandoned. St. 1915, p. 1408, § 16, as amended by St. 1917, p. 1596. The trial court found that the term of each lease was terminated long prior to the time that the plaintiff acquired its title. Shortly prior to January 1, 1928, the plaintiff under various grant deeds obtained its title to the lands, and thereafter on July 7, 1928, it entered on the lands and commenced drilling. Drilling was in progress when plaintiff filed this action to quiet its title. During the pendency of the action plaintiff completed two wells, and, when the judgment was entered, those wells were producing oil in commercial quantities. As a part of the judgment, an accounting was taken as of December 31, 1930. The value of the production was established at $1,000,781.37. The cost of development and production was found to be $229,888.81. The trial court held that the defendants were the owners of fractional interests in the oil and gas in place, had the right to participate in the gross production of oil and gas, were entitled to a judgment against plaintiff for the gross value of such percentages of oil and gas, and were entitled to be paid therefor without deductions for the cost of development and production.

There are four different forms of the assignments. If each conveyed an interest in perpetuity in the land, the judgment should be affirmed; otherwise it should be reversed in whole or in part. The sole question before us is whether any of the assignments when properly construed purported to convey anything except certain rights flowing from, and possibly to flow from, the lease specifically referred to and forming a part of such assignment.

The Donovan form is as follows:

"Assignment

"Whereas, on the 14th day of November, 1922, Burton Benwell, leased to H. H. Hitchcock and W. T. Casteel the following described lands:

"Lots Twelve (12), Thirteen (13), Fourteen (14) and Seventeen (17) of Atlantic Boulevard Tract No. 3, in the County of Los Angeles, State of California, as per map recorded in Book 11, page 92 of Maps, Records of Los Angeles County, California.

"And Whereas, said lease is what is commonly known and understood to be an Oil and Gas Lease and

"Whereas, said lease provides that the lessees shall pay, or cause to be paid, to the lessor, as rental or royalty for the use of said lands, thirty per cent (30%) of all oil, gas or other hydrocarbon substances of value discovered, produced and saved by the lessees from said described lands; and

"Whereas, according to the terms of said lease the said lessor is entitled to take and receive thirty per cent (30%) of all oil, gas and other hydrocarbon substances of value discovered, produced and saved by the lessees from said premises; and

"Whereas, the said Burton Benwell desires to sell, transfer, set over and convey unto J. B. Donovan ten per cent (10%) of all oil, gas and other hydrocarbon substances produced and saved from said described lands;

"Now, Therefore, Burton Benwell, for and in consideration of the sum of Ten Dollars ($10.00) lawful money of the United States of America, to him in hand paid by J. B. Donovan, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer, set over and convey unto the said J. B. Donovan ten per cent (10%) of all oil, gas and other hydrocarbon substances which may hereafter be produced and saved from said described real property.

"To Have and to Hold the same unto the said J. B. Donovan, his heirs and assigns.

"That the said J. B. Donovan, his beneficiaries, heirs, executors, administrators and assigns shall be, and are hereby entitled to take and receive said ten per cent (10%) of all oil, gas and other hydrocarbon substances which may be produced and saved from said described lands during and for so long as said lands shall be used for the purpose of developing and producing oil, gas and other hydrocarbon substances, and until said land shall be abandoned as a producer of oil, gas and other hydrocarbon substances.

"That this assignment shall be and constitute sufficient authority unto the purchaser or purchasers, of the oil, gas and other hydrocarbon substances produced and saved from said premises to pay direct to the said J. B. Donovan, or to his beneficiaries, heirs, executors, administrators or assigns, the money proceeds derived from the sale of said ten per cent (10%) of all oil, gas and other hydrocarbon substances produced and saved from said described premises."

The Walden form, including the title thereof, is as follows:

"Assignment of Land Owners Royalty Interest

"Whereas, Burton Benwell and Maude F. Benwell, being owners of that certain parcel, lot or tract of land particularly described as follows, to-wit:

"Lots Twelve (12), Thirteen (13), Fourteen (14) and Seventeen (17) of the Atlantic Boulevard Tract #3, partly within and partly without the City of Long Beach, County of Los

Angeles, State of California, as per map recorded in Book II, Page 92 of Maps, in the office of the Recorder of said County.

"Whereas, said Burton Benwell and Maude F. Benwell reserved a certain twenty-seven and one-half per cent (27½%) royalty in a certain lease dated January 9th, 1923, from Burton Benwell and Maude F. Benwell to W. T. Casteel and H. H. Hitchcock on the above described real estate, subject to the terms and conditions provided for in said lease, recorded January 22nd, 1923, in Book 1750, Page 220 of Official Records.

"Whereas the said Burton Benwell and Maude F. Benwell desire to sell a portion of the said 27½% land owners royalty as reserved in said lease;

"Now, Therefore, in consideration of the sum of $10.00 to them in hand paid, receipt of which is hereby acknowledged, the said Burton Benwell and Maude F. Benwell do hereby sell, assign and set over to E. A. Walden whose address is 35 American Avenue Street, Long Beach City, California State, a two per cent in said land owners royalty of all gas, oil and other hydrocarbon substances to be produced and saved and sold from said described land, together with all of the rights and privileges granted to said Burton Benwell and Maude F. Benwell, in that certain lease above set out."

The Heiderman form was as follows:

"Assignment of Land Owners Royalty Interest.

"Whereas Burton Benwell and Maude F. Benwell, being the owners of that certain parcel, lot or tract of land particularly described as follows, to-wit:

"Lot Twelve (12) and Thirteen (13) Fourteen (14) and Seventeen (17) of the Atlantic Boulevard Tract #3, partly within and partly without the City of Long Beach, County of Los Angeles, State of California, as per map recorded in Book 11, Page 92 of Maps, in the office of the Recorder of said County. Whereas said Burton Benwell and Maude F. Benwell reserved a certain twenty-seven and one-half per cent (27½%) royalty in a certain lease dated January 9th, 1923, from Burton Benwell and Maude F. Benwell to W. T. Casteel and H. H. Hitchcock on the above described real estate, subject to the terms and conditions provided for in said lease, recorded January 22nd, 1923, in Book 1750, Page 220 of Official Records.

"Whereas the said Burton Benwell and Maude F. Benwell desire to sell a portion of the said 27½% land owners royalty as reserved in said lease;

"Now, therefore, in consideration of the sum of $10.00 to them in hand paid, receipt of which is hereby acknowledged, the said Burton Benwell and Maude F. Benwell do hereby sell, assign and set over to George A. Heiderman, whose address is 2020 East 3rd Street, Long Beach City, California State one (1) per cent in said land owners royalty of all gas, oil and other hydrocarbon substances to be produced and saved and sold from said described land, together with all of the rights and privileges granted to said Burton Benwell and Maude F. Benwell in that certain lease above set out."

The Hite form was as follows:

"Assignment of Land Owners Royalty Interest.

"Whereas, Burton Benwell and Maude F. Benwell, being the owners of that certain parcel, lot or tract of land particularly described as follows, to-wit: Lots Twelve (12), Thirteen (13), Fourteen (14) and Seventeen (17), of the Atlantic Boulevard Tract #3, partly within and partly without the City of Long Beach, County of Los Angeles, State of California, as per map recorded in Book 11, Page 92 of Maps, in the office of the Recorder of said County.

"Whereas, said Burton Benwell and Maude F. Benwell reserved a certain Twenty-seven and one-half per cent (27½%) royalty in a certain lease dated January 19th, 1923, from Burton Benwell and Maude F. Benwell to W. T. Casteel and H. H. Hitchcock on the above described real estate, subject to the terms and conditions provided for in said lease, recorded January 22nd, 1923, in Book 1750, Page 220 of Official Records.

"Whereas, the said Burton Benwell and Maude F. Benwell, desire to sell a portion of said 27½% land owners royalty as reserved in said lease, or any subsequent lease.

"Now, Therefore, in consideration of the sum of $10.00 to them in hand paid, receipt of which is hereby acknowledged, the said Burton Benwell and Maude F. Benwell do hereby sell, assign and set over to Courtwright Hite whose address is ——— Street, Long Beach City, California State, a one-half of one (½ of 1%) per cent in said land owners royalty of all gas, oil and other hydrocarbon substances to be produced and saved and sold from said described land, together with all of the rights and privileges granted to said Burton Benwell and Maude F. Benwell in that certain lease above set out."

Points 1, 2, and 6 are different methods of stating the main contention of the plaintiff. It contends that the defendants had no title or ownership of any oil, gas, or other hydrocarbons in place, that they held merely an interest in personal property, and that they did not hold any interest in the land. Those contentions are too broad. The correct answer depends on the meaning of each particular instrument when properly construed. At least some assignments have been held to convey an interest in the land. Beam v. Dugan (Cal. App.) 23 P.(2d) 58. On the trial it was contended that the assignments contained words that were used in a technical sense, and, when that sense was explained and applied, and when the contracts were construed with reference to the circumstances under which they were made and the matter to which they related, it was then clear that the assignments conveyed interests in the land in perpetuity. Over the objection and exception of the plaintiff, the defendants introduced evidence to that effect. Thereafter the court made full findings in which the facts were found as contended for by the assignees. It is now urgently contended by the plaintiff that the court erred in receiving such evidence. With this contention we do not agree. It will be noted that no single assignment by its terms was limited to any right or rights arising out of any one of the leases. The most that can be said in that behalf is some of the assignments might be said to be ambiguous. In Higgins v. Cal. Petroleum, etc., Co., 120 Cal. 629, 52 P. 1080, the contract involved used the expression "gross ton." On the trial in the lower court evidence was admitted to explain the meaning of that expression as understood and used at the place where the contract was written regarding a sale of asphaltum. On page 631 of 120 Cal., 52 P. 1080, 1081, Mr. Justice Temple, writing the opinion for the court said:

"I think the question is entirely settled by section 1861 of the Code of Civil Procedure, which reads as follows: 'The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.'

"I know no reason why this rule would not apply as well to a statutory weight or measure as to any other term used in a writing.

"Suppose there had been a bill of exceptions in this case, showing that upon the trial it was proven (1) that there was a usage throughout the state among all dealing in asphaltum that the crude material was dealt in according to a gross ton of 2,240 pounds; (2) that there was a custom to the same effect in Santa Barbara county; that in fact, by the usage and custom, the phrase 'gross ton' is always used to indicate the long ton, just as by commercial usage, the last phrase is used to indicate that 2,240 pounds is meant; (3) that the parties, acting under this very contract, had in numerous settlements recognized the fact that 'gross ton' meant the long ton, and not the statutory ton. And we might add to this that there had been previous contracts between these same parties, of the same general character, but in which the phrase had been so defined. Would not such evidence have been admissible, and would it not have supported the finding? I think it would.

"Of course, appellant would contend that, even under section 1861, such evidence cannot be received, unless the contract expressly indicates a local, technical, or peculiar signification. But the section plainly provides that it may be shown by evidence that the language is used in a technical, local, or peculiar sense, and not merely that evidence may be introduced to show what such meaning is when language is so used."

[1] In the instant case the evidence introduced showed that the contracts were written in that part of this state where the development of oil wells is one of the extensive industries; that they were written by the lessors; that all persons interested were familiar with the terms used and the meaning thereof in the oil industry; that the lessors at the time the instruments were written declared their intention of conveying in perpetuity the interest designated in the hydrocarbon substances believed to be contained in the lands of the lessors; and that every one of the documents showed, by express language or clear inference, that a part of the "land owners royalty" was being conveyed and that said expression had the technical meaning of being an interest in perpetuity. The trial court did not err in receiving the evidence. (Civ. Code, §§ 1645 and 1647; Code Civ. Proc. § 1861; Higgins v. Cal. Petroleum, etc., Co., supra; Hind v. Oriental Products Co., Inc., 195 Cal. 655, 235 P. 438; 6 Cal. Jur. 287.

[2] Each lease contained words to the effect that the royalty would be paid in money. The plaintiff stresses that fact, and argues therefrom that all of the parties were dealing in personal property and that no vested right of any kind in the land was or is involved. It will suffice to state that an inspection of the several instruments discloses that the covenant to pay the royalty in money was but a mere incident of the transactions. It follows that the incident follows the principal and not the principal the incident.

[3] Again, the plaintiff calls to our attention that the assignments contained no right of entry upon the land. Thereupon it argues that the defendants obtained no interests in the land. Morgan v. McGee, 117 Okl. 212, 245 P. 888. But, in this state, as we have shown above, it has been held that under some assignments the assignees acquire an interest in the land. Beam v. Dugan, supra.

The next point made by plaintiff is that the assignments as reformed do not enlarge the rights of the defendants. We do not understand the defendants as contending to the contrary. It was their contention in the trial court, and is their contention in this court, that the reformation made by the trial court was but a formal statement of the rights of the defendants when such rights are weighed in the light of the written instruments and the other evidence legally admissible. No language has been quoted to us that would indicate that the instruments as reformed differed in substance from the instruments as written when properly construed. Conceding solely for the purposes of this decision that the defendants were guilty of laches in not applying for reformation at an earlier date, it is perfectly clear that the plaintiff has not been prejudiced by the reformation.

[4] The plaintiff contends that a judgment against the plaintiff in the stated amount, or any amounts, was erroneous. Primarily the point is based on the theory of the plaintiff that the defendants had no title of any kind to the land or any part thereof. As we have shown above, we think it is mistaken in making this contention. From what we have said above, it is clear that the contention of the plaintiff is not based on the law of this state. Continuing, the plaintiff objects strenuously to the fact that the trial court made no allowance for the cost of production of the oil. That contention is equally without merit. If the original lessors had made no assignments whatsoever under the clear terms of the lease, the plaintiff would be paying, not in fractional amounts, but the total royalty reserved by the lessors. In so paying we think the plaintiff would not even contend that it was entitled to charge up costs of development and costs of pumping. If the rights of the assignees were to be less than the rights of their assignors, a covenant on the subject should have been inserted in the assignments. It is needless to say that the written instruments are silent on the subject.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

134 Cal.App. 561

In re NELSON'S ESTATE.

NELSON et al. v. SNYFELD et al.

Civ. 9137.

District Court of Appeal, First District, Division 1, California.

Oct. 10, 1933.

Rehearing Denied Nov. 9, 1933.

Hearing Denied by Supreme Court Dec. 7, 1933.

1. **Wills** ⟹324(3).

If there was any substantial evidence that will and codicil were not executed freely and voluntarily, but under pressure overpowering testator's volition, question of undue influence was for jury.

2. **Wills** ⟹324(3).

Whether will of aged testator leaving practically entire estate to legatee, who until she moved into deceased's house was entire stranger, was induced by legatee's undue influence *held* for jury.

3. **Wills** ⟹164(5, 7).

Testator's advanced age and weakened condition, and legatee's activity in procuring execution of will, *held* properly considered in determining undue influence.

4. **Wills** ⟹163(1).

Testator's age and weakened condition, relations affording legatee opportunity to control testamentary act, and legatee's activity in procuring execution of will, cast upon legatee obligation of presenting evidence of volition of testator.

5. **Wills** ⟹324(3).

Where evidence for contestants cast obligation of presenting evidence of volition of testator on proponent, testimony of attorney who drew will and his clerk who witnessed it, tending to show testamentary power, *held* not to authorize taking question of undue influence from jury.

6. **Wills** ⟹324(1).

In will contest, questions involving motives and inferences to be deduced from facts are, within reasonable bounds, exclusively within jury's province.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

In the matter of the estate of John L. Nelson, also known as J. L. Nelson, deceased. Will contest by Charles Nelson and another against Myrtle L. Snyfeld, as executrix and legatee, and others. From a judgment in favor of proponents, admitting the will to probate notwithstanding a verdict in favor of contestants, contestants appeal.

Reversed, with directions.

Daniel A. Ryan and Thomas C. Ryan, both of San Francisco (James W. Harvey, of San Francisco, of counsel), for appellants.

Thomas & Sullivan, of San Francisco, and Carl W. Anderson, of San Mateo, for respondent Myrtle L. Snyfeld.

PER CURIAM.

This is a contest of the will and codicil thereto of the decedent. The contest was filed by Charles Nelson, a brother, and Arthur Nelson, a nephew of the deceased wife, of the testator. The grounds of contest were: (1) Unsoundness of mind; (2) undue influence exerted upon the testator by the respondent legatee, Myrtle L. Snyfeld; (3) that the will and codicil were not duly executed and attested by the testator and the subscribing witnesses. At the close of contestants' case the proponents moved for a nonsuit, which was denied as to unsoundness of mind and undue influence but was granted as to the claim of want of due execution, there having been no evidence offered on this ground of contest. At the conclusion of the evidence proponents moved for a directed verdict in their favor on each of the two remaining counts, which the court denied. The case was then submitted to the jury which returned its verdict that the testator was of sound and disposing mind when the will and codicil thereto were executed, but that he was at such time acting under the undue influence of proponent Myrtle L. Snyfeld. Proponents thereupon, and before judgment was entered, moved the court for judgment for the proponents, notwithstanding the verdict, which motion was granted, and judgment was thereupon entered accordingly. It is from this judgment that the appeal herein is taken.

[1, 2] The sole question involved is whether or not the trial court erred in directing judgment for the proponents, notwithstanding the verdict in favor of the contestants on the ground of undue influence. If there is any substantial evidence in the record to show that the execution of the will and codicil were not the free and voluntary acts of the testator, but were the result of pressure which overpowered his volition at the time they were executed, the action of the trial court was unauthorized. The contestants urge that there is evidence in the record to support the verdict that the deceased was induced to make the will through the undue influence of the proponent Myrtle L. Snyfeld. We are of a like opinion. There was evidence to show that this proponent was a total stranger to decedent up to December 26, 1929. She met the deceased through her husband, an itinerant peddler, who had become acquainted with deceased while the husband was engaged in peddling brushes from door to door in Burlingame, where the deceased lived. On the very day she met the deceased, the proponent and her husband moved into his house under an agreement by which they were to pay a stipulated rent and to furnish him board. The testator was at this time about seventy-five years of age. The rent agreed upon was paid for about three months, at the end of which time proponent informed the testator that she was going to move, whereupon, so proponent testified, the deceased agreed to deed his home to her provided she remained with him. Several months later the deed was executed, but it was not recorded until after the testator's death. Later, deceased made proponent a gift of an expensive automobile.

[3, 4] The testator executed his will on September 29, 1931, and the codicil thereto about one month later. Under the terms of the will practically the entire estate of decedent, consisting of corporate stocks of the value of $4,500 and real estate of the value of $6,000, was left to proponent, to the exclusion of his relatives. After deceased was stricken with his last illness and while very weak mentally and physically, proponent received from him a general power of attorney. At this time he was unable to sign his name to the instrument and could only make a cross thereon. Upon receiving this instrument, proponent immediately called at the bank where the testator had a safety deposit box and attempted to gain access thereto, but the bank refused to honor the power of attorney until the testator personally authorized such act. One of the witnesses to the power of attorney at first refused to sign the instrument as he was of the impression that the testator did not understand the effect of what he was doing. There was also testimony to show that proponent was very active in arranging appointments with testator's attorney to have both the will and codicil executed, and brought him to the attorney's office for such purpose. By the terms of the will bequests of one dollar each were left to a nephew and the children of a deceased nephew and to a niece of testator's wife. In the codicil executed one month later, the dollar bequest to his deceased wife's niece was changed to provide for her a legacy of $250. In this connection there was evidence to show that the proponent had been active in procuring this change in the will. As indicating her possible reason for desiring this change, it appeared that after the death of the testator proponent visited the niece at her home and offered her, so the niece testified, $250 of her own money if she would support the will. There was also evidence showing that the testator had a strong affection for his younger brother Charles, one of the contestants. For nearly fifty years they had lived close together and had never had a quarrel, and Charles had frequently given the deceased employment and had been his constant advisor. Arthur Nelson, the other contestant, was the nephew of Mrs. John L. Nelson, the deceased wife of the testator. Arthur Nelson was raised by the testator and his wife from infancy, and christened under the name of Nelson. The relations between him and the testator were of the most affectionate nature. He gave all his earnings to testator's wife and up to the time of his marriage he lived with them, and after the birth of a son he again lived with them. The son was named after the deceased who thought considerable of him, and promised on several occasions to make provision for him. After the death of testator's wife, Arthur Nelson and his wife continued to live with the testator for three years and they paid all the family bills. When the testator suffered a stroke he was nursed through this serious illness by Mrs. Arthur Nelson. Other evidence shows that the will was at variance with the testamentary intentions of the decedent as declared by him both before and after the execution thereof. All these facts taken together were sufficient to support the verdict of the jury. The fact that the deceased was of an advanced age and in a weak-

ened condition, both physically and mentally, afforded the proponent an opportunity to control his testamentary act, and is an important factor in determining whether or not the will was his free act or an instrument procured by undue influence. Estate of Motz, 136 Cal. 558, 69 P. 294. So, also, was the activity of proponent in taking testator to an attorney's office for the purpose of having his will executed, a potent circumstance. Estate of Welch, 6 Cal. App. 44, 91 P. 336. Then, too, the relations between proponent and the decedent afforded her an opportunity to control the testamentary act. While none of these and the other circumstances standing alone might have the effect of creating a presumption against the validity of the will, their probative force in combination was to impose upon proponents the obligation of presenting evidence of volition, and to make the question of undue influence one of fact for the jury's determination. Estate of Graves, 202 Cal. 258, 262, 259 P. 935; Estate of Baird, 176 Cal. 381, 168 P. 561; Estate of Gallo, 61 Cal. App. 163, 214 P. 496.

[5, 6] Respondents rely upon the testimony of the attorney who drew the will and his clerk who witnessed it as showing testamentary power in the deceased. This evidence merely raised a conflict, and the jury was free to reject it. Estate of McDonald, 191 Cal. 161, 215 P. 545. Questions involving motives and inferences to be deduced from facts and circumstances are, within reasonable bounds, exclusively within the province of the jury. Estate of Maescher, 78 Cal. App. 189, 248 P. 537.

Under all the facts and circumstances it cannot be said that the evidence did not support the finding of the jury. We conclude, therefore, that the trial court committed error in granting the motion for judgment notwithstanding the verdict. The order admitting the will to probate is therefore reversed, and it is ordered that judgment be rendered rejecting the will in accordance with the verdict of the jury.

134 Cal.App. 534

STOCKWELL et al. v. EQUITABLE FIRE & MARINE INS. CO. OF PROVIDENCE, R. I.

Civ. 4897.

District Court of Appeal, Third District, California.

Oct. 7, 1933.

Hearing Denied by Supreme Court Dec. 4, 1933.

1. Insurance 🔑574(7).

Evidence supported judgment based on jury's implied finding that appraisers' award under fire policy was void because procured without opportunity to insured to furnish appraisers with proof of character or value of property destroyed.

2. Arbitration and award 🔑1.

"Arbitration" is submission for determination of disputed matter to private unofficial persons selected in manner provided by law or agreement.

[Ed. Note.—For other definitions of "Arbitrate; Arbitration," see Words & Phrases.]

3. Arbitration and award 🔑82(1).

Appraisers' award in arbitration proceeding is binding, in absence of procedure contrary to law or specific stipulations of parties, or of conduct which prejudices substantial rights of parties.

4. Arbitration and award 🔑64.

Any conduct amounting to fraud or resulting in depriving either party of fair and impartial hearing in arbitration proceeding to party's substantial prejudice is ground for setting award aside (Code Civ. Proc. § 1288, subd. (c).

5. Arbitration and award 🔑31.

In arbitration proceeding, though hearing and method of adducing evidence are informal, parties should have opportunity of fairly presenting evidence of their respective claims (Code Civ. Proc. § 1288, subd. (c).

6. Insurance 🔑574(2).

Where insured had no notice of meeting of appraisers under fire policy, and had no opportunity to furnish appraisers with proof of character and value of building and furniture destroyed, entire award *held* invalid (Code Civ. Proc. § 1288, subd. (c).

7. Insurance 🔑574(7).

In action on fire policy, where defense was award of appraisers and issue regarding invalidity of award was presented to jury and general verdict rendered in favor of plaintiff, further specific findings of court respecting invalidity of award *held* unnecessary to support judgment.

8. Trial 🔑330(5).

In action on fire policy for destruction of building and furniture, where case was tried on theory that award of appraisers was valid or invalid as whole, and verdict was for gross sum, award could not be segregated and held to be valid as to building.

9. Insurance 🔑645(3).

In action on fire policy, alleged exclusion of evidence tending to show that fire was of incendiary origin and that house was permitted to remain vacant contrary to policy provision *held* not erroneous; such issues not being raised by pleadings.

10. Appeal and error 🔑1056(1).

In action on fire policy, where insured, as witness, had already denied knowledge of cause of fire, exclusion of question whether insured had any information regarding cause of fire *held* not prejudicial error.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Mrs. E. C. Stockwell and another against the Equitable Fire & Marine Insurance Company of Providence, R. I. From a judgment in favor of plaintiffs, defendant appeals.

Affirmed.

J. F. Riley, of San Francisco, for appellant.

J. Oscar Goldstein, of Chico, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant insurance company has appealed from a judgment, which was rendered against it pursuant to the verdict of a jury, in a suit upon a fire insurance policy for the total loss by fire of a dwelling house and furniture. It is contended a previous arbitration and appraisal of the property which was made pursuant to the provisions of the policy is binding upon the insured and renders the judgment ineffectual and void.

The plaintiff Mrs. E. C. Stockwell was the owner of a dwelling house at Chico of the value of approximately $4,500, together with furniture of the value of about $500. There was also a garage situated on the premises. The Butte County Savings Bank held a mortgage on the premises, upon which there was an unpaid balance of $1,627.81. This mortgage was assigned to plaintiff Bank of America. On December 8, 1929, the Equitable Fire & Marine Insurance Company of Providence, through its local agent, issued a three-year policy of insurance to Mrs. Stockwell, subject to the mortgagee's interest as it appeared. By the terms of this policy, the building was insured for $3,750. The furniture was insured for $500, and the garage was insured for $250. July 28, 1931, the dwelling house and furniture were practically destroyed by fire. The garage was not burned. There is no contention that fraud was exercised in procuring the insurance. No misrepresentation is charged in valuing the property for the purpose of insurance. While there is some conflict with regard to the question as to whether the building was totally destroyed by fire, two experienced and responsible contractors testified that the fire resulted in a total loss. Mr. Smith said:

"I consider it (the dwelling house) a total loss. * * * There is not anything about the building that I would use in the construction of another building. * * * Part of the outside walls are standing and a little bit of the floor is standing, and the floor is burned underneath, and the upper floor is gone entirely. * * * The roof is entirely gone.

"Q. How about the building as it stands, can it be repaired? A. Absolutely no."

Mr. Erwin testified in that regard: "I found that building there to be what I would call a total loss."

The insurance policy contains the usual standard statutory insurance clause with respect to arbitration and appraisal (Deering's Gen. Laws 1931, Act 3735), as follows:

"If the insured and this company fail to agree in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appaiser, and the insured within five days after receipt of such demand and name, shall appoint a competent and disinterested appraiser and notify the company thereof in writing, and the two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

"The appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount of such loss."

Within the time prescribed by the contract, the insured on September 14, 1931, presented to the company her verified itemized proof of loss, in which she claimed a total loss of the dwelling house valued at $3,750, which was the full amount for which it was insured, and all her furniture, which she valued at $466.90. She demanded full compensation therefor. Pursuant to the terms of the policy, the company, on September 30, notified the insured in writing of its disagreement regarding her valuation of both the dwelling house and the furniture, but acknowledged its liability for the loss of the building in the sum of $2,000, and of the furniture in the aggregate sum of $116.73. This amount of compensation was rejected by the insured. Appraisers were subsequently appointed in the manner provided by the above-quoted clause of the policy. The insurance company named Ira W. Coburn as its representative. The mortgagee bank named, and the insured approved, the appointment of Merrick W. Evans as their representative. Louis Van Vlack was selected by the two previously named appraisers to act as an umpire in the appraisement of the property. All three appraisers took the oath and qualified. Subsequently, without notice to, or the presence of, the insured, or any one representing her interest, or of the umpire, the two appraisers, Coburn and Evans, met at the site of the burned property and agreed upon fixing the loss of the building at $1,956. The loss of furniture was fixed at the total sum of $146.25. This appraisement was subsequently reduced to writing, signed by the two appraisers and served upon the insured, who promptly rejected the offer as an illegal, unfair, and inadequate appraisement of her loss. Suit upon the policy was then instituted by the plaintiffs. The complaint alleges that the appraisement of the property was procured illegally and unfairly by means of fraud and collusion, and without notice to the insured or opportunity to present to the appraisers proof of the character or value of the real or personal property which was destroyed by fire. The cause was tried by a jury, which was fully and fairly instructed regarding the issues of the case, including the effect of the alleged arbitration and appraisal of the property. No objections are made to the instructions which were given to the jury. A verdict was returned in favor of the plaintiffs for the sum of $4,216.90. Judgment was rendered accordingly. From this judgment the defendant has appealed.

The appellant contends that the judgment is not supported by the evidence; that the plaintiffs are bound by the award of damages fixed by the appraisers; that the judgment fails to pass upon the validity of the award of the appraisers; and that the court erred in rejecting testimony which was offered by the insurance company.

[1] We are of the opinion the evidence sufficiently supports the judgment based upon implied findings of the jury that the award of the appraisers is void for the reason that it was illegally procured by means of implied fraud, without notice to the insured, and without opportunity for her to furnish the appraisers with proof of the character or value of the real or personal property which was destroyed. Circumstances were adduced at the trial from which the jury was warranted in inferring that the appraisers acted in collusion, to the detriment of the insured, and that the appraiser, Evans, was dominated and controlled in the fixing of damages by his associate, Coburn. In spite of the fact that one of the attorneys representing the insured instructed Mr. Evans to visit the site of the fire prior to the arbitration and secure all the data respecting the character and value of the property destroyed, and report this information back to them, this appraiser admitted at the trial: "I talked to Mr. Bybee; he told me to go down and figure it up and to get all the data together and I guess he instructed me to bring it to him and I didn't. I never talked to him again until after the appraisement was made."

It further appears that no notice was given to the insured or to any one representing her by the appraisers, or by the defendant, of the time and place of making the appraisement and fixing the award. Neither the insured, the mortgagee, or any one representing them or either of them was present at the time of the appraisement, nor were they ever given an opportunity to offer proof to the appraisers of the character or value of the real or personal property which was destroyed by fire. The appraiser, Coburn, appears to have directed the entire proceeding, suggested the figures, and dictated the terms of the proposed award. He did all the writing in the document by the terms of which the appraisement was made. Evans admitted at the trial that he had no knowledge of the value of the furniture, and that the aggregate sum of $116.73 in compensation therefor was arbitrarily placed in the award by Coburn with the statement that he could duplicate the entire lot of furniture for that sum. There is evidence that this sum was not written in the award at the time Evans signed the document. Van Vlack, who had been appointed and qualified as umpire of the arbitration, was not notified of the time of appraisement. He was not present, and he was not called upon by the appraisers to participate in the determination of values or to take part in the transaction. After the two appraisers had arbitrarily met and fixed their award, Coburn notified Van Vlack that his services would not be required. It is true that any two of the appraisers were authorized to fix the amount of the award. Evans testified at the trial that he did finally accept the figures of Coburn respecting the value of the real and personal property, but there is evidence from which the jury was warranted in assuming that Evans never did agree to the amount of $116.73 which was placed in the award, as the value of the furniture destroyed. This being true, it may not be said the award represents a valid agreement respecting the value of the furniture, by any two appraisers, such as is contemplated by the arbitration clause of the policy. Under such circumstances, the award would be invalid for failure to submit the disagreement respecting the value of the furniture to the umpire. At least there is evidence of its invalidity for failure to furnish the insured with notice of the appraisement, or to afford her the opportunity of supplying proof of the character and value of the real and personal property which was destroyed.

[2-5] Arbitration is the submission for determination of a disputed matter to private

unofficial persons selected in the manner provided by law or by agreement of the parties. It is said the appraisers partake of the nature of experts and the board of inquiry constitutes an informal quasi court for the determination of the contested matter. In the absence of procedure on the part of the appraisers which is contrary to law or the specific stipulations of the parties, or conduct which prejudices the substantial rights of the parties, their award will be binding. Any conduct which amounts to fraud or which results in depriving either of the parties of a fair and impartial hearing to their substantial prejudice may be grounds for setting the award aside. While the hearing and the method of adducing evidence is informal, it is absolutely essential that the parties should have the opportunity of fairly presenting evidence of their respective claims. In 5 C. J. 84, § 175, it is said in that regard: "It may be stated as a general proposition, that parties are always entitled to a hearing before the arbitrators, and, although arbitrators are not bound by strict rules of evidence, they cannot transgress that fundamental principle of justice which declares that no man shall be condemned without the opportunity of being heard. The parties are entitled to a hearing upon all the matters submitted. 'The injustice is the same, and the injury as great, to deprive one of a right without a hearing before arbitrators as before a court.' And the right is one which no statute can be so construed as to abrogate. So the fact that the arbitrators in denying the parties a hearing acted in perfect good faith, merely mistaking their duty in this respect, in no way affects the question of the rule. The parties may, of course, waive their right to a hearing by an express agreement. But nothing short of plain and clear words will be sufficient for that purpose."

It is ordinarily necessary to the validity of an award by arbitration and appraisal that the interested parties shall have notice of the hearing of the board and a fair opportunity to present competent proof of the character and value of the property which is involved therein. Curtis v. Sacramento, 64 Cal. 102, 28 P. 108, 109; 3 Cal. Jur. 62, § 23; 2 R. C. L. 379, § 25; 5 C. J. 86, § 179; 7 Cooley's Briefs on Ins. 6202, § 3 (1). In the authority last cited it is said: "A refusal by the appraisers to give insured an opportunity to present to them the facts as to his loss renders the award invalid. * * * And it has been held that a mere failure to give insured notice of the meeting, so as to permit him to introduce his evidence, would have the same effect."

In the Curtis Case, above cited, the court quotes with approval from the opinion of the United States Supreme Court in Lutz v. Linthicum, 8 Pet. 178, 8 L. Ed. 904, as follows: "Without question due notice should be given to the parties of the time and place of hearing the cause, and, if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside."

Section 1288 of the Code of Civil Procedure clearly contemplates the giving of a notice of the hearing of an arbitration board and of the affording of an opportunity for the interested parties to furnish proof of their claims. That section of the Code provides that an award may be vacated: "(c) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehaviors, by which the rights of any party have been prejudiced."

There are cases which hold that this service of notice may be waived by the interested parties. Other cases uphold awards which were made without specific notice on the ground that the appraisers were possessed of all the material evidence of the character and value of the property involved, and that the owner was therefore not harmed by failure to notify him of the time and place of the hearing of a board of arbitration.

In the present case notice of the hearing was not waived by the insured. Upon the contrary, the record indicates that she expected to be given an opportunity to be heard. Her attorney instructed their appraiser, Evans, "to get all data together," and bring it back to them. Certainly common justice would require that the insured should have an opportunity to furnish proof of the character, condition, and value of her household furniture, which was insured for $500 before appraisers arbitrarily awarded but the sum of $116.73 for its loss. Evans admitted that he knew nothing about the furniture or its condition or value. The furniture was entirely destroyed by the fire. Neither of the appraisers ever saw the furniture, or talked with the owner about its character, condition, or value. Evans admitted that he accepted Coburn's value of the furniture upon his assurance that he could replace the whole lot for that sum. But it is apparent that Coburn had no knowledge of what sum the furniture could be replaced for, in the absence of personal knowledge regarding its identity, condition, or character.

[6] Under the circumstances of this case, we are satisfied the insured should have been afforded an opportunity to furnish the appraisers with proof of the character and value of the property which was destroyed by fire, and that the award is therefore invalid. There is ample evidence to support this implied finding of the jury.

The appellant contends the judgment should be reversed, for the reason that the court failed to specifically find that the award is void for lack of notice, or because the insured was not afforded an opportunity to offer proof of the character and value of the property which she lost by fire, or that the award was procured by fraud.

[7] Specific findings upon these subjects were not required in the present case. The cause was instituted as a plain suit based upon the contract of the insurance policy. The invalidity of an alleged award of damages was incidentally injected into the cause as an issue. The validity of the award became a matter of defense on the part of the insurance company, since arbitration was only necessary when the insurance company disputed the proof of loss. The case was tried with a jury. The issue regarding the invalidity of the award was presented to the jury under adequate instructions by the court. A general verdict was rendered in favor of the plaintiffs. This verdict implies that the issues regarding the validity of the award were determined by the jury adversely to the defendant. Further specific findings of the court are unnecessary.

[8] It is asserted that, although the award of compensation for the furniture may be illegal for lack of notice or opportunity on the part of the insured to show its character and value, still the award for the loss of the building is not subject to the same infirmity, and therefore should be approved as valid, since it may readily be severed from the award as a whole. We are of the opinion the entire award is invalid for the reasons heretofore given. Moreover, the case was tried on the theory that the award was either valid or invalid as a whole. There was no attempt at the trial of the case to sever the award and determine its validity with respect to the value of the dwelling house as separate and distinct from that of the furniture. The verdict of the jury was for the gross sum of $4,216.90. The jury was not asked to segregate its award, and it made no effort to do so. Under the circumstances of this case, there is no merit in the contention that the award should be segregated and held to be valid in part.

Finally, it is claimed the court erred in excluding from the jury certain evidence tending to show that the fire occurred from incendiary origin, that the house was permitted to remain vacant prior to the fire, contrary to the provisions of the policy, and that the insured had some knowledge of the cause of the fire which she was not permitted to disclose.

[9, 10] There was no error in excluding this evidence. The pleadings in this case raise neither the issue of a fire occurring from incendiary origin nor the vacancy of the house contrary to the provisions of the policy. The answer set up neither of these issues as a defense to the suit. Far from denying a liability upon the policy on these grounds, the company conceded in a written statement which was sent to the insured on September 30, 1931: "This company admits on the property set forth in said purported preliminary proof of loss the following amount of loss only, viz.: On building $2,000.00." The defendant made no real effort at the trial to prove that the fire occurred from incendiary origin. It was sufficiently established by the evidence that the insured had no knowledge or belief regarding the cause of the fire. On cross-examination she testified in that regard: "Q. Now I will ask you the question, do you know how the fire started? A. No." Her son also testified in that regard: "Q. Did either one of you know anything about the cause of the fire? A. Not one single thing." There was no prejudicial error in sustaining the objection to the further question propounded to the insured as to whether she had any information regarding the cause of the fire.

The only evidence tending to show an opportunity on the part of any one to set the fire is that the insured frankly admitted the house was vacant for several months before the fire occurred. Mrs. King, a neighbor who resides across the street from the property in question, testified at length, without objection, that she had seen a man about the place one night, a week or so before the fire occurred, and that he parked a green Essex automobile on the premises while he placed some curtains at the windows. The son of the insured was subsequently called as a witness by the defendant. He frankly admitted that he owned a green Essex automobile which he drove to his mother's premises at 8 o'clock one evening about two weeks before the fire occurred and parked it on the premises while he put up some shades at the windows. It was not charged in the answer or otherwise that the fire was of incendiary origin. That was not an issue in the case. No serious effort was made at the trial to prove that theory. The objections were properly sustained.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

134 Cal.App. 566

BOYD et al. v. A. E. J. CHIVERS CO. et al.

Civ. 9013.

District Court of Appeal, First District, Division 2, California.

Oct. 10, 1933.

1. Contracts 🔑323(1).

Under contract making time of its essence, whether there was waiver is question of fact.

2. Vendor and purchaser 🔑78.

Facts *held* to sustain finding that covenant as to time, being of essence for contract for sale of realty, was waived.

> Facts showed that under contract on date when purchasers would pay last installment vendors would deliver deed, that last payment was made on November 15, 1930, and it was not until March 14, 1931, that purchasers notified vendors that they rescinded contract, and deed was mailed to purchasers in New York on March 26, 1931.

3. Vendor and purchaser 🔑50.

Purchasers could not rescind contract on ground that vendors failed to construct sidewalks as required by contract, where by collateral contract vendors were required to farm realty, which could not be done with sidewalks in place.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Ella N. Boyd and another against A. E. J. Chivers Company and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

A. P. Coviello, of Los Angeles, for appellants.

J. R. Wilder, of Los Angeles, for respondents.

STURTEVANT, Justice.

The plaintiffs commenced an action against the defendants to obtain a judgment rescinding a contract and to recover damages. The trial court made findings in favor of the defendants, and from the judgment entered thereon the plaintiffs have appealed. The defendant Fitz Investment Company is a corporation. Formerly it was known by another name. The personal defendants are officers of the corporation. Hereinafter it will not be necessary for us to refer to any of the defendants excepting the Fitz Investment Company.

On the 7th day of August, 1924, the corporation was engaged in subdividing and selling certain tracts of land in Los Angeles county. Some of the tracts and particularly tract 6573 were orange groves apparently in bearing. Each tract was being farmed as an orange grove. Tract 6573 was being so farmed and was offered for sale in subdivisions as shown by a certain map then on record. On the 7th day of August, 1924, the defendant, as party of the first part, and the plaintiffs Ella N. Boyd and Robert J. Boyd, entered into a written contract under the terms of which the plaintiffs agreed to purchase lot number 43 of tract 6573. The sales price was $1,090. The plaintiffs paid $165 down and agreed to pay $15 monthly, together with interest at 7 per cent. until the balance was paid. In the contract it is provided that "The party of the first part hereby agrees to place upon said lands described above, the following improvements and none other: Sidewalks, curbs, water, gas and electricity and graveled, oiled and rolled streets." No other covenant on that subject was inserted. The contract also provided that "The said party of the second part is hereby given possession of the premises aforesaid and in consideration thereof said party of the second part hereby agrees to pay all state, city and county taxes and assessments of whatsoever nature which may be levied or assessed on the premises above described. * * * Time is strictly the essence of this agreement. * * * In the event the party of the second part shall have complied with all the terms and provisions hereof at the time and in the manner herein specified and upon surrender of this instrument, the party of the first part will execute a good and sufficient deed of conveyance conveying the premises herein described and furnish a certificate of title issued by a reputable title company doing business in the city of Los Angeles, showing the title then vested in the party of the first part, free and clear of all encumbrances except the first half taxes for the fiscal year 1924–1925." Although the above-mentioned contract is silent on the subject, there is evidence in the record that the defendant corporation farmed the land from August 7, 1924, and down to the date that the action was commenced. In doing so, it caused the orange trees to be sprayed. Growing out of that transaction the county of Los Angeles filed a lien on the entire tract 6573. Because the property could not be farmed to an advantage if sidewalks were put in place, the latter work was not done. The fact that it was not done was known to the plaintiffs and their agent, and no demand that the work be done was made. Many payments were not made monthly, but there was evidence that on the 15th day of November, 1930, the final payment on the purchase price was made by the plaintiffs acting through their agent, Ronald M. Boyd. As to what was said by him at the time said payment was made regarding the delivery of a deed and a certificate of title, the evidence is conflicting. However, there was evidence that Mr. Boyd was told a deed would be prepared and a certificate would be issued as soon as the defendant could clear the title, and that thereupon Mr. Boyd left without making any objection or any further demand. It was stipulated that from the time the lien was imposed until March 31, 1931, the defendant exercised every effort to get the lien withdrawn, and on the date last mentioned the lien was withdrawn. A trust deed stood against tract No. 6573 and a partial release of lot No. 43 was issued shortly before March 31, 1931. A grant deed was executed on the 24th day of March, 1931, acknowledged on the 26th day of March, and forwarded to the plaintiffs at their address in New York. A policy of title insurance was executed on the 31st day of March, 1931, and was thereafter forwarded to the plaintiffs. There was evidence that the defendant was ready, able, and willing at all times to install any of the improvements hereinabove mentioned, and that it would do so on the demand of the plaintiffs.

[1, 2] The plaintiffs call to our attention that on March 14, 1931, they wrote the defendant Fitz Investment Company a letter, by the terms of which they gave notice of rescission. Thereupon, they contend the trial court erred in holding the plaintiffs were not entitled to rescind the contract when defendant failed to deliver a deed upon demand and after the plaintiffs had fully performed their contract which contained a covenant that time was of the essence thereof. The defendant replies that under the facts hereinabove recited the plaintiffs waived that covenant. Tuffin v. Warfield, 72 Cal. App. 282, 237 P. 64; Larson v. Thomas, 51 S. D. 564, 215 N. W. 927, 57 A. L. R. 1246, note at page 1548. It will be conceded that a waiver is a question of fact to be considered under all of the evidence. Frazer v. Hovey, 195 Mich. 160, 161 N. W. 887. That being so, we think it cannot be said in the instant case there was not evidence supporting the implied finding that the covenant as to time being of the essence was waived. After November 15, 1930, and down to March 14, 1931, no notice was given by the plaintiffs that thereafter they would rely strictly on the covenant. It follows the notice given on March 14, 1931, should have given the defendant a reasonable time within which to perform. Furthermore, it may not be said under the facts that the defendant did not perform within a reasonable time after said date.

[3] The plaintiffs call to our attention that the improvements consisting of sidewalks, streets, etc., had not been installed and therefore they were entitled to rescind. As the written contract did not specify the date the improvements were to be installed, the plaintiffs claim that performance on the part of the defendant was concurrent with the date of performance by the plaintiffs. Mills v. Richmond Co., Inc., 56 Cal. App. 774, 206 P. 486. Continuing, they claim that the consideration as to them has failed. Blahnik v. Small Farms Improvement Co., 181 Cal. 379, 184 P. 661; Walker v. Harbor Business Blocks Co., 181 Cal. 773, 186 P. 356. The authorities cited may be distinguished on a very material point. In those cases no collateral contract was in existence. In the instant case there was before the court the written instrument which we have quoted from, and there was the other contract, whether in writing or oral, which was collateral thereto. By the terms of that latter contract the defendant was called upon to farm tract 6573. It is patent the farming could not be well done with the sidewalks and streets in place, and furthermore, if it was done with modern equipment, the streets and sidewalks, if in place, would be greatly injured by farming implements. Under such a set of facts, we think it is clear it may not be said that the defendant breached its contract.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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134 Cal.App. 419

OLSON et al. v. CORNWELL et al.

Civ. 8937.

District Court of Appeal, First District, Division 1, California.

Sept. 29, 1933.

Rehearing Denied Oct. 28, 1933.

1. Husband and wife ⚿274(4).

Whether land acquired by wife after marriage was her separate property *held* question of fact under evidence rebutting presumption that it was community property (Civ. Code, §§ 162–164).

> The evidence tended to show that part of money paid for the land came from wife's own savings and that subsequent payments were made from money given her by her husband and that deed was taken in her name with his consent. Evidence that husband and son joined in subsequent agreements executed by wife affecting the property was relied on to show land was community property.

2. Evidence ⚿273(4).

Declaration in bankrupt husband's petition for discharge that he had surrendered all his property *held* relevant on question whether property standing in wife's name

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

and not listed in schedules in husband's bankruptcy was community property (Civ. Code, §§ 162–164).

3. Husband and wife 🔑266.
Husband furnishing money for purchase of property could make effectual gift to wife by directing that conveyance be made to her (Civ. Code, §§ 162–164).

4. Appeal and error 🔑996, 1011(1).
Trial court's conclusion that property acquired by wife after marriage is separate property will not be disturbed if evidence is substantially conflicting or if different inferences might fairly be drawn (Civ. Code, §§ 162–164).

5. Husband and wife 🔑264.
Finding that real property purchased in wife's name after marriage was wife's separate property *held* justified under evidence, notwithstanding proof that her husband and son joined her in executing trust deed thereon.

6. Lis pendens 🔑22(1).
Lis pendens filed by plaintiff gives sufficient notice of adverse interest claimed by defendants in their answer.

7. Lis pendens 🔑22(2).
Lis pendens gives constructive notice of all facts apparent on face of proceedings and of further facts of which purchaser of premises is necessarily put on inquiry.

8. Lis pendens 🔑11(1).
Rights of loan corporation taking deed of trust on property after filing of lis pendens *held* unaffected thereby, where judgment of dismissal was thereafter rendered pursuant to settlement contract.

9. Deeds 🔑28.
Instrument transferring property will be given effect, notwithstanding inaptness of words used, if intention to make present transfer appears.

10. Vendor and purchaser 🔑229(2).
Whatever is sufficient to direct attention of subsequent purchaser or incumbrancer to prior rights or equities of third person under unrecorded contract will operate as notice of facts ascertainable by inquiry.

11. Mortgages 🔑186(3).
Persons claiming property under deed of trust given subsequent to execution of contract conveying undivided interest therein, but before such contract was recorded, had burden to prove that their predecessor was good faith incumbrancer for valuable consideration without notice, actual or constructive.

12. Mortgages 🔑186(6).
Court in action to quiet title should make finding on question whether incumbrancer taking deed of trust subsequent to execution of unrecorded conveyance had constructive notice, where letter from title company contained information that quiet title action was then pending.

> The evidence showed that the borrower was in possession of the property and claimed the land as her separate property, and the president of the loan company testified that he had no information of third party claims except as appeared in letters from the title company, which stated that a quiet title action was pending but that the title company would insure the loan. No further showing was made of investigation by the loan company.

13. Vendor and purchaser 🔑231(10).
As respects delay, negligence in recording instrument may constitute estoppel to question the title of bona fide purchaser.

14. Mortgages 🔑154(4).
Lapse of 21 days between execution and recording of conveyance *held* not as matter of law to estop grantees thereunder from asserting claim as against successors of incumbrancer taking deed of trust during 21-day period.

15. Subrogation 🔑23(1).
Court, on finding that loan company taking deed of trust had constructive notice of prior unrecorded conveyance, may in interest of justice revive, as against grantees of premises, prior incumbrances which were discharged with proceeds of loan.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Amy Olson and another against Ella H. Cornwell and others, in which Charles H. Rhoades and wife filed a cross-complaint. From the judgment, plaintiffs and defendants Ella H. Cornwell and others appeal.

Reversed and remanded.

John Henderson Pelletier and John C. Kleber, both of Los Angeles, for appellants.

Rex Hardy, of Los Angeles, for respondents.

PER CURIAM.

An action by plaintiffs Olson and Caldwell to quiet their alleged title to an undivided interest in a parcel of land in Los Angeles county.

They are daughters of Charles Lyman Cornwell, who died intestate in said county on September 26, 1921. They claim that the land was the community property of decedent and defendant Ella H. Cornwell, their mother, who will be hereinafter referred to as Mrs. Cornwell; also that defendant California Security Loan Corporation, hereinafter referred to as the loan company, acquired its interest therein with notice of their rights as heirs of decedent and under a certain contract of settlement made with their mother, by which the latter agreed that they should have an interest in the property. After said contract was recorded defendants Rhoades succeeded to the interest of the loan company therein.

The trial court found against plaintiffs' claims, and judgment having been entered accordingly, they have appealed therefrom.

Decedent and Mrs. Cornwell married on November 20, 1872, and came to California in 1882. There were four children of the marriage. The land was purchased on a contract in 1884, and was conveyed by the record owner to Mrs. Cornwell by grant deed dated July 12, 1886, and recorded July 27, 1886. According to the court's findings the conveyance to her was made at decedent's request. The spouses and their children resided thereon until the death of decedent.

Commencing in 1924 Mrs. Cornwell executed several incumbrances upon the property to secure sums borrowed. Among these were several deeds of trust to the Title Guaranty & Trust Company to secure loans made by the loan company. The last was dated August 29, 1927, when Mrs. Cornwell, with her son, Ralph, executed a deed to the title company as trustee to secure a loan of $24,500 from the loan company. Defaults occurred under this deed, and on April 19, 1930, the land was sold by the title company as trustee and purchased by the loan company. In 1930 the loan company's interest therein was acquired by defendants Rhoades.

When the title to the land was secured by Mrs. Cornwell, the statute provided that all property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, should be her separate property. Civ. Code, § 162. The same rule applied to property owned or in like manner acquired by the husband. Civ. Code, § 163. Section 164 of the same Code provided that "all other property acquired after marriage by either husband or wife * * * is community property."

[1, 2] In support of their contention that the land was the community property of their parents plaintiffs rely in part upon the disputable presumption that it was of that character. Alverson v. Jones, 10 Cal. 9, 70 Am. Dec. 689; Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538; Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L. R. A. (N. S.) 1092. It was, of course, incumbent upon defendants to meet this presumption, and it has been said that the evidence, in order to have this effect, must be clear and convincing. This question, however, was one for the trial court, and its determination is conclusive unless its conclusion is manifestly unsupported. Estate of Pepper, supra; Couts v. Winston, 153 Cal. 686, 96 P. 357; Fanning v. Green, 156 Cal. 279, 104 P. 308; Estate of Nickson, 187 Cal. 603, 203 P. 106. Defendants adduced evidence showing that in 1907 decedent upon his verified petition was adjudged a voluntary bankrupt. The land in question was not listed in the schedules attached to his petition, which purported to show all his property, both real and personal, nor in the inventory subsequently filed by the trustee. Following this, decedent filed his petition for a discharge, alleging that he had duly surrendered all his property and rights of property, and the petition was granted. No reference to the land appears in either of these proceedings. Decedent's declaration was relevant on the question of his ownership, and competent against those claiming under him. Lyon v. Phillips, 106 Pa. 57; Rankin v. Busby (Tex. Civ. App.) 25 S. W. 678; Bald v. Nuernberger, 267 Ill. 616, 108 N. E. 724; Spotswood v. Spotswood, 4 Cal. App. 711, 89 P. 362; Chamberlayne, The Modern Law of Evidence, § 2777. Mrs. Cornwell testified in substance that before coming to California she had saved about $500; that this was her own money, and that a portion of it was paid on the land contract; that subsequent payments were made from money given her by her husband; that when the purchase was made he stated that the property should be hers; that with his consent the deed was taken in her name; and that subsequently on several occasions he referred to the land as her property and that he had no interest therein. A son also testified to the same effect.

[3-5] If her testimony was true, this was evidence of her husband's intention to give her the property. Parties might have so agreed (Hoeck v. Greif, 142 Cal. 119, 75 P. 670), and he could have made the gift effectual by directing the conveyance to be made to her, as she testified. Peck v. Brummagim, 31 Cal. 441, 89 Am. Dec. 195; Jackson v. Torrence, 83 Cal. 521, 23 P. 695; Cullen v. Bisbee, 168 Cal. 695, 144 P. 968. She joined with her husband in the execution of certain agreements affecting the property and a mortgage thereon; she also joined with her son in executing the deed of trust mentioned, and permitted a part of the loan secured thereby to be paid to the latter. She also brought a suit to quiet the title thereto against her children, which suit will be hereafter considered in another connection. A letter was written by her after the date of the last deed of trust requesting plaintiffs to join in the execution of a new incumbrance on the property in order to pay off the existing debt. She stated therein that if that were done she would be "willing to make out a paper to give you your part when sold."

Plaintiffs claim that these and other circumstances constituted admissions showing that the land was not her separate property. Although the evidence last referred to tends to support plaintiffs' contention, it is not conclusive. It does not necessarily follow from the fact that her husband and son joined in the execution of the instrument mentioned that the land was not originally her separate property, nor does the letter referred to necessarily have that effect. It was written after the execution of the contract of settlement above mentioned, in which it was agreed that each of her daughters should thereafter have a fractional part or interest in the property. The significance and force of such acts and statements is for the jury or the trial court sitting as such to determine. Smith v. Whittier, 95 Cal. 279, 30 P. 529; Bush v. Barnett, 96 Cal. 202, 31 P. 2; 10 Cal. Jur., Evidence, § 321, p. 1082. As stated by Chamberlayne (The Modern Law of Evidence, § 1390), the substantive or procedural law prescribes no predetermined weight for extrajudicial admissions, whether oral or in writing. It leaves the question of weight and the construction of an admission, verbal or written, to the jury, entirely unaffected by specific rules as to weight. All relevant facts and circumstances are to be considered in order to ascertain the intention of the parties; and the court's conclusion that the presumption mentioned has been overcome will not be disturbed if there be a substantial conflict in the evidence. Woods v. Whitney, 42 Cal. 358; Stafford v. Martinoni, 192 Cal. 724, 221 P. 919; Estate of Nickson, supra; Lyon v. Lyon, 70 Cal. App. 607, 233 P. 988. And the same is true where there is no conflict if different inferences might fairly be drawn from the evidence. MacDermot v. Hayes, 175 Cal. 95, 170 P. 616. We are satisfied that the conclusion of the trial court that the land was the separate property of Mrs. Cornwell is fully supported.

[6-8] It is also contended that the loan company had notice of plaintiffs' claims both as heirs of their father and under their contract with Mrs. Cornwell. This is based upon the facts that a lis pendens was filed in Mrs. Cornwell's suit to quiet title and that the loan company had actual notice of the suit.

The suit mentioned was commenced by Mrs. Cornwell against her children on March 2, 1926, and a lis pendens was filed on March 4, 1926. The complaint alleged title in her, and that the defendants (including the plaintiffs in the present action) claimed some estate or interest in the property. On June 14, 1926, defendants last mentioned answered, denying Mrs. Cornwell's alleged title and averring that the land was community property and that the interest they claimed therein was by right of inheritance as heirs of their father. They asked no affirmative relief nor did they file a lis pendens. However, that filed by Mrs. Cornwell was sufficient notice that they claimed an adverse interest. Welton v. Cook, 61 Cal. 481; Imperial Farming Co. v. Van Horn, 107 Cal. App. 717, 290 P. 1077. The effect of a lis pendens is to give constructive notice of all facts apparent on the face of the proceedings, and of those facts of which the facts so stated necessarily put a purchaser on inquiry (17 R. C. L., Lis Pendens, § 7, p. 1014); and a subsequent purchaser from a party takes subject to any judgment that may be rendered in the action of the pendency of which notice is given (16 Cal. Jur., Lis Pendens, § 12, p. 658). While it has been held that the doctrine extends to a compromise of litigation and a decree entered accordingly (Turner v. Babb, 60 Mo. 342), according to the decisions, if the action is settled and is abandoned or dismissed the lis pendens is terminated, and a person acquiring interests before settlement, abandonment, or dismissal does not take such rights pendente lite so as to be affected thereby. 38 Cor. Jur., Lis Pendens, §§ 65, 67, p. 40; Bailey v. Ford, 132 Ark. 203, 200 S. W. 797; Johnson v. Marti (Tex. Civ. App.) 214 S. W. 726; Wells v. Goss, 110 La. 347, 34 So. 470.

No judgment except one of dismissal was entered in the quiet title action, and this was done pursuant to the contract between the parties settling their differences and by which plaintiffs acquired an interest in the land. The trial court in the present case has found that plaintiffs' asserted interest by succession from their father was without foundation, and it appears that their sole interest was that acquired from Mrs. Cornwell under the settlement contract mentioned, following the execution of which the suit was dismissed.

These facts bring the case within the rule above stated, and the rights of the loan corporation were unaffected by the lis pendens filed.

[9] However, it is clear from the evidence that both the loan and title companies had actual notice of the pendency of the suit as early as February, 1927; but, according to correspondence between them, the loan company was satisfied to accept a policy of insurance from the title company insuring the loan against any loss growing out of the litigation. The settlement contract was executed on August 8, 1927, but was not recorded until June 29, 1928. The last deed of trust was executed on August 29, 1927, and recorded September 6, 1927. The contract recited that a settlement of all disputes between the parties had been made, and contained the provision that plaintiffs "shall have and from now on are entitled to one-sixth (1/6) part and interest each" in the property. It seems clear from the language of the parties that it was

the intention to make a present transfer to plaintiffs of an undivided interest in the property; and where the intent is expressed it is sufficient, whatever may be the inaccuracy of expression or the inaptness of the words used, and the courts will give the instrument that effect. 8 R. C. L., Deeds, § 64, p. 937; Meyers v. Farquharson, 46 Cal. 190; Brusseau v. Hill, 201 Cal. 225, 256 P. 419, 55 A. L. R. 157; Leala v. Carroll, 207 Cal. 542, 279 P. 443; Field v. Columbet, 4 Sawy. 523, 9 Fed. Cas. 12, No. 4,764; Evenson v. Webster, 3 S. D. 382, 53 N. W. 747, 44 Am. St. Rep. 802; Gambril v. Doe ex dem. Rose, 8 Blackf. (Ind.) 140, 44 Am. Dec. 760; Harlowe v. Hudgins, 84 Tex. 107, 19 S. W. 364, 31 Am. St. Rep. 21.

[10, 11] It has been held that actual notice of the pendency of an action is in many respects more extensive than the doctrine of lis pendens (38 Cor. Jur., Lis Pendens, § 7, p. 10); and it is the general rule that whatever is sufficient to direct the attention of a purchaser or incumbrancer to the prior rights or equities of third persons, and to enable him to ascertain their nature by inquiry, will operate as a notice of the facts. Lawton v. Gordon, 37 Cal. 202; Montgomery v. Keppel, 75 Cal. 128, 19 P. 178, 7 Am. St. Rep. 125; Pellissier v. Title Guaranty & Trust Co., 208 Cal. 172, 280 P. 947. As the rule is stated by Pomeroy (Eq. Jur., 4th Ed., § 608), whenever a party has information or knowledge of certain extraneous facts which of themselves do not amount to or tend to show actual notice but which are sufficient to put a reasonably prudent man upon inquiry respecting a conflicting interest, claim or right, and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to the discovery of the truth or to a knowledge of the interest, claim or right which really exists, then the party is absolutely charged with constructive notice of such interest, claim or right. Where a plaintiff asserts title under a prior unrecorded deed, and the defendant claims under a recorded deed, the burden is upon the latter to prove that he is a purchaser in good faith for a valuable consideration and without notice, actual or constructive, prior and down to the time of payment. Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Bell v. Pleasant, 145 Cal. 410, 78 P. 957, 104 Am. St. Rep. 61. A mortgage comes within the same rule, and the law protects or defeats both alike. 18 Cal. Jur., Mortgages, § 421, p. 114; Prouty v. Devin, 118 Cal. 258, 50 P. 380.

[12] One of the plaintiffs resided in Pasadena, the place of business of the loan company. The evidence shows that Mrs. Cornwell was in possession of the property, and the president of the loan company testified that he ascertained this before the loans were made, and that she claimed the land as her separate property. He further testified in substance that he had no information that plaintiffs had or claimed any interest therein except such as was contained in letters from the title company. These letters contained the information that the quiet title action was pending but that the title company would insure the loan against it. With the above exceptions the record discloses no inquiry by the loan company. It might be inferred from the letters that some investigation was made by it, but the extent thereof or the result do not appear. The trial court made no finding with respect to the diligence or good faith of either the loan or title company, or upon the question of constructive notice. It found merely that neither company had "any knowledge of the existence of said property settlement agreement prior to the recordation thereof on June 29, 1928, and dealt with said Ella H. Cornwell and with said property on the assumption that said Ella H. Cornwell was the owner of said real property." While the question whether one is an innocent purchaser for value without notice is for the jury (California Packing Corp. v. Lopez, 207 Cal. 600, 279 P. 664, 64 A. L. R. 1412), as held in Prouty v. Devin, supra, if there is evidence upon the question of constructive notice it is not sufficient to find merely that a defendant had no actual notice of the existence of an unrecorded instrument, but the court must also find upon the question of constructive notice; otherwise the judgment in favor of a defendant cannot be sustained. With the exception of the testimony of the president of the loan company as to what he knew, neither company has disclosed the extent of its information at the time the last loan was made. The burden being upon defendants to show that the loan company was not in possession of information amounting to constructive notice we are satisfied that the evidence adduced was insufficient to support a finding in their favor on this question.

[13, 14] Defendants claim that the delay in recording the settlement contract should bar a recovery by plaintiffs. Negligence in recording an instrument may constitute an estoppel to question the title of a bona fide purchaser. Schumacher v. Truman, 134 Cal. 430, 66 P. 591. Here twenty-one days elapsed between the execution of this agreement and the recordation of the last trust deed. According to the findings defendants had no knowledge of this agreement at the time, but, as stated, there was no finding with respect to constructive notice; and we cannot say as a matter of law that plaintiffs' delay was sufficient to estop them from asserting their claims.

The court also found that plaintiffs' action was barred by the provisions of section 164 of the Civil Code. This could only be true if the land was community property, or if the plaintiffs succeeded to an interest therein, and could have no application to the enforcement of their rights under the settlement contract.

The same may be said of the contention that the acts of the decedent were such as to estop those claiming under him from asserting an interest in the property.

[15] Mrs. Cornwell executed three deeds of trust upon the property to secure the repayment of money borrowed from the loan company, the dates and amounts of these incumbrances being as follows: September 12, 1925, $12,500; January 4, 1927, $21,000; and August 29, 1927, $24,500. The proceeds of the second and third loans were used to pay off the one which immediately preceded them, respectively. As found by the court, plaintiffs had acquired no interest in the land before the first and second loans were made; and should it be finally determined that the loan company had constructive notice of the contract before its third loan was made it will then be a question for the trial court as to whether under the circumstances the prior incumbrances should in the interest of justice be kept alive. That this may be done in a proper case appears to be well settled. 18 Cal. Jur., Mortgages, § 490, p. 197.

The finding and conclusion of the trial court that the land was separate property is sustained by the evidence, and it will be unnecessary to litigate this issue further. However, there remain to be determined the questions whether the loan company had constructive notice of plaintiffs' rights when the last deed of trust was executed and the loan secured thereby was made; and if it had, whether that portion of its loan which was used to pay off the loan or loans which preceded it should in equity be chargeable against the interest which plaintiffs acquired under the settlement contract.

The judgment is accordingly reversed, and the cause remanded for a determination of these questions.

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134 Cal.App. 576

WHITE et al. v. ROSENSTEIN et al.

Civ. 8031.

District Court of Appeal, Second District, Division 2, California.

Oct. 10, 1933.

1. Trial 🔑404(3).

Ultimate findings prevail in support of judgment over specific findings tending to show that ultimate fact was found against evidence.

2. Trial 🔑395(5).

Findings of ultimate fact from all specific facts at trial is within province of trial court, and inclusion of probative facts in ultimate findings is improper.

3. Trial 🔑395(5).

Findings of probative facts will not invalidate finding of ultimate fact, unless ultimate finding is based on and entirely overcome by probative findings, and probative findings dispose of all facts involved in pleadings and constitute all facts of case.

4. Appeal and error 🔑873(2).

Reviewing court could not consider alleged error in granting of order permitting entry of another judgment, where appeal was from judgment only (Code Civ. Proc. §§ 663a, 956).

5. Appeal and error 🔑544(2).

On appeal upon judgment roll, reviewing court can only consider whether findings support judgment.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Suit by Howard White and another against Harriett B. Rosenstein and another. From a judgment for defendants, plaintiffs appeal.

Reversed and remanded, with directions.

Hyams & Himrod, of Los Angeles, for appellants.

Brown, Bissell & Beery, of Los Angeles, for respondent Rosenstein.

Whitson & Sims, of Los Angeles, for respondent National Surety Co.

STEPHENS, Justice.

In this suit it was sought to recover from a notary public or the notary's bondsman certain damages resulting from a transaction regarding real estate and an incumbrance thereon to secure the loan, in which the notary took an acknowledgment without knowing that the acknowledger was the person she claimed to be. The case was tried by the court without a jury, and judgment was awarded plaintiffs. A motion was subsequently made by defendants under section 663, Code of Civil Procedure, "for an order vacating and setting aside said judgment in favor of plaintiffs and against defendants and directing another and different judgment to be entered on the said findings of fact in favor of defendants and against plaintiffs." Such motion was granted, and an order entitled "New and Different Conclusions of Law" was signed by the court holding that the specific facts set out in the findings of fact show that the proximate cause of the damages suffered by plaintiffs was the plaintiffs' own contributory negligence. The origfinal judgment was set aside, and, from the judgment subsequently entered pursuant to the new conclusions of law, plaintiffs appeal upon the judgment roll.

[1-3] We have here a situation wherein the trial court has determined after judgment that the specific facts related in its findings show negligence on plaintiffs' (appellants') part, notwithstanding the ultimate finding of facts, and original opinion, that they were free from negligence. In other words, the court has sought to cause its conclusions of law to flow from its findings of specific fact instead of from its findings of ultimate fact. Read strictly, section 663 of the Code of Civil Procedure does not permit the court to go this far, as it specifically limits relief under it to cases where the judgment is *inconsistent with* or is *not supported by* the findings. There is plenty of authority to the effect that ultimate findings prevail over specific findings, that the findings of the ultimate fact from all of the specific facts established at the trial is the province of the trial court and that the inclusion of probative facts in the findings is improper. However, upon good reasoning not necessary to be repeated here, the rule has been held in Forsythe v. Los Angeles Ry. Co., 149 Cal. 569, at page 575, 87 P. 24, 27, to be as follows, quoting: "The finding of the ultimate fact prevails in support of the judgment notwithstanding a finding of a probative or evidentiary fact which tends to show that the ultimate fact was found against the evidence. And findings of probative facts will not invalidate the finding of an ultimate fact *unless* the latter is based on the former, and is entirely overcome thereby, and *unless*, also, it appears that these findings of probative facts dispose of all the facts involved in the pleadings, and [*unless*] that the facts found constitute all the facts in the case. Semple v. Cook, 50 Cal. 26; Smith v. Acker, 52 Cal. 219; Wood v. Pendola, 78 Cal. 287, 20 P. 678; Com. Bank v. Redfield, 122 Cal. 407, 55 P. 160, 772." (Italics ours.)

We shall proceed to examine the findings herein with this question before us: Are all of the requirements mentioned in the quotation from the Forsythe Case present? The acknowledgment complained of was taken to a forged deed before the plaintiffs appellants came upon the scene. Plaintiffs appellants, relying upon said deed, which had been placed of record, loaned $4,000 upon the security of such property to the record owner, the perpetrator of the fraudulent deed. Plaintiffs appellants had never met the record owner before negotiating with her for the loan. The deal was handled in the ordinary manner through a title company. Thereafter a quiet title suit cleared the title to the real owner, and, by reason of the loss of the security, the plaintiffs lost their money. The plaintiffs appellants had no knowledge that the true owner was occupying the property or had possession thereof, but, when one of the plaintiffs, together with her agent, went through the main house on the land, they saw an elderly lady standing by the small rear house on the land, who asked about their mission. The agent told her that they were looking through the house, and nothing further was said or done. No investigation was ever made by plaintiffs as to the identity of the elderly lady, but the plaintiff present thought she was a tenant. It is further found that the injury was not caused by plaintiffs' (appellants') negligence or contributory negligence.

[4] Relating the findings to the requirements set up in the quotation from the Forsythe Case, it does not seem to us that it is at all certain that the finding of ultimate fact is *based on* the probative or specific findings and "is entirely overcome thereby," nor that "it appears that the findings of probative [specific] facts dispose of all the facts involved in the pleadings," nor that "the facts found constitute all of the facts of the case." We are therefore of the opinion that the granting of the order permitting of another judgment was error. Section 663a of the Code of Civil Procedure grants the right of direct appeal from such an order, but, as the appeal here is from the judgment only, we cannot consider this error. Section 956, Code Civ. Proc., and section 481, "Appeal and Error," vol. 2, Cal. Jur.

[5] We have carefully considered the authorities cited by defendants respondents upon the point that the facts revealed by the findings support the judgment, and, while we do not agree with them on this point and think the facts in each of the cited cases are distinguishable from the facts specifically revealed by the findings here, this point is not before us. The appeal is upon the judgment roll, and the only point raised which we can take cognizance of is: Do the findings support the judgment? We have already seen that they do not, but that, on the contrary, they support the relief sought by the complaint.

The judgment is reversed, and the cause remanded to the trial court, with directions to make and cause to be entered a judgment for plaintiffs and against defendants, as prayed for in the complaint.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

134 Cal.App. 456

PEOPLE v. ONE FORD TOURING AUTOMOBILE, LICENSE NO. (None—New Car), ENGINE NO. A—3887 097, ITS TOOLS AND EQUIPMENT, etc. (HILLMAN AUTO LOAN, Limited, Intervener).

Civ. 4893.

District Court of Appeal, Third District, California.

Sept. 29, 1933.

Intoxicating liquors ⟹246.

Automobile could not be forfeited where assignee of conditional sales contract covering it was without knowledge or notice of use or intended use by another in the commission of crime (St. 1921, p. 79).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Proceeding by the People of the State of California against one Ford touring automobile, license No. (none—new car), engine No. A—3887 097, its tools and equipment, etc., wherein Hillman Auto Loan, Limited, intervened. From a judgment for intervener, plaintiff appeals.

Affirmed.

Charles P. Johnson, City Pros., and John L. Bland and Joe W. Matherly, Deputies City Pros., all of Los Angeles, for the People.

Syril S. Tipton and Elmer E. Sawyer, both of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was prosecuted to secure a judgment of forfeiture and sale of one Ford touring automobile. Judgment went for the intervener, and the plaintiff has appealed.

At the trial of the action the following stipulation was entered into between the plaintiff and the intervener, which, omitting the title, is in the words and figures following:

"It is hereby stipulated, by and between the parties herein, through their respective attorneys, that the following is a true and correct statement of the facts involved in the above entitled cause:

"I. That the third party claims filed therein shall have the same force and effect as suit in intervention.

"II. That Hillman Auto Loan, Ltd., a corporation, is the bona fide owner of the conditional sales contract purporting to establish legal title to the automobile defendant; that there is due and owing to Hillman Auto Loan, Ltd., a corporation, the sum of Five Hundred Fifty and 35/100 ($550.35) Dollars, as evidenced by a conditional contract of sale covering the said automobile.

"III. That Hillman Auto Loan, Ltd., a corporation, had no actual knowledge or notice that the said automobile was being used in aid of, or as an agency for the commission of any crime.

"IV. That Hillman Auto Loan, Ltd., a corporation, had no notice or knowledge of the intention of any party to use the same automobile in aid of, or as an agency for the commission of any crime.

"V. That Hillman Auto Loan, Ltd., a corporation, did not make, nor did they have made for them, any investigation of the use to which the said automobile was being put, nor did they make, or have made for them, any investigation as to the intention of any party to use the said automobile in aid of, or as an agency for the commission of any crime.

"Dated this 21st day of April, 1931."

The record shows the intervener to be the assignee of the conditional contract referred to in the stipulation. Neither the stipulation nor the findings of the court refer to the good faith or lack of knowledge on the part of the intervener's assignor. The court found in accordance with the stipulation, ordering judgment in favor of the intervener.

Upon this appeal it is contended that the good faith of the intervener's assignor should have been established by the intervener, and also that the intervener should have introduced testimony showing its good faith, and that it had made reasonable investigation as to the uses for which the automobile was intended. It is sufficient to say that as to the good faith of the intervener, the stipulation is conclusive. Upon the other questions involved, it appears that the courts of this state have definitely decided them against the contentions of the appellant.

In the case of People v. One 1923 Oakland Sport Automobile, Anglo-California Trust Company, Intervening Claimant, 71 Cal. App. 590, 236 P. 194, 196, an exactly similar state of facts was involved as to knowledge of assignor and knowledge of assignee, and also as to lack of investigation being established on the part of assignor and assignee. This court, upon these facts, ruled as follows: "It must be remembered that, while the civil process of the courts may be invoked to enforce the penalty of forfeiture of private property, authorized in proper cases by the Volstead (U. S. Comp. Stats. Ann. Supp. 1923, § 10138¼ et seq. [27 USCA § 1 et seq.]) and Wright (St. Cal. 1921, p. 79) Acts, the fact is that, after all, the object of such proceeding, as is that of the present proceeding, is to enforce a criminal penalty or, it may aptly be said, to enforce a judgment of sentence in a criminal case. In substantial effect, it is nothing less than that; hence, wisely, the law contemplates that, when a party has been charged with and convicted of committing any offense under the prohibition enforcement law, and it develops that, in committing such offense, he has used as an agency therefor certain property, the legal title to which is in another, and it clearly appears that such owner has not himself actually participated in the commission of the crime, before the legal owner can be deprived of his property by the people of the state through proceedings of forfeiture, based upon the fact of the use of such property for such illegal purpose, it is incumbent upon the people to show by sufficient evidence that such owner had actual knowledge that the intention was to use such property, or that it was being used, as an instrumentality for consummating the commission of such crime. Of course, the fact of knowledge by the legal owner of the property that the intention was to use the property, or that it was being used, as in aid of or an agency for the commission of the crime, may be proved, as may any other ultimate fact, by circumstantial evidence, but the circumstances must go further in their probative effect than merely to show, as seems to be the extent of the showing here, that the owner, though having no tangible or substantial reason for so proceeding, might discover that the car was being used for an unlawful purpose, if he would at all times, and wherever it might be taken or driven, keep it under espionage. Such a duty certainly is not imposed upon dealers in automobiles." See, also, People v. One 1924 Studebaker Automobile, 71 Cal. App. 134, 234 P. 856, 857.

In People v. Buttulia, 70 Cal. App. 444, 233 P. 401, 402, we find language approving former decisions of this court that is applicable here: "But it is the position of appellant that as the Volstead Act [27 USCA § 1 et seq.] makes possession alone prima facie evidence of illegality and shifts the burden to the defendant to show legal possession, the state had no burden of showing more than possession, and therefore the evidence complained of had no legitimate purpose in the record. This position is destroyed, basically, by the decisions in People v. Mattos, 67 Cal. App. 346, 227 P. 974, and People v. Silva, 67 Cal. App. 351, 227 P. 976, wherein it is held that as the Wright Act (St. 1921, p. 79) adopted only the penal provisions of the Volstead Act and as the provision making possession prima facie evidence of illegality is a procedural one, it is not the law of this state. In California, therefore, the burden rests upon the prosecution to prove the illegality of possession of intoxicating liquor and that is a material element of the offense.

Quoting again from the People v. One 1924 Studebaker Automobile, supra: "The situation merely presents a case where it is sought to enforce an extreme penalty against an innocent owner of an automobile, which penalty is not only not provided in the Volstead Act, but is expressly denied therein, and, consequently, is not a penalty under the Wright Act."

Summing up these cases, the text in 22 California Jurisprudence, 1114, reads as follows: "Again, in order to involve the seller in the buyer's offense, it must be established that he had actual knowledge of the illegal purpose; he is not to be held liable upon the theory that he ought to have known of the use to which the chattel was put." As this case was prosecuted in accordance with the provisions of the Wright Act (St. 1921, p. 79), the fact that courts of other jurisdictions in some instances have followed a different rule is not controlling here.

The cases which we have cited are decisive of the questions involved.

The findings of the court were strictly in accordance with the stipulation filed by counsel, and the judgment must therefore be, and the same is, hereby affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

134 Cal.App. 595

TAYLOR v. TALBERT.

Civ. 9002.

District Court of Appeal, First District, Division 2, California.

Oct. 11, 1933.

Appeal and error 🔑856(1).

Judgment for plaintiff in quiet title action, tried on erroneous theory, cannot be affirmed because plaintiff was defrauded, where issue of fraud was not tried below.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Mary E. Taylor against Nora Talbert. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

Robert L. Hubbard, of Los Angeles, for appellant.

L. G. Shelton and Dora Dukeshire, both of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to quiet title to real property and had judgment.

While plaintiff and her husband, now deceased, were living together as husband and wife they acquired the property, most of the purchase price having been paid from the separate property of the wife, the balance from the community earnings of husband and wife. The husband had no separate property. Eight years later the wife was induced to participate in conveyances which transferred the entire property to husband and wife as joint tenants. They became estranged and the husband, a man of eighty-one years, was taken to the home of his daughter by a former marriage, the defendant herein. Immediately thereafter the husband conveyed by deed his entire interest in the property to the defendant, and this deed was recorded. Four months later the husband died.

The cause was tried on the theory expressed in Siberell v. Siberell (Cal. App.) 295 P. 385, that in a transaction of this nature the wife took an undivided one-half interest as her separate property and the other one-half interest as community. Because of that decision the issue of fraud raised in the complaint was not tried. Since the entry of judgment the Supreme Court rejected the rule of the Siberell Case and held that each spouse took an undivided one-half as separate property with all the incidents of joint tenancy, including the power to dissolve the estate by deed. Siberell v. Siberell, 214 Cal. 767, 7 P.(2d) 1003; Delanoy v. Delanoy, 216 Cal. 23, 13 P.(2d) 513; Estate of Kessler (Cal. Sup.) 17 P.(2d) 117.

Respondent argues that, notwithstanding this ruling we should affirm the judgment because of the equities supporting it, basing her argument on the evidence that, without legal advice, she was induced to part with her separate property through the creation of the joint tenancy. It may be that the transactions were a fraud upon the wife under the terms of section 2235, Civil Code, as interpreted in McKay v. McKay, 184 Cal. 742, 195 P. 385, but that issue was not tried because the trial court limited respondent to the theory of the original Siberell decision. Hence the record does not present a case where this court could affirm the judgment upon the evidence before us; it is one where the issue should be fully tried in the trial court.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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134 Cal.App. 554

WILLIAMS v. RUSH.

Civ. 8959.

District Court of Appeal, First District, Division 1, California.

Oct. 10, 1933.

1. **Quieting title** 🔑15.

In quiet title action, defendant was entitled to assert, as equitable defense, prospective as well as present claim in property.

2. **Quieting title** 🔑43.

In quiet title action, elimination of counterclaim for specific performance did not relieve defendant from necessity of pleading and proving adequacy of consideration and fairness of agreement, since requirements of action for specific performance are applicable when it is sought to subject legal title to equitable rights created by contract.

3. **Pleading** 🔑8(3).

In quiet title action, answer averring that sum agreed to be paid for property was fair, reasonable, and market value, and that terms of contract were fair, reasonable, and equitable, *held* insufficient, as mere conclusion.

4. **Appeal and error** 🔑194(1).

In quiet title action, sufficiency of affirmative defense, which would have been bad on demurrer, could not be questioned, where pleadings were sufficient to enable plaintiff to understand issue, and plaintiff did not object.

5. Vendor and purchaser ⚷21.

Escrow instructions signed by vendor and purchaser *held* "written contract" of parties, where instructions contained all necessary elements to make contract.

[Ed. Note.—For other definitions of "Written Contract or Agreement," see Words & Phrases.]

6. Escrows ⚷8(1).

Where subsequent to escrow agreement purchaser instructed escrow agent to effect change without consent of vendor, instruction *held* not to change contract, since written contract could be altered only by written contract or executed oral agreement (Civ. Code, § 1698).

7. Vendor and purchaser ⚷44.

Evidence *held* to establish that $2,400 was adequate consideration for property sold under escrow.

8. Vendor and purchaser ⚷13.

Adequate consideration does not necessarily mean full value of property, but comparison must be considered with all other facts and circumstances.

9. Appeal and error ⚷1010(1).

Trial court's finding should not be set aside, unless it has no support in evidence.

10. Vendor and purchaser ⚷186.

Purchaser of premises under escrow could not be charged for delay in closing transaction, where delay was due to necessity of administering estate of vendor's wife.

11. Trial ⚷397(1).

Failure to find as to ownership of property subsequent to execution of contract *held* not error, where issue was eliminated by stipulation.

12. Quieting title ⚷47(2).

In quiet title action, finding that parties entered into contract and that its terms were enforceable *held* not insufficient because not finding nature and extent of defendant's interest in property, where defendant's interest in property necessarily resulted from contract.

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by Albert Williams against John H. Rush, and cross-complaint by defendant, which was dismissed during trial. Judgment for defendant, and plaintiff appeals.

Reversed, with instructions.

George W. Bush and E. C. Jennings, both of Los Angeles, for appellant.

H. R. Collins, of Los Angeles, for respondent.

GRAY, Justice pro tem.

The plaintiff, in this action to quiet title, claims that the judgment should be reversed because (1) the affirmative defense of the answer fails to state facts which would enable the court to decide whether it would be equitable to enforce the contract pleaded; (2) two essential findings are contrary to the evidence; (3) the court failed to find on a material issue of title; and (4) the judgment does not adjudicate the respective interests of the parties.

The complaint, in the usual form, alleges appellant's ownership and possession of described residential property and respondent's claim of an adverse interest therein, without right. The answer, with amendments thereto, denies such ownership and possession, admits such adverse interest, and denies it is without right. Respondent's stipulation, during the trial, that appellant was the owner and in possession of the property, and the theory upon which the case was tried, eliminated from consideration such denial of ownership. The case was tried upon the issue as to whether under the facts, pleaded in an affirmative defense, respondent had any interest in the property. This affirmative defense inartificially alleges that on October 1, 1929, the parties entered into an agreement, in and by which appellant offered to sell his property for $2,400 and thereafter entered into an escrow, with a title company, providing for the sale of the property to respondent and the correction of the title so as to vest an unincumbered title in respondent, and that escrow instructions, signed by appellant and made part of the sale agreement, instructed respondent and the title company to correct the title by administering the estate of appellant's deceased wife. It further alleges that, at appellant's request, respondent advanced the initial expenses of administration, fully performed everything required of him, and deposited in escrow the sum of $2,400, less $100 advanced to appellant. It concludes by alleging that the sale agreement has never been rescinded, that the escrow remains with the title company, awaiting completion of the administration, that respondent is ready, able, and willing to comply with the agreement, and that the sum of $2,400 is the fair, reasonable, and market value of the property, and the terms of the contract are fair, reasonable, and equitable. The prayer asks that appellant take nothing and that respondent recover his costs.

[1, 2] Respondent had filed a cross-complaint, more fully alleging the same facts as are pleaded in the affirmative defense, and requesting specific performance of the sale agreement. His dismissal, during trial, of that cross-complaint eliminated the issue of specific performance and left, as the sole issue, whether such agreement gave him any

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

interest in the property. He was entitled to assert as an equitable defense a prospective as well as a present claim in the property. Title Ins., etc. Co. v. Miller & Lux, Inc., 183 Cal. 71, 190 P. 433. But such elimination did not relieve him from the necessity of pleading and proving adequacy of consideration and fairness of the agreement, since these requirements of an action for specific performance are also applicable when it is sought to subject the legal title to equitable rights created by a contract. Archer v. Miller, 73 Cal. App. 678, 239 P. 92. If the conditions of the escrow had been fulfilled, respondent would not have been required to allege and prove these matters. Law v. Title Guarantee & Trust Co., 91 Cal. App. 621, 267 P. 565.

[3, 4] Although far from a model pleading because of its allegation of probative rather than ultimate facts, the affirmative defense, liberally construed, shows that the open escrow, which could not be closed pending administration of the wife's estate, gave respondent a prospective interest in the property, which would ripen into ownership upon fulfillment of the escrow's condition. An answer, in a quiet title action, which seeks to subject plaintiff's title to defendant's rights under a contract is insufficient if it does not contain facts sufficient to show that the contract was just and reasonable or that the consideration was adequate. Archer v. Miller, supra. The only averment as to these matters is "that the said sum of $2400.00 is the fair, reasonable and market value of said lot 8 aforesaid and the terms of the contract between the parties are fair, reasonable and equitable." Aside from the statement of value, there is nothing more than a mere conclusion of law without facts to support it. Baker v. Miller, 190 Cal. 263, 212 P. 11. The sufficiency of an affirmative defense, which would have been held bad on demurrer, cannot be questioned on appeal, if the pleadings are sufficient to enable the plaintiff to understand the issue, which defendant was endeavoring to make, and plaintiff went to trial without objection by demurrer or otherwise. Rawlins v. Ferguson, 133 Cal. 470, 65 P. 957; see, also, Baker v. Miller, supra; Law v. Title Guarantee & Trust Co., supra.

The court found that on October 8, 1929, appellant was the owner of the property, that on said date the parties entered into a written contract, whereby appellant agreed to sell and respondent agreed to buy the property for $2,400, and that an escrow was opened with a title company, in which appellant deposited his deed and respondent deposited $2,163. It further found that the escrow instructions contained language (set forth in hæc verba) to the effect that the seller handed to the title company his deed, executed to respondent, which it was instructed to record when it could comply with the instructions and hold for appellant $2,400, out of which it was authorized to pay sums aggregating $113.75, and to deduct his portion of escrow expenses. It is also found that said sums were paid, with appellant's consent, by respondent outside of the escrow, by deducting items totaling $286.75, of which respondent is entitled to a credit of $236.75. Any apparent discrepancy in amount of deductions is not questioned by appellant. The findings further determine that the contract of purchase has never been canceled or rescinded, and is a valid, binding, and enforceable contract of sale; that the purchase price is the fair, reasonable, and equitable market value of the property; and that the terms of the contract are fair, reasonable, and equitable and were entered into by the parties freely and without fraud, duress, misrepresentation, undue influence, or undue advantage. From these findings the court concluded that appellant take nothing and that respondent recover his costs.

[5-6] Appellant questions the finding that the parties entered into a written contract on October 8, 1929, because he claims that a subsequent disagreement as to the amount of respondent's deposit shows that the parties never agreed as to the terms of the contract. Since the escrow instructions, signed by both parties on that day, contain all the necessary constituent elements to make a contract, they are to be regarded as the written contract of the parties. Tuso v. Green, 194 Cal. 574, 229 P. 327; Neher v. Kauffman, 197 Cal. 674, 242 P. 713; Thoroman v. David, 199 Cal. 386, 249 P. 513. The evidence does not disclose any prior contract, because it is silent as to any prior acceptance by respondent of appellant's written offer, under date of October 1, 1929. Subsequently respondent gave the title company instructions, which reduced the amount of his deposit by crediting him with moneys claimed to have been advanced by him to appellant. Appellant never consented to this change. Since a written contract can only be altered by a written contract or an executed oral agreement (Civ. Code, § 1698) respondent's new instructions did not change their prior contract. Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916. The contract having been made, any subsequent attempt by one party to change part of its terms did not abrogate it or make it any less a contract.

[7-10] Appellant claims that the purchase price of $2,400 was an inadequate consideration for the sale contract, and that therefore the contract was unfair, unjust, and unreasonable. The validity of this claim depends upon a determination as to whether the evidence supports the findings as to these matters. Two real estate experts, called by appellant, testified that the market value of the property, as of the date of the contract, was $4,250 and a third, also called by him, fixed it at $4,500. Respondent's sole expert, in the

same answer on direct examination, appraised such market value, first, as $2,750 and, second, as $3,450. However, appellant in his offer of October 1 and in his contract of October 8, freely and voluntarily, and with full knowledge of the facts, fixed the price at $2,400. The finding that the market value was $2,400 is sufficiently supported by appellant's opinion so expressed. Bird v. Potter, 146 Cal. 286, 79 P. 970; Dore v. Southern Pac. Co., 163 Cal. 182, 124 P. 817; Estate of Cheda, 58 Cal. App. 433, 209 P. 70. Even if the finding as to market value should fall, it would not necessarily carry with it the remainder of the finding that the consideration was adequate and the contract was fair, reasonable, and equitable. An adequate consideration does not necessarily mean a price measuring fully up to the value of the property. Such comparison is but a factor to be considered with all of the other facts and circumstances. Wilson v. White, 161 Cal. 453, 119 P. 895; Dore v. Southern Pac. Co., supra; Haddock v. Knapp, 171 Cal. 59, 151 P. 1140; O'Hara v. Wattson, 172 Cal. 525, 157 P. 608; Schader v. White, 173 Cal. 441, 160 P. 557. The finding of the trial court should not be set aside unless it is clear that it has no sufficient support in the evidence. Wilson v. White, supra; Boulenger v. Morison, 88 Cal. App. 664, 264 P. 256. Appellant's anxiety to sell, without any urging by respondent, explains any difference between price and value, rather than establishing any inadequacy. Schader v. White, supra. It is undisputed that appellant received an advance on the purchase price and delivered possession to respondent, and that the latter expended several hundred dollars in repair of the property. Appellant's dissatisfaction with his bargain first arose because of the delay in closing the escrow and still seems to be his principal complaint. Obviously respondent was not chargeable for such delay. due to the necessity of administering the wife's estate.

[11, 12] The court merely found that appellant was the owner of the property on October 8, 1929, and that, on that date, the parties entered into the contract of sale. Appellant claims that the failure to find as to the ownership, subsequent to that date and at the time of trial, requires a reversal of the judgment. While the pleadings raised the issue of ownership, such issue, as above pointed out, was eliminated by stipulation and the theory upon which the case was tried. This issue having become immaterial for lack of any dispute thereupon, it was unnecessary to make any finding thereon. Pinheiro v. Bettencourt, 17 Cal. App. 111, 118 P. 941. He further complains of the failure to find the nature and extent, if any, of respondent's interest in the property. The court, however, found the probative facts that the parties entered into the contract and that its terms were valid, binding, and enforceable. This finding is sufficient, since the ultimate fact as to respondent's interest in the property necessarily results from the terms of the contract. Lawson v. Steinbeck, 44 Cal. App. 685, 186 P. 842; 24 Cal. Jur. 970.

The judgment, following the conclusions of law, decrees that appellant shall take nothing and respondent shall recover his costs. The judgment should have decreed that appellant was the owner of the property, subject to respondent's rights under the contract of October 8, 1929, as amended. The judgment is reversed, neither party to recover his costs on appeal, with instructions to the trial court to enter judgment in this form, just indicated. Lantz v. City of Los Angeles, 185 Cal. 262, 196 P. 481.

We concur: **TYLER, P. J.; CASHIN, J.**

HALL v. WILLIAMS, County Auditor.*

Civ. 5006.

District Court of Appeal, Third District, California.

Sept. 29, 1933.

Hearing Granted by Supreme Court Nov. 27, 1933.

1. Counties ⚷3½.

County charter, duly approved and ratified becomes organic law of county (Const. art. 11, § 7½).

2. Counties ⚷3½.

As to any matter not provided for in county charter, general law of state controls (Const. art. 11, § 7½).

3. Counties ⚷3½.

In construing county charters and general laws, primary rule of construction is to ascertain intent and purpose.

4. Counties ⚷3½.

Court, in construing county charter, must primarily seek intention of voters in approving charter (Const. art. 11, § 7½).

5. Statutes ⚷188.

Court must impartially and without bias review words of statute, aided by canons of construction.

6. Statutes ⚷190.

Where statutory language is plain and unambiguous, there is no occasion for construction, even though other meanings could be found.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 39 P.2d 419.

7. Statutes 🔑227.

Generally, word "shall" used in statute is construed as mandatory; but if context of statute and purposes sought to be accomplished require permissive construction, word may be construed as directory only.

[Ed. Note.—For other definitions of "Shall (In Statutes as Permissive or Mandatory)," see Words & Phrases.]

8. Counties 🔑74(2).

County clerk *held* not "elective officer" within provision of county charter relating to fixing of compensation of elective officers of county.

[Ed. Note.—For other definitions of "Elective Officer or Officer Receiving Statutory Salary," see Words & Phrases.]

9. Counties 🔑74(2).

Board of supervisors of Sacramento county, under provisions of charter, and constitutional and statutory provisions, *held* authorized to fix compensation of county clerk at any time (Const. art. 11, § 5, as amended in 1933, and § 7½).

10. Counties 🔑69(2).

Word "shall," within provision of charter for Sacramento county stating time when board of supervisors shall fix compensation of county officers, *held* directory only.

11. Counties 🔑69(2).

Legislature, by ratifying county charter containing provision governing fixing of compensation of officers thereof, fixed maximum compensation allowable to officers of such county (Const. art. 11, § 5, as amended in 1933, and § 7½).

12. Counties 🔑69(2).

Constitutional provision authorizing board of supervisors to regulate compensation of county officers, with certain exceptions, *held* not to abridge, modify, or otherwise affect provisions of constitutional provision relative to adoption of county charter giving board of supervisors power to fix salary of county officers (Const. art. 11, § 5, as amended in 1933, and § 7½).

13. Counties 🔑74(2).

Statutory provision fixing amount payable to county officers as salaries *held* inapplicable to county clerk of county which adopted charter authorizing board of supervisors to fix salary (Pol. Code, § 4236a, as amended by St. 1933, p. 1734; Const. art. 11, § 5, as amended in 1933, and § 7½).

14. Counties 🔑3½.

Fact that some provisions of county charter may be unconstitutional does not affect whole charter or interfere with valid provisions.

Original application by Harry W. Hall for a writ of mandate prayed to be directed to L. P. Williams, as County Auditor of the County of Sacramento, to compel him to draw a warrant for the payment of the petitioner's salary as county clerk.

Writ of mandate denied.

A. D. McDougall and Bronson, Bronson & Slaven, all of San Francisco, for petitioner.

Neil R. McAllister, Dist. Atty., and Ralph H. Cowing, Deputy Dist. Atty., both of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the application of the above-named petitioner praying for a writ of mandate to be directed against the respondent as the auditor of the county of Sacramento, commanding him to forthwith draw a warrant in favor of the petitioner for the sum of $321.50, as and for the petitioner's compensation as county clerk of the county of Sacramento, for the month of August, 1933. The sum named in the petition as due the applicant for his services as county clerk of the county of Sacramento is based upon an act of the Legislature amending section 4236n of the Political Code, alleged to have become effective on August 21, 1933 (St. 1933, p. —). The respondent, contending that the charter of the county of Sacramento and the action of the board of supervisors fixing salaries thereunder are in full force and effect, refuses to draw a warrant in favor of the petitioner for his services, as aforesaid, in any amount in excess of the sum of $290.32.

The record before us shows that on the 27th day of April, 1933, at an election held for that purpose, the qualified voters of the county of Sacramento ratified a proposed charter for the government of the county of Sacramento, and thereafter, and on or about the 11th day of May, 1933, the Legislature of the State of California approved the charter theretofore ratified by the voters of said county, and on the 11th day of May, 1933, after such ratification and approval, a duly certified copy of the charter for the county of Sacramento was filed with the secretary of state of the state of California.

The right of the petitioner for a writ of mandate depends upon whether the act of the Legislature amending section 4236n of the Political Code, or the provisions of the charter approved and ratified as aforesaid, and the action of the board of supervisors of the county of Sacramento had in pursuance thereof, fixes the compensation to which the petitioner is entitled. Likewise, the application of section 5, article 11 of the Constitution, as amended June 27, 1933.

The third subdivision of section 7½ of article 11 of the Constitution relative to county charters provides that the charter, after having been regularly adopted and approved, "shall become the organic law thereof relative to the matters therein provided, and supersede any existing charter framed under the provisions of this section, and all amendments thereof, and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter." The section to which we have referred authorizes provision being made fixing the compensation, and election of boards of supervisors and other county officers, to wit, sheriffs, county clerks, treasurers, recorders, license collectors, tax collectors, public administrators, coroners, surveyors, district attorneys, auditors, assessors, and superintendents of schools; and also, to fix their compensation, or for the fixing of such compensation by boards of supervisors. The section likewise authorizes provision being made for the appointment of officers in lieu of elections. The section also specifies that provision may be made for the powers and duties of boards of supervisors and other county officers, containing also the following: "That the provisions of such charters relating to the powers and duties of boards of supervisors, and other county officers shall be subject to, and controlled by general laws." The effect of such a charter is by the Constitution (article 11, § 7½) stated as follows: "Whenever any county has framed and adopted a charter, and the same shall have been approved by the legislature, as herein provided, the general laws adopted by the legislature in pursuance of sections 4 and 5 of this article shall, as to such county, be superseded by said charter as to matters for which, under this section, it is competent to make provision in such charter, and for which provision is made therein, except as herein otherwise expressly provided; and also, except that any such charter shall not affect the tenure of any elective officer in office at the time such charter becomes effective."

On June 27, 1933, section 5 of article 11 of the Constitution was amended so far as pertinent here, to read as follows: "The board of supervisors in the respective counties shall regulate the compensation of all officers in said counties, other than boards of supervisors, district attorneys, auditors and judges of municipal courts, and shall regulate the number, method of appointment, terms of office or employment and compensation of all deputies, assistants and employees of the counties. The provisions of this section shall not be construed to abridge, modify or otherwise affect the provisions of section 7½, 7½-A, and 8½ of this article relating to county or city and county charters." The same amendment also ratified and approved a previous act of the Legislature adopting an amendment to the Political Code to be numbered section 4056d, giving boards of supervisors of the different counties of the state power and authority to regulate the compensation of all officers except boards of supervisors, district attorneys, auditors, and the judges of municipal courts.

Subdivision B of section 15 of article V of the Sacramento county charter empowers the board of supervisors to fix the compensation of certain county officers, including the petitioner in this action, specifying that the compensation of elective officers shall be fixed at least six months prior to the election of such officers, and shall not be increased during the term of office.

Sections 24 and 27 of article VIII of the county charter sets forth the officers to be elected and the officers to be appointed after the tenure of the present elective officers has expired. Sections 34 and 35 of article VIII of said charter set forth the maximum salaries that shall be paid, respectively, to elective and appointive officers. Designated as an appointive officer, the petitioner in the action before us may be allowed a maximum salary of $3,000 per annum.

[1, 2] The first subdivision of section 90 of article 28 of the Sacramento charter reads: "This charter shall take effect for the purpose of selecting a county executive, upon its approval by the legislature, and for all other purposes, on July 1, 1933, provided, if it be approved after that date, then it shall become effective for all purposes immediately upon approval." As the approval was prior to July 1, 1933, the charter became effective for all purposes, unless there are exceptions contained therein as to the date of any provision of the charter becoming effective, or unless the language of any particular section prevents the carrying out of the intent of the framers of the charter, the voters approving the charter, and of the Legislature in ratifying the charter. As stated herein, a charter so framed, approved, and ratified "becomes the organic law thereof (of the county) relative to the matters therein provided." If any matter is not provided for in the charter, then and in that case the general law of the state applies, and if there is any section of the Constitution or state law supplying such an omission in a county charter, then the Constitution or general laws may be resorted to in determining the powers that may be exercised by either the board of supervisors or any of the county officers. In fact, section 7½ of article 11, as we have stated, specifies that the powers and duties of boards of supervisors shall be subject to, and controlled by general laws, and to these laws recourse may be had to determine the validity of any act of the board of supervisors.

[3] In construing charters and general laws the primary rule of construction is first to ascertain the intent and purpose of either a charter or a general law, and if the language used in the charter or general law will permit of that intent being given effect, it is the duty of the court to so hold. This rule is stat-

ed in 59 C. J. 943, as follows: "The purpose of all rules or maxims as to the construction or interpretation of statutes is to discover the true intention of the law, they are useful only in cases of doubt, they are never to be used to create doubt but only to remove it, and cannot be invoked to defeat or destroy natural justice or substantial equities. * * * For the purpose of construction resort may be had not only to the language and arrangement of the statute, but also to the intention of the legislature, the object to be secured, and to such extrinsic matters as the circumstances attending its passage, the sense in which it was understood by contemporaries, and its relation to other laws."

[4-6] While, as stated, the court must primarily seek the intention of the Legislature, or in this case, of the voters, in approving the charter, as well as the Legislature, the rule in 59 C. J. p. 952, is thus further stated: "The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found."

[7] Further setting forth the rule of construction this court, in Re Chadbourne's Estate, 15 Cal. App. 363, 114 P. 1012, 1014, approved the language of Judge Thayer in Chauncey v. Dyke Bros. (C. C. A.) 119 F. 1, 9, to wit: " 'We are aware that some courts have at times expressed in strong terms the necessity of pleading and enforcing statutes literally without regard to consequences. Some of these utterances have been called to our attention. But this doctrine of literalism which clings to the letter of a statute and ignores its purpose is not well calculated to promote the ends of justice. It is not the duty of a court of justice to perpetuate mistakes inadvertently made by the lawmaker by a blind adherence to the letter of the law, when the purpose of the law is apparent. Legislative bodies are not always fortunate in the use of language, but, if careful attention is paid to all the provisions of a statute as well as to the conditions which led to its enactment, little difficulty will generally be experienced in ascertaining what was intended. When the purpose is disclosed, it should be given effect, since whatever is within the intention of the lawmaker is as much within the statute as if it was within the letter.' In accordance with this primary rule of interpretation, courts have construed 'may' as mandatory, giving it the meaning of 'shall' or 'must' (citing a number of authorities); and in many cases it is held that 'shall' and 'must' are directory merely" (citing numerous cases).

In the case then pending before this court the word "shall" was held to be directory merely, and not mandatory. The purpose to be accomplished could be attained by such interpretation, and the ends of justice fully subserved.

In 57 C. J. 547, we find the following rule relative to whether the word "shall" shall be construed as peremptory or permissive, to wit: "As used in constitutional, contractual, statutory, and testamentary provisions, it depends upon the intention as to whether or not the word should be construed to be mandatory or directory; and its construction is controlled by the object sought to be reached, or by the subject matter and context." While ordinarily the word "shall" is construed as mandatory, if the context of the statute in which the word is found, and the purposes to be accomplished require permissive construction, the word will be construed as directory only.

Reading the charter adopted by the voters of the county of Sacramento, it is clearly shown that the primary purpose to be accomplished was to simplify the administration of the business affairs of the county, and to lessen the expenses, in order that the burden of taxation might be to a considerable extent decreased.

[8-10] Section 90 of article VIII of the charter expressly states that for all purposes except the appointing of a county executive, the charter shall become effective on July 1, 1933. To accomplish this purpose, if the word "shall" requires a permissive or directory interpretation, the rules of law which we have set forth require such a construction. Irrespective of whether the word "shall" should be given a mandatory or directory construction, the requirement of fixing an officer's salary six months preceding an election, as set forth in subdivision B of section 15 of article V, does not apply to the petitioner. The petitioner in the charter is not denominated an elective officer. Hence, the door is open for the board of supervisors to fix the compensation of the petitioner at any time, not alone by virtue of the charter, but also by virtue of the act of the Legislature approved June 2, 1933, and the amendment to the Constitution adopted June 27, 1933, as hereinafter referred to in this opinion. As to the petitioner, the charter nowhere purports to limit the power of the board of supervisors to lessen his compensation at any time. The evident intent of the framers of the charter and of the voters adopting the charter, and of the Legislature in ratifying the charter was and is to limit the expenses and fix a maximum of salaries that might be paid to different officers of the county. To give it such effect, the word "shall," as it appears in subdivision B of section 15 of said charter, stating the time when the board of supervisors shall fix the compensation of officers of the county, must be read as directory only. Sections 34 and 35 of the charter fixes the maximum compensation of the officers of the county of Sacramento. The fact that they are called "elec-

tive officers" or "appointive officers" is of no significance. The only intendment of those terms is that certain officers are hereafter to be elected, and certain other officers are hereafter to be appointed.

The record before us shows that the board of supervisors of the county of Sacramento, by ordinance duly adopted, has fixed the salary of the petitioner at $3,000 per annum, which would, as contended for by the respondent, entitle the petitioner only to the $290.32 on the 1st day of September, 1933.

[11, 12] There are two other reasons why the petitioner cannot prevail in this proceeding. First. The Legislature, by ratifying the charter, fixed the maximum compensation that could be allowed the officers of the county of Sacramento. We may here state that until the board of supervisors fixed such compensation, it is questionable whether the petitioner was entitled to any salary. The third reason why the petitioner cannot prevail herein is found in the amendment to section 5 of article 11 of the Constitution, approved by the voters on the 27th day of June, 1933. That amendment gives to boards of supervisors the power and authority to fix the compensation of county officers, including the petitioner herein. It is further set forth in this amendment that the provisions of the section as amended shall not be construed to abridge, modify, or otherwise affect the provisions of sections 7½, 7½a and 8½ of article 11. The charter in this instance was adopted under the provisions of section 7½ of article 11. In that section, as we have stated, it is provided that the charter shall become the organic law of the county adopting such charter as to all matters therein provided for. If it be assumed, as contended for by the petitioner, that the charter fails to confer upon the board of supervisors power to fix his present compensation, then and in that case the general law of the state applies. Section 5 of article 11 does not abridge, modify, or otherwise affect the provisions of section 7½, supra, in so far as the powers of boards of supervisors are given to fix the salaries of county officers. There is nothing in section 5 of article 11 which would limit the other provisions thereof, or of the amendment to the Political Code adding section 4056d, conferring power upon the boards of supervisors to make an immediate reduction in the compensation of the petitioner. Thus, the omission, if any, as urged by the petitioner in the charter, is supplied by the Constitution itself, and it does not matter whether the petitioner is denominated as an "elective officer" or as an "appointive officer." That is a mere matter of nomenclature and not of substance. The cases cited by the respective counsel having to do with tenure and increases in the salaries of county officers are not pertinent here. Tenure is fixed by the Constitution. Compensation is now a matter for boards of supervisors to determine.

[13] In view of the provisions of the charter and the amendment to section 5 of article 11 of the Constitution, the act of the Legislature purporting to amend section 4236a of the Political Code, alleged to have become effective on the 21st day of August, 1933, must be held void as to the petitioner herein.

[14] That some provisions of the charter may be unconstitutional does not affect the whole charter or interfere with the provisions which may be held valid. This is definitely held in the case of Winter v. De Shields, 46 Cal. App. 574, 189 P. 703, and other cases following the rule there laid down.

The constitutional power to decrease salaries is firmly established by a long line of cases.

The writ is denied.

We concur: **PULLEN, P. J.; THOMPSON, J.**

Edward T. RYAN, Petitioner, v. L. P. WILLIAMS, as County Auditor of County of Sacramento, State of California, Respondent.*
Civ. 5008.

District Court of Appeal, Third District, California.
Sept. 29, 1933.

Hearing Granted by Supreme Court Nov. 27, 1933.

Application for writ of mandate prayed to be directed to respondent, as auditor of Sacramento county, to compel drawing of warrant for payment of salary as tax collector.

A. D. McDougall and Bronson, Bronson & Slaven, all of San Francisco, for petitioner.

Neil R. McAllister, Dist. Atty., and Ralph H. Cowing, Deputy Dist. Atty., both of Sacramento, for respondent.

PER CURIAM.

This is a companion case with that of Harry W. Hall v. L. P. Williams, 25 P.(2d) 891, and for the reasons stated in the opinion filed in that case this 29th day of September, 1933, the writ is denied.

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*For subsequent opinion see 39 P.2d 419.

Charles A. ROOT, Petitioner, v. L. P. WILLIAMS, as County Auditor of County of Sacramento, State of California, Respondent.*

Civ. 5009.

District Court of Appeal, Third District, California.

Sept. 29, 1933.

Hearing granted by Supreme Court Nov. 27, 1933.

Application for writ of mandate prayed to be directed to respondent, as auditor of Sacramento county, to compel drawing of warrant for payment of salary as recorder.

A. D. McDougall and Bronson, Bronson & Slaven, all of San Francisco, for petitioner.

Neil R. McAllister, Dist. Atty., and Ralph H. Cowing, Deputy Dist. Atty., both of Sacramento, for respondent.

PER CURIAM.

This is a companion case with that of Harry W. Hall v. L. P. Williams, 25 P.(2d) 891, and for the reasons stated in the opinion filed in that case this 29th day of September, 1933, the writ is denied.

Frank P. CHRISTOPHEL, Petitioner, v. L. P. WILLIAMS, as County Auditor of County of Sacramento, State of California, Respondent.*

Civ. 5010.

District Court of Appeal, Third District, California.

Sept. 29, 1933.

Hearing granted by Supreme Court Nov. 27, 1933.

Application for writ of mandate prayed to be directed to respondent, as auditor of Sacramento county, to compel drawing of warrant for payment of salary as treasurer.

A. D. McDougall and Bronson, Bronson & Slaven, all of San Francisco, for petitioner.

Neil R. McAllister, Dist. Atty., and Ralph H. Cowing, Deputy Dist. Atty., both of Sacramento, for respondent.

PER CURIAM.

This is a companion case with that of Harry W. Hall v. L. P. Williams, 25 P.(2d) 891, and for the reasons stated in the opinion filed in that case this 29th day of September, 1933, the writ is denied.

R. E. GOLWAY, Petitioner, v. L. P. WILLIAMS, as County Auditor of County of Sacramento, State of California, Respondent.*

Civ. 5011.

District Court of Appeal, Third District, California.

Sept. 29, 1933.

Hearing Granted by Supreme Court Nov. 27, 1933.

Application for writ of mandate prayed to be directed to respondent, as auditor of Sacramento county, to compel drawing of warrant for payment of salary as superintendent of schools.

A. D. McDougall and Bronson, Bronson & Slaven, all of San Francisco, for petitioner.

Neil R. McAllister, Dist. Atty., and Ralph H. Cowing, Deputy Dist. Atty., both of Sacramento, for respondent.

PER CURIAM.

This is a companion case with that of Harry W. Hall v. L. P. Williams, 25 P.(2d) 891, and for the reasons stated in the opinion filed in that case this 29th day of September, 1933, the writ is denied.

MAPES v. WILLIAMS, County Auditor.†

McDOUGALL v. SAME.

Civ. 5005, 5007.

District Court of Appeal, Third District, California.

Oct. 9, 1933.

Hearing Granted by Supreme Court Dec. 7, 1933.

1. Counties ⚷65.

Tenure of officers in office at time of adoption of county charter cannot be affected by provisions of charter (Const. art. 11, § 7½).

2. Counties ⚷3½.

Valid provision of county charter is not affected by reason of invalid provision dealing with different subjects.

3. Counties ⚷46.

Members of board of supervisors of Sacramento county *held* entitled only to salary provided for by county charter duly adopted and approved, and not to salary specified in statute (Const. art. 11, § 7½).

Separate applications by Ollie Mapes and by Donald McDougall for writs of mandate

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 39 P.2d 419.

† For subsequent opinion see 39 P.2d 421.

prayed to be directed to L. P. Williams, as County Auditor of the County of Sacramento, to compel the respondent to issue warrants for salaries of petitioners as members of the Board of Supervisors of Sacramento County.

Writs of mandate denied.

Charles L. Gilmore, of Sacramento, for petitioner Mapes.

A. D. McDougall and Bronson, Bronson & Slaven, all of San Francisco, for petitioner McDougall.

Neil R. McAllister, Dist. Atty., and Ralph H. Cowing, Deputy Dist. Atty., both of Sacramento, for respondent.

PER CURIAM.

The above-entitled cases are petitions for writs of mandate involving identical questions, to wit, the salary of supervisors of the county of Sacramento, were argued together as one case, and will be so treated in this opinion.

The question presented is whether the charter provisions of the county of Sacramento, which became effective July 1, 1933, or an act of the Legislature, which became effective August 21, 1933, are controlling.

In the case of Hall v. Williams, 25 P.(2d) 891, filed in this court on September 29, 1933, to which reference is hereby made, this court set forth a number of provisions of the charter and various provisions of the Constitution relating thereto, and also stated the rules governing the interpretation of charters and legislative acts, and the duty of the court to ascertain the intent of the board of freeholders in framing the charter, of the voters in adopting the charter, and of the Legislature in ratifying the same, and to give such intent full force and effect unless prohibited by the very terms of the statute or charter. Reference is hereby made to the opinion in that case, and in so far as applicable, adopted as the opinion of the court in this case.

In the argument of the cases which we are now considering, petitioners laid great stress upon the different provisions of the charter relating to the subsequent election and districting of the county of Sacramento for that purpose, and in some particulars questioned the constitutionality of those provisions. These questions are not before the court, and as to the constitutionality of the provisions of the charter relating to the election of supervisors or the tenure of supervisors, we express no opinion. The question which the court has to determine relates only to compensation.

[1] By the terms of section 7½ of article 11 of the Constitution, the tenure of officers in office at the time of the adoption of a charter cannot be affected. The same section of the Constitution, however, authorizes the adoption of a charter which makes provision for the compensation, and either for the election at large or by districts of boards of supervisors. Thus, irrespective of the question of tenure, irrespective of how the board of supervisors are to be elected, or whether such provisions are valid or void, the charter provision as to compensation stands alone and is directly authorized to be fixed in the charter and made a component part thereof.

[2] Section 10 of article IV of the charter of the county of Sacramento reads: "The compensation of a supervisor shall be $10.00 per meeting, but not to exceed $50.00 per month, plus mileage to and from the place of meeting, payable monthly from the county treasury." This provision, by virtue of section 90 of the same charter, became effective July 1, 1933. As stated by this court, in substance, in Hall v. Williams, supra, a valid section of the charter is not affected by reason of an invalid section therein, dealing with a different subject.

[3] As section 7½ of article 11 of the Constitution provides that the charter "shall supersede all laws inconsistent with such charter relative to the matters provided for in such charter," it follows that the petitioners are only entitled to the salary provided for by the charter, and therefore that they are not entitled to a writ of mandate directing the respondent to draw a warrant based upon the salary specified in the act of the Legislature.

The writs are therefore denied in both cases.

134 Cal.App. 328

WIGGINS v. PACIFIC INDEMNITY CO.

PACIFIC INDEMNITY CO. v. WIGGINS et al.

Civ. 9006.

District Court of Appeal, First District, Division 2, California.

Sept. 27, 1933.

As Modified on Denial of Rehearing Oct. 27, 1933.

1. **Constitutional law 🔑48.**
Statutes 🔑181(2).
Statute must be given reasonable construction in accordance with legislative intent and preference given to construction which would not invalidate it.

2. **Statutes 🔑224.**
In construing statute, similar and contemporaneous legislation may be considered.

3. **Statutes 🔑212.**
Presumption is that, in passing statute providing for realty brokers' bonds, Legislature had in mind decisions construing similar statutes (St. 1919, p. 1252, § 9a, as added by St. 1923, p. 96, § 4).

4. **Brokers 🔑4.**
Under statute requiring bonds of realty brokers, and providing that any person injured by broker's failure to perform duty should have action on bond for any damage thereby sustained, aggregate recovery on any one bond could not exceed penalty thereof (St. 1919, p. 1252, § 9a, as added by St. 1923, p. 96, § 4; Civ. Code, § 2836).

5. **Constitutional law 🔑88.**
Vocation of realty broker cannot be taken away under guise of regulation (St. 1919, p. 1252, § 9a, as added by St. 1923, p. 96, § 4; Civ. Code, § 2836).

6. **Brokers 🔑4.**
Where one surety was on separate realty broker's bond given by each partner, both bonds could be resorted to where necessary for either partner's failure to perform duty (St. 1919, p. 1252, § 9a, as added by St. 1923, p. 96, § 4; Civ. Code, §§ 2407–2409, 2836).

7. **Brokers 🔑4.**
Where full penalties of realty brokers' bonds were allowed for breaches of duty, interest should have been allowed only from time of demands, which were dates of filing respective complaints, where record failed to show alleged prior demands (St. 1919, p. 1252, § 9a, as added by St. 1923, p. 96, § 4; Civ. Code, § 2836).

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action by Adelia F. Wiggins against the Pacific Indemnity Company, which filed a cross-complaint against plaintiff and others. From an adverse judgment, the Pacific Indemnity Company appeals.

Reversed, with directions.

Lawler & Degnan, George L. Greer, and Lobdell & Watt, all of Los Angeles, for appellant.

James H. Sims, Bailie, Turner & Lake, Mathes & Sheppard and Robert A. Cushman, all of Los Angeles (Richard A. Turner and Allen T. Lynch, both of Los Angeles, and Joseph G. De Forest, of San Francisco, of counsel), amici curiæ in behalf of appellant.

Sherer & Daugherty, of Los Angeles, amici curiæ in behalf of Hartford Accident & Indemnity Co.

Maynard J. Givens, of Los Angeles, for respondent Bertha Cunningham.

Scarborough & Bowen and Melvin J. Keane, all of Los Angeles, for respondents William L. and Truman H. Wiggins.

NOURSE, Presiding Justice.

The plaintiff Wiggins commenced an action against the Pacific Indemnity Company and others to recover the sum of $2,150 with interest for moneys paid to the Homeway Realty Company, a copartnership composed of Weygint and Gillette. The surety company, at the time of answering the complaint, filed a cross-complaint against plaintiff Wiggins and the cross-defendants named herein in which it was alleged that the surety company had executed and delivered to the Homeway Realty Company two bonds in the principal sum of $2,000 each in compliance with the terms of the California Real Estate Act (St. 1923, p. 93), and that as such surety it had theretofore paid to one Keers the sum of $1,811.47 pursuant to a final judgment predicated on the bond issued to Gillette; that it had theretofore paid to one Kelsey the sum of $937.13 predicated on the bond issued to Weygint. It was further alleged that at the time of the filing of the cross-complaint an action was pending in the municipal court of the city of Los Angeles brought by the cross-defendants Herman and Emmi Bollmann against the Homeway Realty Company and the Pacific Indemnity Company to recover the sum of $1,353.02 upon both of said bonds, and that at the same time there was pending in said municipal court an action brought by the cross-defendant Benn against the same parties to recover the sum of $250 based on the bond issued to Weygint. The cross-defendant Cunningham was brought in on allegations that she asserted a claim against the realty company and its surety, and the cross-complainants prayed that all these cross-defendants be required to litigate their respective claims in the one action. This was done, and as a result of the trial judgment was awarded in favor of the various cross-defendants as follows: Wiggins, $2,150; Benn, $250; Bollmann, $1,264.50; Cunningham, $1,635.31. Each cross-defendant was awarded interest in addition to these amounts running from the date of the fraudulent transaction complained of. The total principal of the four judgments was $5,299.81; interest, $1,033.32, making a total principal and interest of $6,333.13. The Keers and Kelsey judgments were admitted to have been paid in the sum of $2,748.60, without the surety's knowledge of the existence of any other claims. The total charge upon the surety through all of these judgments was in excess of $9,000.

From the judgment as entered, the surety company has appealed, assigning four grounds for reversal: First, that it cannot be held for more than the penalty designated in the bond; second, that the surety company was entitled to have credit for the payment theretofore made in compliance with the final judgment based upon the bonds in suit; third, that recovery of either bond must be confined to the copartner whose acts are complained of; and, fourth, that interest should not have been allowed prior to the date of the judgment.

The first question rests on an interpretation of the provisions of section 9a of the California Real Estate Act (St. 1923, p. 96). This section requires all applicants for a broker's license to file a bond payable to the people of the state of California in the amount of $2,000 conditioned for the faithful performance by such broker of any undertaking as a licensed real estate broker under the act. The provisions of the section which forced this controversy read: "Any person injured by the failure of a real estate broker to perform his duties, or comply with the provisions of this act, shall have the right in his own name to commence such an action against said real estate broker and his sureties for the recovery of any damage sustained by the failure or omission of said real estate broker to perform his duties or either of them, or to comply with the provisions of this act or any of them. It shall be the duty of the real estate commissioner to see that such bond remains and is kept good." The bonds which were deposited by the brokers in this case were identical in form, and obligated the surety in the penal sum of $2,000 for the faithful performance of the broker's duties under the act, and provided that any person injured by the failure of such real estate broker to perform such duties shall have the right to maintain an action against the broker and surety for the recovery of any damage sustained by the failure or omission of such broker.

[1] The judicial construction of the portion of the statute referred to is to be governed by two well-settled rules of law: First, that the construction must be reasonable and in accord with the legislative intent; and, second, that if two constructions are possible, one of which would render the statute constitutional, the other unconstitutional, that construction which would make a constitutional statute must be followed.

[2] In this connection we may refer to similar and contemporaneous legislation in order to determine the meaning of the Legislature. With this in mind, we find the general rule relating to the liability of a surety stated in section 2836 of the Civil Code as follows: "A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty." This principle is recognized in all our decisions. See County of Glenn v. Jones, 146 Cal. 518, 80 P. 695; W. P. Fuller & Co. v. Alturas School Dist., 28 Cal. App. 609, 612, 153 P. 743; Ryan v. Shannahan, 209 Cal. 98, 101–102, 285 P. 1045.

This principle has been applied to other bonds required to be given for the faithful performance of some obligation of a third party. Thus section 1183, Code of Civil Procedure, requires a bond in an amount not less than 50 per cent. of the contract price "conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in * * *" any work coming under the Mechanic's Lien Law (Code Civ. Proc. § 1183 et seq.). Section 962 of the Political Code authorizes suit upon a public official's bond "from time to time, and judgment recovered thereon by the state of California, or by any person to whom a right of action has accrued against such officer and his sureties, until the whole penalty of the bond is exhausted." Section 554 of the Probate Code, relating to an administrator's bond, provides that: "The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted."

Subdivision 3 of section 5 of the Corporate Securities Act, as amended in 1925 (St. 1925, p. 967), after providing for a bond "payable to the people of the State," reads: "Any person who sustains an injury covered by such bond, may in addition to any other remedy that he may have, bring an action in his own name upon said bond for the recovery of any damages sustained by him." Section 5 of the Produce Dealer's Act (St. 1927, p. 1814) authorizes: "Any consignor of farm products claiming to be injured * * * may bring action upon said bond against both principal and surety * * * to recover the damages caused by such fraud." In the act relating to private detectives (St. 1927, p. 1940, § 4), "every person injured * * * may bring an action on said bond in his own name to recover damages suffered. * * *"

In reference to the provisions of section 1183, Code of Civil Procedure, the Supreme Court, in Roystone Co. v. Darling, 171 Cal. 526, 543, 154 P. 15, 22, had occasion to consider a question closely akin to that presented here. In that proceeding claims arising under a building contract far exceeded the penalty specified in the bond, but the claimant therein argued that, because the statute required a bond conditioned for the payment in full of the claims of all persons, such claimants were not limited to the penalty named in the bond. The Supreme Court referred to the Code section which fixed the penalty of the bond at not less than one-half the amount of the contract price. This, the court said, measured the obligation and the liability of the surety. "The subsequent statement," said the court, "that after applying to the payment of liens the sum due from the owner to the contractor, such claimants may, in a suit on the bond, recover the unpaid balance of their claims, cannot be construed to authorize a recovery on the bond of more than the penal sum thereof. * * * The statement that the bond must be 'conditioned for the payment in full of the claims' of lienholders, is the usual phraseology of the obligation of a bond at common law. This is not understood to create an obligation in excess of the penal sum named, but only an obligation to pay such claims in full, provided they do not exceed the penal sum." Similarly in Roberts v. Security Trust & Savings Bank, 196 Cal. 557, 238 P. 673, a case involving a bond given under the same Code section, the Supreme Court, approving the rule of Roystone Co. v. Darling, said (page 574 of 196 Cal., 238 P. 673, 680): "The bond given by appellant to secure the payment for labor and materials is conditioned that the contractor shall pay, or cause to be paid, all claims against him for such labor or materials, and is expressly made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in the contract between Roberts and Mrs. Spires, or any modification thereof. By section 1183 of the Code of Civil Procedure, and by the express stipulation in the bond, such persons are given a right of action to recover upon the bond against the contractor and his surety, or either of them, in any suit brought to foreclose liens which may be filed by such persons upon the property of the owner, or in a separate suit brought upon the bond. The claimants may recover in such action, or actions, the value of such labor done or materials furnished, not exceeding, however, in the aggregate the amount of the bond, which in this case was one-half of the contract price for the erection of the building. The obligation of the appellant is therefore to pay the lienholders in full, provided their claims do not exceed the penal sum of the bond, $95,000. Roystone Co. v. Darling, 171 Cal. 526, 543, 154 P. 15."

[3, 4] We have here decisions construing the language of a statute of a similar nature, and the Legislature must be presumed to have had these decisions in mind when the real estate act was passed. Hence, when the Legislature in the later act provided that "any person injured" might sue on the bond for the recovery "of any damage sustained," the Legislature must be presumed to have intended that the aggregate of all recoveries under one bond should not exceed the penalty named in the bond because the courts in construing similar language in the Mechanic's Lien Law had definitely ruled that such was the legislative intent. This intention is emphasized by reference to the other statutes herein noted. Some of these were enacted before, some after the Real Estate Act; but all recognize the general principle of surety liability defined in section 2836 of the Civil Code.

In support of the judgment, the respondent relies on Salo v. Pacific Coast Casualty Co., 95 Wash. 109, 163 P. 384, L. R. A. 1917D, 613, and Commercial State Bank v. Palmerton, 152 Wash. 89, 277 P. 389. The Salo opinion was a five to four decision of the Supreme Court of Washington. It involved a surety bond given under a statute relating to the operation of jitney busses. The majority of the court held that, when the statute authorized "every person" to sue the principal and surety on the bond, the liability of the surety was not limited to the penal sum stipulated in the bond and called for by the statute. The majority opinion was not supported by, and has not been approved in, any other authority. The dissenting justices rested their dissent on the well-accepted general rule that the penalty named in the bond was the limit of the surety's liability. The decision in the Commercial State Bank Case involved a bond given under the Warehouseman's Act. The Supreme Court of Washington reached the same conclusion as to the surety's liability, basing its decision solely upon the ground that the question had been determined in the Salo Case. Following these decisions, the Supreme Court of the state of Iowa in Witter v. Massachusetts Bonding & Insurance Co., 247 N. W. 831, 834, gave a full consideration of the rule announced in the Salo Case and declined to follow it. The Iowa court, after citing numerous authorities from other jurisdictions adhering to the general rule, said: "Thus it appears that by the great weight of authority, a surety company cannot be held liable for a greater amount than that specified in the bond, and that one recovery of the full amount constitutes a defense against all pending or future suits, even though such suits are based on distinct wrongful acts of the party giving the bond."

We agree with the interpretation given by the Iowa court, and conclude that our statute must be given a like interpretation for two reasons: First, that this is the only sound and reasonable construction to be given the statute; and, second, that any other construction would render the act unconstitutional. This construction is sound and reasonable because the surety company is entitled to know the extent of its liability before it enters into the contract of surety. It is entitled to know this in order to fix the premium to be charged to its principal on the bond and also in order that it might comply with the provisions of section 625b of the Political Code (as added by St. 1929, p. 1968), limiting the undertaking on any bond to 10 per cent. of the capital and surplus of the surety company. It will be noted that the Real Estate Act does not require a bond from a corporate surety or prohibit a bond executed by an individual or personal surety. But, under the provisions of section 1057, Code of Civil Procedure, a personal surety may justify by showing that he is worth "the sum specified in the undertaking or bond." Hence, if respondent's construction of the Real Estate Act is to be followed, it would be impossible for a personal surety to justify upon any bond required by that act.

We are not impressed with the academic discussion of the purely grammatical construction of this portion of the Real Estate Act. To the average mind, either lay or legislative, there is no marked difference between a right given to "any person" and one given to "all persons," or between the right to recover "any damage sustained" and the right to recover "payment in full." Thus there is no real or substantial difference between the language used in the Real Estate Act and that used in the Mechanic's Lien Law. Similarly section 961 of the Political Code (as it read when the Real Estate Act was passed) provided that all official bonds shall be obligatory "to and for the use and benefit of all persons who may be injured," and that "any person so injured" may sue on such bonds. Upon principle and reason we are compelled to the conclusion that the Legislature, having in mind the judicial construction of the mechanic's lien and official bonds, did not intend to increase the liability of a surety in the Real Estate Act beyond the penalty named. To our minds, the real purpose which the Legislature intended to express in section 9a of the act was that the bond should inure to the benefit of all persons injured by the acts of the principal, and that any such person might sue the surety directly—thus distinguishing the rights under such bonds from those under the common-law rule where the right to sue was limited to the obligee named in the bond, and from those bonds or contracts of insurance which postponed the right to sue until final judgment was had against the principal. See, generally, Sunter v. Fraser, 194 Cal. 337, 340, 228 P. 660; Milliron v. Dittman, 180 Cal. 443, 181 P. 779; Fraher v. Eisenmann, 94 Cal. App. 48, 51, 270 P. 704; Severns v. Cal. H. Indem. Exch., 100 Cal. App. 384, 390, 280 P. 213.

[5] Furthermore, this construction of the act is necessary because, if the Legislature intended to place a continuing liability on the surety beyond the penal sum specified in the act, then the act to that extent would be unreasonable and void. The vocation of a real estate broker is a legitimate and useful one which cannot be taken away under the guise of regulation. Riley v. Chambers, 181 Cal. 589, 592, 185 P. 855, 8 A. L. R. 418. Regulations of such occupations which are arbitrary, discriminatory, and unreasonable are beyond the scope of legislation. In re Carlson, 87 Cal. App. 584, 587, 262 P. 792; In re Weisberg, 215 Cal. 624, 632, 12 P.(2d) 446. If the act means that, while the required bond purports to be in the penal sum of $2,000, "yet, after recovery to that amount, the obligors shall continue to be liable for other and additional amounts without limit, then the requirement is clearly unreasonable. No surety could properly be asked to undertake such an indefinite and unlimited responsibility." Jitney Bus Ass'n v. Wilkes-Barre, 256 Pa. 462, 100 A. 954, 956; State ex rel. Stephenson v. Dillon, 82 Fla. 276, 89 So. 558, 22 A. L. R. 227; People v. Kastings, 307 Ill. 92, 138 N. E. 269.

It is true, as is said in the Bus Association Case, that, if the statute imposes a continuing and unlimited liability, "no surety could properly be asked to undertake" it because there would be no possible method of determining the extent of its undertaking. And no personal surety could undertake the obligation because it would be impossible for him to justify under our Code when the extent of his obligation is unknown. The effect of the interpretation urged by respondents would be that no real estate broker could secure a bond within the terms of the act, and hence the occupation would be prohibited rather than regulated. As such construction of the statute would render it unconstitutional, the other construction, which is also a sound and reasonable one, must be adopted. 5 Cal. Jur. pp. 615, 616.

[6, 7] We find no error in the ruling of the trial court that the plaintiff and cross-defendants were entitled to recover upon both bonds. Weygint and Gillette were copart-

ners doing business under the name of Homeway Realty Company. The statute requires each copartner to file a bond, and two bonds were accordingly filed here, both naming Homeway Realty Company as principal and both conditional upon the compliance of the copartnership with the terms of the act. The wrongful act of one partner in the conduct of partnership business is chargeable to the partnership and to the other partners. Civ. Code, §§ 2407–2409.

The trial court awarded each plaintiff interest running from the date each plaintiff paid money to the broker. Throughout the hearing on appeal the appellant contended that interest should not commence to run until judgment because the claims were for unliquidated damages. To this respondent answered that in each judgment the claimant recovered the exact amount sued for, which in each case was alleged to represent a definite amount paid to the brokers for a specific purpose; that there was at no time any controversy over any of the amounts claimed to be due. Austin v. American Surety Co., 118 Cal. App. 68, 72, 4 P.(2d) 577, was cited by respondents. It is directly in point on the questions presented and argued on the appeal.

[7] In its petition for a rehearing, the appellant states that in the Austin Case the judgment was in a sum less than the full penalty of the bond, whereas here the full penalty is decreed. Democa v. Barasch, 212 Cal. 293, 298, 298 P. 17, is cited to the point that, when "the full penalty of the bond is decreed, interest should not begin until after demand." The latter case is controlling; but, as in that case, the record here is incomplete. Though demand was alleged in each complaint, there was no finding on the issue and the evidence does not disclose when any demand was made. The record is also incomplete in failing to show the amount of the demands. We cannot take appellant's mere statement that the demands were excessive without some reference to the evidence. For these reasons the judgments should follow the rule of the Democa Case and carry interest from the date of filing of each complaint, as that "is the only definite date the record fixes as the time of such demand."

The judgment as to the surety company is reversed, with directions to enter judgments for the respective cross-defendants in accordance with the views heretofore expressed, with interest from the date of filing of the respective complaints.

The petition for a rehearing is denied.

We concur: SPENCE, J.; STURTEVANT, J.

219 Cal. 231

HOLMQUIST v. KENT et al.

L. A. 13360.

Supreme Court of California.

Oct. 20, 1933.

As Modified on Denial of Rehearing Nov. 17, 1933.

1. Licenses 🔑36.

Transaction wherein corporation sold stock to plaintiff and received realty, notwithstanding exchange of checks between corporation and escrow holder, *held* not to disclose sale for cash as required by permit (St. 1917, p. 679, § 12).

2. Licenses 🔑39.

Plaintiff seeking reconveyance of realty deeded to corporation in exchange for stock sold in violation of permit, or damages, *held* not in pari delicto with corporation or its directors (St. 1917, p. 679, § 12).

In Bank.

Appeal from Superior Court, San Diego County; Claude L. Chambers, Judge.

Action by Hulda C. Holmquist against James D. Kent, trustee in bankruptcy for the California Land Buyers' Syndicate, and others. From a judgment in favor of the plaintiff, the defendant named and the defendants Ed Fletcher, Jr., and John N. Haskell separately appeal.

Affirmed.

Harrison G. Sloane, of San Diego, for appellants Ed Fletcher, Jr., and John N. Haskell.

Gray, Cary, Ames & Driscoll, of San Diego, for appellant George Flagg.

Ed. P. Sample and William H. Wylie, both of San Diego, for respondent Hulda C. Holmquist.

PER CURIAM.

These appeals presented in one record are by the defendant trustee in bankruptcy for California Land Buyers' Syndicate, and by the defendants Fletcher and Haskell, from a judgment for the plaintiff in an action for the return of real property or for damages growing out of an alleged void stock sale transaction. The defendant California Land Buyers' Syndicate went into bankruptcy after judgment was entered, and the defendant James D. Kent, as such trustee, was substituted in its place.

The stipulated facts form the basis of the trial court's findings.

The plaintiff and her sister owned real property in San Diego consisting of lots A and B, block 191, Horton's Addition, of the value of $160,000 incumbered by a mortgage in the sum of $25,000. The defendant California Land Buyers' Syndicate, a Delaware corporation, obtained a permit from the corporation commissioner of the state of California to sell and issue 24,569 investment shares and a like number of common shares in units of one investment share and one common share for $30 per unit, cash, lawful money of the United States. The syndicate was permitted to pay a selling commission of not to exceed 20 per cent. The business of the syndicate at the times herein involved was exclusively to buy and sell or exchange real estate at a profit. R. L. Stewart was its fiscal agent, and was authorized to sell the stock units for a commission of 20 per cent. The defendants Fletcher and Haskell are two of the directors of the corporation, also vice president and secretary thereof, respectively.

C. R. Wilson, a stock salesman and manager of the real estate department of the syndicate, solicited the interest in the company of the plaintiff and her sister. On December 6, 1928, the board of directors in meeting received and read a letter addressed to Mr. Wilson, as manager of the real estate department, signed by the plaintiff and her sister, offering for sale the real estate above described and improvements at a price of $160,000, subject to a $25,000 mortgage, the purchase price to be $10,000 cash and 4,166 units of the company's stock. The owners also agreed to turn over $2,000 of such securities to Mr. Wilson as his commission on the sale of the real estate. The minute record of the meeting shows that the motion to purchase the real estate at the figure offered, viz., $160,000, was carried without a negative vote.

An escrow was opened with the Southern Title & Trust Company of San Diego, as escrow holder. Through the escrow the syndicate obtained a loan of $70,000 on the property to be purchased, and the existing mortgage of $25,000 was discharged. Concededly the syndicate had no funds, either cash or deposits, against which to draw a check for the sum of $135,000, the purchase price of the real property less the amount of the mortgage. Neither were the plaintiff nor her sister possessed of funds with which to pay for the stock units specified. The transaction was consummated by the check of the escrow holder Southern Title & Trust Company of San Diego, in favor of California Land Buyers' Syndicate, in the sum of $124,980, the sum due for the stock units, together with a sufficient amount from the proceeds of the loan to make up the necessary amount against which the check of the syndicate in the sum of $135,000 was drawn in favor of the Southern Title & Trust Company, and exchanged by the latter upon its indorsement for cashier's checks; that is, the balance of the borrowed funds, the check for $124,980, and the cashier's checks were deposited in the escrow, and, when the escrow closed, the respective offsetting checks were deposited, honored, and cleared in the customary manner. The net material result was that the plaintiff and her sister received the specified $10,000 cash and certificates of stock representing the stipulated units, and the defendant syndicate received a deed to the real property formerly owned by the plaintiff and her sister.

The trial court found that this transaction was an exchange of stock for real estate and was consummated with the aid and assistance of the defendants Fletcher and Haskell, with notice and knowledge that the syndicate did not receive cash in the sum of $30 per unit for each unit so transferred, and that the transaction was in violation of the terms of the permit. The court found further that the incumbrance created against said property in the sum of $70,000 had not been discharged, and that the property was sold under foreclosure proceedings. The certificates of stock were declared void pursuant to section 12 of the Corporate Securities Act (St. 1917, pp. 673, 679), and judgment was entered for the plaintiff and against the California Land Buyers' Syndicate and the individual defendants for a reconveyance to the plaintiff of a one-half interest in the property, subject only to a mortgage in the sum of $25,000, or for damages in the sum of $62,500.

[1] The decisive questions on this appeal arise from the contentions of the appellants that the court erred in finding that the shares of stock were issued in exchange for real property; that the court should have found that the plaintiff was in pari delicto with the defendants; and the additional contention on the part of the defendants Fletcher and Haskell that the plaintiff is not entitled to a money judgment as against them, on the theory either that the facts do not warrant the finding that the stock issue was with their knowledge and aid or assistance, or, said defendants not having received any of the property, that the form of action brought by the plaintiff does not permit such relief as against them. If the transaction involved in the present case was a violation of the permit, then the manner of its consummation and the acts of the agent Stewart to that end were, under the facts disclosed by the record, attributable to the defendants Fletcher and Haskell. Randall v. California Land Buyers' Syndicate (Cal. Sup.) 20 P.(2d) 331. So that the principal inquiry is whether or not the transaction was for cash within the meaning of the act.

The defendants argue that the credit of the Southern Title & Trust Company, which backed the checks used in the transaction, renders the transaction in all its essential characteristics one for cash; that the transaction is essentially the same as though the checks of the parties were used backed by actual funds on deposit to their own credit, and duly honored. We may start with the premise that the latter situation would unquestionably be considered the equivalent of cash; and it is argued therefrom that the credit of the Southern Title & Trust Company is as much an equivalent of the cash requirement. There is no proof in the record, if the point be considered material, that the credit of that company was backed by any more tangible asset than a similar credit. On the contrary, the conclusion is irresistible that the manner in which the checks were issued and used was merely a method of offsetting bookkeeping entries. In the final analysis, we therefore still are faced with the fact that credit merely was utilized in the transaction when cash or actual funds on deposit was the requirement. The arguments of counsel have not persuaded us that this transaction in its essence is to be distinguished from the transaction involved in the case of Randall v. California Land Buyers' Syndicate, supra, and the reasons material there for concluding that the transfer was one not for cash are controlling here.

[2] The plaintiff is not in pari delicto with the defendants. Randall v. California Land Buyers' Syndicate, supra, page 332 of 20 P.(2d); Western Oil & Refining Co. v. Venago Oil Corp. (Cal. Sup.) 24 P.(2d) 971. Also, the case of Randall v. California Land Buyers' Syndicate, supra, at page 332 of 20 P.(2d), answers adversely to their contentions the question whether the plaintiff is entitled in the form or theory of the action prosecuted by her to a money judgment as against the defendants Fletcher and Haskell.

The judgment is affirmed.

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219 Cal. 228

BARDWELL v. TURNER et al.

L. A. 14370.

Supreme Court of California.

Oct. 20, 1933.

1. Appeal and error ⚿479(1).

Writ of supersedeas to stay proceedings pending appeal from order denying change of venue would issue only on showing that substantial questions would be presented on appeal.

2. Venue ⚿4.

Where subject-matter is local, cause should be tried in county where subject-matter or some part thereof is situated, otherwise it should be tried in county of defendant's residence (Code Civ. Proc. §§ 392, 395).

3. Venue 🔑6.

Action for accounting is proceeding in equity and is essentially "personal action" for venue purposes (Code Civ. Proc. § 395).

[Ed. Note.—For other definitions of "Personal Action," see Words & Phrases.]

4. Venue 🔑6.

It is only when land or an interest therein is exclusive subject-matter of action that statute respecting trial of action in county where subject-matter is situated controls (Code Civ. Proc. § 392).

5. Venue 🔑16½.

Where in one complaint there are united allegations, and prayer for relief in causes of action both transitory and local, defendants are entitled to have cause tried in county of residence (Code Civ. Proc. §§ 392, 395).

6. Appeal and error 🔑479(1).

On appeal from order denying change of venue on which substantial question of whether action for accounting and seeking establishment of rights in leases was local or transitory, appellants *held* entitled to writ of supersedeas (Code Civ. Proc. §§ 949, 963).

In Bank.

Action by E. R. Bardwell against Fred D. Turner and others. From an order denying a motion for change of venue, defendants appealed, and they now apply for writ of supersedeas.

Writ issued.

Boyd C. Barrington, of Los Angeles, for appellants.

Borton & Petrini, of Bakersfield, for respondent.

PRESTON, Justice.

[1] Defendants seek a writ of supersedeas to stay proceedings in this cause pending their appeal from an order of the court below denying their motion for change of venue from Kern to Los Angeles county. Sections 963 and 949, Code Civ. Proc. This is a discretionary matter, and the writ will issue only when justified by a showing that substantial questions will be presented upon the appeal from the order denying change of venue. McKenzie v. Los Angeles Life Ins. Co., 88 Cal. App. 259, 263 P. 338.

In this cause defendants' moving papers were sufficient in form to satisfy Code requirements (section 1010, Code Civ. Proc.), and consisted of a written demand for change of venue, notice of motion, motion, and affidavit of merits in support thereof, wherein defendants claimed they were entitled to have the cause tried in the county of their residence because the action was essentially transitory—an equitable action for an accounting. They also indicated that the convenience of both parties and witnesses would be served by the change. The first ground only need be considered.

[2-5] If the subject-matter of the action is local, the cause should be tried in the county where such subject-matter, or some part thereof, is situated; otherwise it should be tried in the county of defendants' residence. Sections 392, 395, Code Civ. Proc. An action for an accounting is a proceeding in equity and is essentially a personal action; it is only when land or an interest therein is the exclusive subject-matter of the action that section 392 controls. If, in one complaint, there have been united allegations and a prayer for relief in causes of action both transitory and local, defendants are likewise entitled to have the cause tried in the county of their residence. Howe v. Tucker (Cal. Sup.) 25 P.(2d) 832, decided October 3, 1933; Weygandt v. Larson (Cal. App.) 19 P.(2d) 852; Smith v. Smith, 88 Cal. 572, 26 P. 356, and cases cited in said decisions.

[6] In this cause plaintiff seeks an accounting and the establishment of the rights of the parties in and to their respective interests in and profits from certain oil wells and oil leases. He claims that the action is essentially local because he prays for the declaration of a resulting trust in his favor for his appropriate interest in certain oil land leases and because his complaint contains substantive allegations in which respective property interests in Kern county are specifically set forth and described, and execution and delivery of appropriate conveyances and transfers to him of such interests are sought. Appellants, on the contrary, assert that the gravamen of the action is purely personal; that in reality it is no more nor less than a simple action in equity for an accounting.

An examination of the pleading reveals at once that these respective contentions present a substantial question to be determined upon the appeal from said order denying a change of venue, to wit, a question as to the nature of the action. Is it essentially local, or is it transitory, or does the pleading join causes of action both real and personal? Thus issuance of the writ to stay proceedings pending the determination of said appeal is clearly justified.

To further substantiate this statement, we shall set forth a résumé of the prayer of the complaint: (1) It asks for an accounting; (2) "that a resulting trust in favor of plaintiff for his appropriate interest as herein set out in each of said ventures be declared and decreed"; (3) that plaintiff have judgment for his proper proportion of the profits as determined upon the accounting and that defendant be required to execute and deliver to plaintiff "the appropriate conveyance and transfer of his interest as may be by such decree determined in each of said ventures"; (4) that plaintiff receive costs; lastly, plaintiff specially prays for appointment of a receiver to manage and control, under direction of the court and until final determination of the action, the said ventures, and the funds in the hands of defendants.

Let the writ issue as prayed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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219 Cal. 213

FREEMAN v. DOWLING.

S. F. 14850.

Supreme Court of California.

Oct. 16, 1933.

1. Venue ⚷58.

On motion for change of venue, if allegations state semblance of cause of action, they are sufficient against assault on ground that they are sham and frivolous.

2. Venue ⚷22(3).

Partner's action for dissolution of partnership, accounting, and for injunction to prevent copartner from disposing and city from paying moneys due partnership under improvement contract *held* maintainable in county where city was resident, though copartner was nonresident, since city was "necessary party" (Code Civ. Proc. §§ 379-379b, 395, 1184).

[Ed. Note.—For other definitions of "Necessary Parties," see Words & Phrases.]

3. Venue ⚷26.

Where resident and nonresident defendants are necessary parties, change of venue will not be granted on demand of nonresident defendant.

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Suit by O. V. Freeman against J. A. Dowling and others. From orders denying named defendant's motions for change of venue, named defendant appeals.

Affirmed.

M. Weber, of San Francisco, for appellant.

Lakin & Lave, of Palo Alto, for respondent.

IRA F. THOMPSON, Justice.

The plaintiff filed a complaint in the county of Santa Clara, joining as defendants the city of Palo Alto and its administrative officers, and the appealing defendant, J. A. Dowling, who is a resident of the city and county of San Francisco. Dowling moved for a change of venue upon the ground of such residence. The motion for a change of the place of trial was twice denied by the superior court of Santa Clara county, and this appeal is from the orders so entered.

According to the facts as set forth in the complaint, the respondent entered into a street improvement contract with the city of Palo Alto and its superintendent of streets. Thereafter respondent entered into a partnership with the appellant Dowling, who was to finance the work and who was to receive 60 per cent. of the profits resulting therefrom. The respondent agreed to superintend the improvement work, furnish necessary equipment, etc., and accept 40 per cent. of the profits. It is further alleged that the contract has been completed; that the city and its officers have on hand approximately $22,000 in street improvement bonds and approximately $6,000 in cash with which to pay the balance due for the work; that there are outstanding unpaid bills for labor performed and materials furnished amounting to $3,620.37; and that, in addition, respondent has paid bills on behalf of the copartnership for labor performed and materials used in said work of improvement in the sum of $1,091.67, which Dowling has refused to pay as provided by the partnership agreement. Also it is averred that all of the records and books and accounts of the partnership are in Dowling's possession, and respondent is unable to ascertain the amount of the profits. The prayer of the complaint is for a dissolution of the partnership; for an accounting, and that an "injunction be granted restraining said defendant J. A. Dowling from accepting, and restraining said defendants, City of Palo Alto, J. F. Byxbee, Superintendent of Streets of said City, the City Clerk, City Auditor, and City Treasurer of said city from paying said defendant J. A. Dowling until the final determination of this action, any bonds, cash or other property"; and that, after all just debts, claims, and liabilities of the copartnership are paid, the profits be divided in accordance with the partnership agreement.

A temporary restraining order issued, and, upon the hearing of an order to show cause, no objections appearing, an injunction pendente lite issued and was served on the defendants, which enjoined Dowling from accepting, and the other defendants from paying over or delivering to Dowling, or to any person or persons in his behalf, any bonds, moneys, or other property in their hands or under their control.

The appellant filed his demand, supported by an affidavit of merits, for change of venue on the ground that he was a resident of the city and county of San Francisco; that the complaint fails to state a cause of action against the defendants "City of Palo Alto, a municipal corporation; J. F. Byxbee, Superintendent of Streets of said city; City Clerk; City Auditor, and City Treasurer of said City," who constitute the defendants other than the appellant; and that they are unnecessary parties, and were joined for the sole purpose of maintaining the jurisdiction in Santa Clara county.

The respondent filed a counter affidavit, and, after hearing, the motion was denied. The court thereafter permitted the motion for change of venue to be renewed, and notice was again given upon the same grounds as the first motion, and again the motion was denied.

The action, as disclosed by the complaint, is equitable in nature and a court of equity assumed jurisdiction and issued an injunction therein which is still in force. It sufficiently appears that Dowling is a resident of the city and county of San Francisco and the other defendants residents of Santa Clara county; that the action is transitory, and the place of trial would be controlled by section 395 of the Code of Civil Procedure if appellant's contention, that the complaint does not state a cause of action against the other defendants and that they are unnecessary parties and joined solely for the purpose of having the action tried where they reside, be upheld.

[1] Upon a motion for a change of venue, however, if the allegations do no more "than shadow forth the semblance of a cause of action," they are "proof against assault upon the ground that they" are "sham and frivolous." McClung v. Watt, 190 Cal. 155, 211 P. 17, 20. The more recent case of Mills v. Brown, 205 Cal. 38, 41, 269 P. 636, 637, quotes with approval from the McClung Case as follows: "It is enough, however, upon the hearing and determination of the demand for a change of venue, that the cause of action purported to be stated against the corporation defendant was apparently pleaded in good faith, and is not, prima facie, so glaringly and vitally defective as to be beyond correction by amendment." As applicable to the present situation we quote from the same case at page 40 of 205 Cal., 269 P. 636: "It is too clear for controversy that the foregoing facts authorize the maintenance of a suit by the plaintiff against defendant Brown, as well as the other defendants named. Mathew v. Mathew, 138 Cal. 334, 336, 71 P. 344. It is also clear that the plaintiff cannot secure the full relief demanded without the presence of the defendant Brown, who is a resident of the county of Sacramento; hence, under the provisions of section 395 of the Code of Civil Procedure, the venue is properly laid at Sacramento county. McClung v. Watt, 190 Cal. 155, 158, 211 P. 17. See, also, Quint v. Dimond, 135 Cal. 572, 67 P. 1034; and Hellman v. Logan, 148 Cal. 58, 82 P. 848."

[2] While it is true that the complaint is inartificially drawn, it may not be said that the respondent has not asked for equitable relief against the defendants other than appellant and that he could obtain all the relief he demands without making them parties. Section 379 of the Code of Civil Procedure provides that: "Any person may be made a defendant * * * who is a necessary party to a complete determination or settlement of the question involved therein; * * *" section 379a adds: "All persons * * * against whom the right to any relief is alleged to exist; * * *" and section 379b says: "It shall not be necessary that each defendant shall be interested as to all relief prayed for." We do not agree with appellant's assumption that the action is entirely one for an accounting as between respondent and appellant, Dowling. The accounting is but incidental to a determination of the rights of the plaintiff which may suffer serious detriment and involve plaintiff in a liability to the city and his bondsmen and possible financial loss, and therefore, in order to render full and complete relief and prevent possible multiplicity of suits, the city of Palo Alto and its officers who are defendants are necessary parties to a complete determination of the issues over which the court has jurisdiction. It is helpful to note that, while by section 1184 of the Code of Civil Procedure the materialmen and laborers may give to the city a notice to withhold the amount of their claims, such right is not accorded the respondent—who was the contractor. He and the city are both interested in having the fund applied to the extinguishment of the obligations. Thus the case is distinguished from Sayward v. Houghton, 82 Cal. 628, 23 P. 120. As said in Hellman v. Logan, 148 Cal. 58, 60, 82 P. 848, 849: "The fact that the plaintiffs might have maintained an action for a part of the relief to which they were entitled, and that in an action for such limited relief no person, except Logan, could properly be made a defendant, would not justify a change of venue of the action which they have stated in the complaint. The test is to be made by ascertaining who are necessary parties to the action as it is set forth in the complaint, and what parties are necessary in order to enable the plaintiffs to obtain all the relief which is properly included in the prayer for relief made therein. Greenleaf v. Jacks, 133 Cal. 506, 65 P. 1039; Quint v. Dimond, 135 Cal. 572, 67 P. 1034."

[3] It is settled law in this state that, where it appears that both resident and nonresident defendants are necessary parties, a change of venue will not be granted upon de-

mand of the nonresident defendant. The appellant must therefore rely entirely upon making it satisfactorily appear that the other defendants are not necessary parties, that no cause of action is stated as against them, and that no relief whatever may be awarded against them. Not having made it so appear upon the motion for a change of venue, the orders should be, and they are, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

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219 Cal. 225

FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO v. STALEY et al.

L. A. 14084.

Supreme Court of California.

Oct. 20, 1933.

1. **Mortgages** ⟹543.

During period of redemption, mortgagor is, under all ordinary circumstances, entitled to remain in possession as against purchaser at foreclosure sale (Code Civ. Proc. §§ 706, 707).

2. **Mortgages** ⟹550.

Mortgagee purchasing property at foreclosure sale on bid for entire amount of debt, without asking for deficiency judgment, was not entitled to appointment of receiver.

3. **Mortgages** ⟹549.

Mortgagee purchasing property at foreclosure sale *held* not entitled to enjoin mortgagor from interfering with mortgagee's collection of rents during redemption period, where mortgagor was in possession (Code Civ. Proc. §§ 706, 707).

In Bank.

Appeal from Superior Court, San Diego County; O. N. Andrews, Judge.

Action by the First National Trust & Savings Bank of San Diego, as executor of the will of Frank R. Kingman, deceased, against W. S. Staley and another. From judgments in favor of plaintiff, defendants appeal.

Reversed.

Prior opinion, 24 P.(2d) 545.

W. S. Staley, of San Diego, for appellants.

John A. Hewicker, of San Diego, for respondent.

PRESTON, Justice.

In this cause plaintiff, a personal representative of the mortgagee, by due proceedings in foreclosure, caused to be sold at a regular sale the premises in dispute, and became the purchaser thereof on behalf of his testate on October 29, 1932, and the time for redemption will expire on October 29, 1933. Appellant Nicoll holds the legal title to said property through mesne conveyances from the original mortgagor. She was the sole defendant in the foreclosure proceeding. The property involved is in San Diego, and consists of a large lot on which are located some seven or eight tenements which now are, and have heretofore been, rented to tenants of moderate means. Since the foreclosure and sale, a continuous scramble for rents from these tenants has been carried on by plaintiff on the one hand and defendant on the other, the latter being guided and controlled by her attorney, defendant Staley. The present proceedings are the outgrowth of this controversy.

Plaintiff sued for an injunction restraining interference by defendants in its campaign to collect and appropriate said rents. Defendant Nicoll demurred to the complaint on general grounds. Her demurrer was overruled, and, failing to ask permission to answer, that right was cut off, followed by the granting of a permanent injunction restraining her from in any wise interfering with the collection of these rents and also from harassing or annoying said tenants.

Defendant Staley also demurred to the complaint. His demurrer was overruled. He later answered. A demurrer to his answer and a motion to strike out certain allegations thereof were then interposed; the demurrer was sustained, and the motion granted. Later a final decree, similar to the one against defendant Nicoll, was duly entered against this defendant also. Both these defendants filed notices of appeal from the said decrees and orders.

[1] The basic question is: What are the rights of the parties in view of the provision of section 707 of the Code of Civil Procedure as follows: "The purchaser from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof." This section has been held to authorize a suit by the purchaser at a foreclosure sale during the period of redemption against the tenant for the rents due from him. Walker v. McCusker, 71 Cal. 594, 12 P. 723; Clarke and Cain v. Cobb, 121 Cal. 595, 54 P. 74. But nothing in said section purports to give to the purchaser the further right, during the period of redemption, of invading the possession of the premises held by the mortgagor or his successor in interest. In fact, the authorities are clear that the mortgagor, during the period of redemption, is, under all ordinary circumstances, entitled

to remain in possession of the property. McClintock v. Powley, 210 Cal. 333, 337, 291 P. 833; Shintaffer v. Bank of Italy, 216 Cal. 243, 13 P.(2d) 668. Indeed, section 706 of the Code of Civil Procedure, which authorizes a suit to restrain the commission of waste on the property, concedes this right to the mortgagor.

[2, 3] In this cause the further fact should be noted that the purchaser bid for the property the entire amount of the debt and costs and did not ask for a deficiency judgment. This being true, a receiver would not be authorized. Boyd v. Benneyan, 204 Cal. 23, 26, 266 P. 278; Reidy v. Young, 119 Cal. App. 322, 325, 6 P.(2d) 112. If the appointment of a receiver would not be authorized, we do not see how an injunction, having practically the same effect, can be justified.

Neither is there a sufficient showing of the commission of waste, because, but for the interference of plaintiffs, defendant would have continued in possession of the property in the same way and manner in which she had theretofore held it. Section 706, Code Civ. Proc. It is true that plaintiff alleges that it was in possession of the property, but the facts show that this possession was at most merely constructive and, moreover, defendant Staley put in issue, by his answer, the question of possession by his denial of possession in plaintiff.

The judgment as to both defendants is reversed.

We concur: WASTE, C. J.; CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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219 Cal. 179

PACIFIC FINANCE CORPORATION v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 13944.

Supreme Court of California.
Oct. 3, 1933.

1. Dismissal and nonsuit 🔑60(1).

Word "action" in statute requiring dismissal of action, unless brought to trial within 5 years after defendant filed answer, does not mean entire proceeding, including cross-complaint (Code Civ. Proc. § 583).

[Ed. Note.—For other definitions of "Action; Action at Law," see Words & Phrases.]

2. Pleading 🔑138.

Cross-actions are distinct and independent causes of action, and issues presented on cross-complaint and answer thereto are entirely separate and distinct from those raised on original complaint and answer (Code Civ. Proc. § 581).

SHENK, THOMPSON, and SEAWELL, JJ., dissenting.

In Bank.

Mandamus proceeding by the Pacific Finance Corporation against the Superior Court in and for Los Angeles County and Caryl M. Sheldon, Judge thereof.

Writ denied.

Prior opinions, 13 P.(2d) 1045; 20 P.(2d) 657.

Overton, Lyman & Plumb and Chalmers L. McGaughey, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and Andrew J. Copp, Jr., all of Los Angeles, for respondents.

PER CURIAM.

After further consideration, we are satisfied that our former opinion, written by Mr. Justice Tyler, upon the question involved in this appeal makes a correct disposition of that question. We, therefore, adopt so much of said opinion as deals with and is decisive of said question. It is as follows:

Mandamus to compel the dismissal of a cross-complaint.

The record presents the following facts: Petitioner commenced an action in the superior court on January 21, 1927, against one Beck, defendant. An answer was filed March 3, 1927, and at the same time defendant filed a cross-complaint. On April 4, 1927, an answer to the cross-complaint was filed. The case was set for trial on March 31, 1932, which was more than five years after issue was joined upon the original complaint, but less than five years after issue joined upon the cross-complaint. On the day set for the trial, upon motion regularly made, the original plaintiff, petitioner herein, moved the respondent court to dismiss "the action" under the provisions of section 583 of the Code of Civil Procedure. The court thereupon on its own motion dismissed the original complaint and answer which had not been brought to trial within five years, but it refused to dismiss the cross-complaint and answer upon which issue the five-year period had not yet run. The court thereupon proceeded to trial upon the cross-complaint, and petitioner then procured the alternative writ herein.

[1] It is conceded that no question as to the exercise of judicial discretion by respondent court is here involved. The motion to dismiss was addressed solely to the mandatory provisions of section 583 of the Code of

Civil Procedure, which reads as follows: "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended." The controversy here presented relates to the proper interpretation to be placed on the word "action" as contained in the provision above quoted. Respondents, in support of the action of the trial court, contend that the issue joined upon a cross-complaint is a separate and distinct action from that joined on the complaint itself; that the two are severable, and the failure of the one has no effect upon the other. Petitioner argues that the word "action" means the entire proceeding or suit, and that when the parties have failed to bring "such action" to trial within five years, then the entire proceeding, cross-complaint and all, must be dismissed. We are of the opinion that petitioner's contention cannot be sustained. Preliminarily it may be stated that a diligent search of the authorities fails to reveal a single case where the precise situation was presented or passed upon by any court in the various jurisdictions. Authority on principle, however, is not wanting.

[2] One of the objects of the reformed or code procedure is to simplify the pleadings and conduct of actions, and to permit of the settlement of all matters of controversy between the parties in one action, so far as may be practicable. And to this end most of the codes have provided that the defendant in an action may, by appropriate pleadings, set up various kinds of new matter, or cross-claims, which must otherwise have been tried in separate actions. Generally speaking, in most of the states this new matter is broad enough to embrace all controversies which under previous statutes might have been the subject of set-off, and all claims which under the adjudication of courts might have been interposed as defenses by way of recoupment, and secures to a defendant all the relief which an action at law, or a bill in equity, or a cross-bill would have secured on the same state of facts prior to the adoption of the code. The object of these remedial statutes is to enable, as far as possible, the settlement of cross-claims between the same parties in the same action, so as to prevent a multiplicity of actions. These cross-actions, however, are still distinct and independent causes of action, so that when properly interposed and stated the defendant becomes in respect to the matters pleaded by him, an actor, and there are two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant. Francis & Bro. v. Edwards, 77 N. C. 271; Davidson v. Remington, 12 How. Prac. (N. Y.) 310; Cragin v. Lovell, 88 N. Y. 258. The same view has been taken by our appellate courts, for the cases recognize and establish the principle that the issues presented upon a cross-complaint and answer are entirely separate and distinct from the issues raised upon the original complaint and answer. In the case of Millar v. Millar, 51 Cal. App. 718, 197 P. 811, it is held that the purpose of allowing a cross-complaint is to avoid a multiplicity of suits and thereby save vexation and expense, and that such a situation involves merely a consolidation of two independent actions arising out of or related to the same transaction. See, also, Mott v. Mott, 82 Cal. 413, 22 P. 1140, and Warner v. Darrow, 91 Cal. 309, 27 P. 737. The code provisions also recognize this distinction. Section 581 of the Code of Civil Procedure authorizing a dismissal of a suit by the plaintiff before trial provides that such dismissal may not be had where affirmative relief is sought by way of cross-complaint, and our courts in construing said section so hold. Islais & Salinas Water Co. v. Allen, 132 Cal. 432, 64 P. 713; Clark v. Hundley, 65 Cal. 96, 3 P. 131; Robinson v. Placerville & Sacramento Valley R. Co., 65 Cal. 263, 3 P. 878. For like reasons a cross-complainant cannot dismiss his cross-complaint after the filing of an answer thereto, asking affirmative relief. Rodgers v. Parker, 136 Cal. 313, 68 P. 975. It therefore seems plain to us that the issues raised upon the cross-complaint and answer are completely severable from the issues upon the original complaint and answer, and a plaintiff has no such control over a cross-complaint as would entitle him under the circumstances to ask for its dismissal under the code provision invoked.

SHENK, Justice (dissenting).

I dissent. The obvious purpose of section 583 of the Code of Civil Procedure is to expedite the disposition of litigation. So far as applicable here, the section provides that any "action" shall be dismissed unless it is brought to trial within five years after the defendant has filed his answer. There is no qualification so far as the present matter is concerned. The condition required by the statute has been met and the court, in my opinion, is not warranted in writing an exception into it. The only justification attempted is by declaring that a cross-complaint is in itself an action independent of and apart from the action brought by the plaintiff. The term "action" is defined by the Code to be "an ordinary proceeding in a court of justice by which one party prosecutes another," etc. Section 22, Code Civ. Proc. An "action" is commenced when the complaint is filed. Section 350, Code Civ. Proc. The cross-complaint is merely a pleading on the part of the defendant (section 422, Code Civ. Proc.), and necessarily in the same "action." That a cross-complaint is indisputably and inseparably a part of the "action" is demonstrated by the language of section 422, Code of Civil Procedure, which authorized the filing of a cross-complaint. The filing thereof is noted in the register of actions under the same number and as a part of the "action" commenced by the plaintiff. The ordinary acceptation of the meaning of the term "action" as used in section 583 is the sum total of the relief sought by the parties notwithstanding it may contain within itself many causes of action between the parties.

The filing of the answer to the complaint starts the running of the time. This court held in Wutchumna Water Co. v. Stevenson, 204 Cal. 191, 267 P. 537, that the filing of a cross-complaint by the defendant on which issue had not been joined prior to the motion to dismiss did not take the case out of the operation of the discretionary powers of section 583. In Sacramento T. Co. v. California Reclamation Co., 205 Cal. 42, 269 P. 640, an order of the trial court dismissing an action under the mandatory provisions of section 583 was affirmed, notwithstanding the fact that the plaintiff's default on the defendant's cross-complaint had been entered. I am unable to distinguish these cases from the case at bar in the essential characteristics. In my opinion the peremptory writ should be granted.

We concur: THOMPSON, J.; SEAWELL, J.

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219 Cal. 106

LOS ANGELES CITY SCHOOL DIST. v.
PAYNE, County Auditor.
L. A. 13760.

Supreme Court of California.
Sept. 29, 1933.

Rehearing Denied Oct. 27, 1933.

Schools and school districts ⇔110.

Funds derived from sale of school district bonds *held* not available for construction of pedestrian traffic tunnel under street not abutting school grounds, since construction of tunnel is not "improving of school grounds" or in "immediate proximity of school" (School Code, § 4.960, as added by St. 1931, p. 718, § 2; School Code, § 6.3 and § 6.4, as amended by St. 1931, p. 2482).

The words "proximity" and "immediate," in School Code, § 6.3, as amended by St. 1933, empowering school trustees and city boards of education to improve streets "in immediate proximity to any school," mean adjoining or next in place.

[Ed. Note.—For other definitions of "Immediate" and "Proximity," see Words & Phrases.]

LANGDON, J., dissenting.

In Bank.

Proceeding in mandate by the Los Angeles City School District of Los Angeles County and another against H. A. Payne, as County Auditor of Los Angeles County.

Writ of mandate denied.

Rehearing denied; LANGDON and THOMPSON, JJ., dissenting.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondent.

PRESTON, Justice.

This proceeding in mandate presents a single question: Are funds derived from the sale of school bonds available for the construction of pedestrian traffic tunnels in streets not abutting school grounds?

Section 4.990 of the School Code, containing provisions substantially as later incorporated in section 4.960 (St. 1931, p. 718, § 2) provided: That the governing board of a school district may call an election and submit to the electors of the district "the question, whether the bonds of such district shall be issued and sold for the purpose of raising money for * * * improving school grounds. * * *" Pursuant to this section the people within Los Angeles City school district, at an election called for March 27, 1931, regularly voted bonds for the improving of school grounds within the district, a portion of which contemplated improvement was to be the construction of a pedestrian tunnel under Soto street, a heavily traveled traffic artery, for the use of children attending the Sheridan school, which is located one block east of said thoroughfare. After the bonds had been issued and sold and plans and specifications for the project were under way, respondent county auditor refused to allow a warrant for $100 to cover the partial cost of services performed and expense incurred in said matter by the city of Los Angeles. Said city, and the school district, thereupon filed herein their petition for writ of mandate to compel respondent county auditor to approve and allow said warrant.

The petition, urging that construction of the underpass is authorized as an "improving of school grounds" (section 4.960), makes a persuasive showing of great need for pedestrian tunnels for the safety of school children, due to the rapid growth of population and school attendance in said city and the enormous increase in swift motor traffic, particularly over main traffic arteries. Indeed, these facts are stipulated, and also that such an underpass would best provide for the safety of the children and would tend, by reason of its proximity to said school, to make the school grounds more accessible to the school children. It is further stipulated that no part of the site of the school is adjacent to or abuts upon said Soto street or the exterior lines thereof, and that the fee title to said street is vested in private persons; the city holding merely an easement for public highway purposes therein and at the site of the proposed tunnel.

Petitioner and respondent are also in accord upon the proposition that funds derived from the sale of school bonds need not be expended in all cases for improvements located physically upon the land to be improved, as remoteness from or proximity to the school grounds is not the final test as to whether such work constitutes an improvement of the grounds. But it is respondent's position that these statements will not apply to a street improvement, which the proposed tunnel concededly is. In other words, respondent claims that the proximity or remoteness of a street improvement does furnish a determinative test as to the validity of expenditures for such purposes from bond funds for the "improving of school grounds"; that while bond funds may be used for abutting street improvements, funds for nonabutting street improvements must come from other sources. Petitioner, on the other hand, claims that street improvements can improve school grounds only by making them more accessible to the school children; that the term "improving of school grounds" cannot mean an improvement merely to enhance the market value of the real property, but must necessarily mean an improvement for the benefit of the children themselves; hence it is immaterial whether the improvement be on an abutting or a nonabutting street, so long as it affords greater safety and protection to the children and makes the school more accessible to them.

Section 6.3 of the School Code (St. 1929, p. 268), as it stood prior to 1933, conferred upon school boards discretion to "grade, pave, sewer, or otherwise improve streets * * * in front of real property owned or controlled by them" and to appropriate money to pay for such improvements, whether made by direct contract or pursuant to general laws of the state or the charter of the municipality. The word "improvement" has, at times, a broad meaning (Meyer v. City, etc., Co., 164 Cal. 645, 130 P. 215), and there would be no difficulty in construing the clause of section 4.960, "improving of the school grounds," to include the improvement of abutting streets as authorized by the above section, thus making bond funds available for such purposes. It is clear, however, that any direct contract for the improvement of nonabutting streets would be in excess of the authority conferred by said section.

The next section of the School Code, section 6.4 (St. 1931, p. 2482), permits school boards to appropriate money to pay assessments for the improving of streets, levied against school property included within an assessment district, and provides: "Such assessments may be paid out of any funds belonging to the school district concerned, except funds derived from the sale of bonds. * * *" This section also fails to confer upon school boards authority to improve nonabutting streets by direct contract; moreover, even if the construction of pedestrian tunnels were undertaken by the city and a special assessment were levied against the school district for payment thereof, still the bond funds would not be available for such purposes by reason of the language of the above-quoted exception.

Nor does the fact that section 6.4 mentions only assessment payments and section 6.3 refers to improvement of only abutting streets, without express provision for improvement of nonabutting streets by direct contract, confer upon school boards discretion to improve nonabutting streets under the aforesaid general provision of section 4.960, subd. 6, as an "improving of the school grounds." It is plain that sections 6.3 and 6.4 of the School Code, read in connection with section 4.960, confer upon school boards the full authority which they possess with respect to street improvements. These sections are both grants and limitations of power, and they authorize payment for the improvement of nonabutting streets to be made only through assessment and from funds other than those derived from bond sales.

But, during the pendency of this proceeding, the Legislature has spoken directly upon the subject, having, in 1933, amended said section 6.3 of the School Code to read: "6.3 Boards of school trustees and city boards of education shall have power to, and may in their discretion, grade, pave, sewer, or otherwise improve streets and other public places in front of real property owned or controlled by them, and also may construct in immediate proximity to any school of the district, pedestrian tunnels, sewers, and water pipes in any street when required for school purposes, and appropriate money from the building fund of the district to pay the cost and expenses of such improvements whether made by said boards, under contract executed by said boards, or under contracts made in pursuance of any of the general laws of the state respecting street improvements, or other contracts made in pursuance of the charter of any municipality." Amendment of 1933, in effect 90 days from and after May 22, 1933.

The sole query now remaining is the interpretation of the phrase "in immediate proximity to any school of the district." Giving the words "proximity" and "immediate" their ordinary meaning, where position is involved, we can but say that "adjoining" or "next in place" is clearly meant. In immediate proximity to the school can be no further away than the street upon which the school grounds abut. The amendment therefore but confirms the deduction we have made from the sections of the Code as they existed prior thereto, from which it is clear that a pedestrian tunnel under a nonabutting street is not contemplated.

The writ is denied.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

LANGDON, Justice.

I dissent. The conclusion reached in the opinion is most unfortunate. An unnecessary narrow and legalistic analysis of terms is made, in contravention of the unmistakable and highly laudable purposes of the statute.

The opinion concedes that as the statute stood prior to 1933, remoteness or proximity to school grounds was not an absolute test, and that an improvement to school grounds might therefore be outside the actual grounds. This necessary concession answers its whole argument. The proposed construction makes the school grounds safer for children. If that is not an improvement, what is?

The statute of 1933, quoted in the opinion, seems designed to clarify this precise situation, and to give the school board the power to make improvements, including "pedestrian tunnels," regardless of whether they abut upon or adjoin the grounds. By use of the general words "immediate proximity" the Legislature undoubtedly had in mind a rough check upon so-called improvements, which, by reason of remoteness, could not be of material benefit to the grounds. Such terms as "immediate proximity," "immediate neighborhood," "immediate vicinity," and "adjacent," are elastic and indefinite. See United States v. St. Anthony R. R. Co., 192 U. S. 524, 537, 24 S. Ct. 333, 48 L. Ed. 548; Lewis v. Gollner, 129 N. Y. 227, 29 N. E. 81, 82, 26 Am. St. Rep. 516. But these words have in the opinion, been given a very clear and restricted meaning, and on which the Legislature definitely did not declare. I think that the objects of the statute call for a more liberal interpretation of its language.

134 Cal.App. 615

GARCIA v. BECHTOL et al.

Civ. 8112.

District Court of Appeal, Second District, Division 2, California.

Oct. 13, 1933.

Motions 🔑59(1).

Motion to set cause for trial against one defendant was properly stricken, where court made written order amending findings so as to exonerate such defendant and judgment was entered thereon, though order also stated new trial was awarded, and clerk in entering order made minutes indicate granting of new trial (Code Civ. Proc. § 662).

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Action by Silveria Garcia, administratrix of the Estate of Vincente Garcia, deceased, against Ray Bechtol and another. From an order striking plaintiff's motion to set cause for trial against named defendant, plaintiff appeals.

Affirmed.

Theodore Gottsdanker, of Los Angeles, for appellant.

George H. Moore, of Los Angeles, for respondent.

STEPHENS, Justice.

Silveria Garcia, as administratrix of the estate of Vincente Garcia, deceased, brought this action for damages for the death of Vincente Garcia, who was killed in a collision between two automobiles. The case was tried by the court without a jury, and damages were awarded in a substantial sum against the operators of both cars. Bechtol, one of the defendant operators, moved for a new trial, and the court made a written order amending the findings of fact under section 662, Code of Civil Procedure, so that they found the other defendant's negligence to be the sole cause of the collision and in such a manner as to relieve Bechtol from the judgment. The order also stated that a new trial was granted Bechtol. A judgment thereon was then made and entered for such defendant and against the plaintiff. The clerk in entering the court's order on the motion for new trial made the minutes indicate the granting of the new trial, and thereafter a motion was made to set the cause for trial. This motion was stricken and eliminated by the court. This action of the court is the subject of this appeal. Without considering whether or not the order appealed from is an appealable order, it is perfectly clear that the attempted appeal has no merit. There was nothing to try.

Appellant cites cases to the effect that the order controls and the opinion of the trial court has nothing to do with the order. This is correct, but has no application here. The trial court filed no opinion, he merely filed an order, and this order could not be avoided or affected in any way by the clerk's abbreviation of it in his minutes.

The order appealed from is affirmed.

We concur: CRAIG, Acting P. J., ARCHBALD, Justice pro tem.

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134 Cal.App. 622

TURNER v. STANDARD OIL CO. OF CALIFORNIA et al.

Civ. 1224.

District Court of Appeal, Fourth District, California.

Oct. 14, 1933.

1. Automobiles 🔑181(1).

Right to recover for injuries to guest is limited to instances where there is intent to injure guest or degree of recklessness beyond gross negligence (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

2. Negligence 🔑1.

"Negligence" is carelessness and tends to be negative in character, whereas "willful misconduct" is something of more positive nature involving intentional doing of wrongful act with intent to harm another with utter disregard of consequences.

[Ed. Note.—For other definitions of "Negligence" and "Willful Misconduct," see Words & Phrases.]

3. Automobiles 🔑181(1).

"Willful misconduct" within automobile guest statute is intentionally doing something in operation of automobile which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or implied, that injury to guest will be probable result (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

4. Automobiles 🔑181(1).

Negligence alone does not constitute "willful misconduct" within automobile guest statute (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

5. Automobiles 🔑244(20).

In action for injuries sustained by guest when differential broke on truck and brakes failed to hold when going downgrade, evidence did not sustain finding of willful misconduct in driving truck and trailer without brakes on trailer (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693; St. 1923, p. 517, § 93½ (a), as added by St. 1931, p. 2115, § 26; St. 1923, p. 562, § 139, as amended by St. 1931, p. 2130. § 53).

6. Automobiles 🔑244(20).

In action for injuries sustained by guest when differential broke on truck and brakes failed to hold when going downgrade, evidence did not sustain finding of willful misconduct by truck driver in failing, after notice that differential was leaking, to examine differential (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

7. Automobiles 🔑244(20).

In action for injuries sustained by guest when differential broke on truck and brakes failed to hold when going downgrade, evidence did not sustain finding of willful misconduct in driver's failing at night to bank truck where examination in daylight showed it might have been banked in safety (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

8. Automobiles 🔑242(1).

Burden of proof is upon guest to establish willful misconduct within meaning of automobile guest statute (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Richard E. Turner, a minor, by and through his guardian ad litem, R. H. Vernon, against the Standard Oil Company of California and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Borton & Petrini, of Bakersfield, for appellants.

Earl F. Crandell and Wm. Christensen, both of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment wherein the respondent was awarded damages for injuries received by him while riding as a guest on a truck owned by the appellant corporation. The accident occurred about 8 o'clock on the evening of October 10, 1931, at a point about four miles south of the

Grapevine grade on the northerly portion of what is known as the Ridge Route. The appellant Shuman, a truck driver in the employ of the appellant Standard Oil Company, on the occasion in question was proceeding north in a four-ton truck containing a load of three tons, to which was attached a new six-wheel trailer which was empty. The truck was equipped with brakes which were in good condition, but the trailer, although equipped with air brakes, was without an air coupling to fit the truck. Shuman was accompanied by his son, aged nineteen years. The respondent testified that at a point near the Newhall cut-off he solicited a ride and boarded the truck with the permission of the driver. He further testified that after riding about fifteen miles and while they were on the Ridge Route grade, he noticed grease dripping from the rear end of the truck near the housing or differential; that he called this to the attention of Shuman who replied that he was going to stop soon and would see about it; that they stopped at Gorman, and after starting on he asked Shuman whether he had examined the rear end, to which Shuman replied that he had forgotten it; and that they proceeded on their way traveling at a moderate rate of speed through Lebec.

The driver of another car testified that he followed the truck for some distance north of Lebec and noticed a lot of smoke coming from the rear of the truck. Neither Shuman nor the respondent noticed this smoke. A few miles north of Lebec the road pitches downward into Grapevine Canyon at about a 6 per cent. grade and there Shuman reduced his gear to third gear in order to gain proper compression, and traveled down the grade at from fifteen to twenty miles per hour. The truck had already passed many grades as steep or steeper than the one at that point. Suddenly something gave way and the truck proceeded to coast without motor compression for about a mile until the crash occurred. During this time Shuman endeavored to control the truck with the brakes but they soon overheated and failed to hold the truck. Along this portion of the road there was a bank on the right quite high in places and rocky and rugged, and on the left was a ravine. It was dark at the time and Shuman could not see clearly the lay of the land adjacent to the highway. He was unable to see any place where he could safely bank the truck and was kept busy dodging traffic until the crash which occurred when, after rounding a sharp turn, the trailer sideswiped a car proceeding in the same direction. Thereupon, he lost control of the truck which jumped the bank and overturned. Both Shuman and the respondent were injured and Shuman's son was killed.

An examination of the truck after the accident disclosed that there was no oil in the housing and that the gears and the differential were stripped completely, breaking the circuit of power from the motor to the rear wheels of the truck. One witness testified that there were two places on the part of the highway where the truck was out of control where it could have been "banked successfully." However, a man who ran a garage near the scene of the accident testified that within two miles back there was "no place that you could go off very well without wrecking the truck." Two witnesses testified that after the accident Shuman stated to them that when the truck went out of control he lost his head and all he could think of was to keep the truck on the road. The respondent testified that until they came to the last hill, where the accident occurred, Shuman was proceeding at an ordinary and normal rate of speed, and a statement made by this witness was introduced in which he said: "During the eighty-odd miles I was either riding on the truck or trailer, Mr. Shuman drove very carefully and apparently handled the equipment in a careful manner. He did not exceed the speed of twenty miles an hour during my entire ride." Shuman testified that when he realized the truck was out of control he told the respondent that something had happened and advised him to save himself if he saw a chance.

While the appellants attack the findings as containing no finding of willful misconduct on their part and as containing no finding that any willful misconduct proximately caused the injuries complained of, the main, and we think the decisive, question presented is whether the evidence is sufficient to sustain a finding of willful misconduct on the part of the appellants.

[1-3] Respondent's right to recover is dependent upon proof of "willful misconduct" on the part of the appellants within the meaning of section 141¾ of the California Vehicle Act, as amended in 1931 (St. 1931, p. 1693). The meaning of "willful misconduct" has been considered in a number of cases, the reasoning of which need not be here repeated. Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327; Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510; Malone v. Clemow, 111 Cal. App. 13, 295 P. 70; Howard v. Howard (Cal. App.) 22 P.(2d) 279; Walker v. Bacon (Cal. App.) 23 P.(2d) 520. It seems clear from the history and the wording of this statute that it was the intention of the Legislature to confine the right to recover in guest cases to instances where there appears either an intent to injure the guest or a degree of recklessness greater and beyond the gross negligence which was formerly recognized as sufficient. Negligence is carelessness, whether greater or less in degree, and tends to be negative in character while willful

misconduct is something of a more positive nature involving the intentional doing of a wrongful act, with the intent to harm another, with an utter disregard of the consequences, or with knowledge that an injury to a guest will be a probable result. All of these situations include actual or implied knowledge that injury is probable. "Willful misconduct," within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.

[4-7] The respondent relies on three acts or omissions as constituting willful misconduct, which are thus stated: "(1) Crossing the Ridge Route with a two-wheel brake equipped four-ton truck loaded to three tons or better, coupled with a six-ton trailer upon which there were no trailer brakes, with the knowledge that the braking facilities were not adequate for mountain travel in the absence of compression of the motor, and that it was poor trucking practice to drive upon the public highways without adequate brakes on the truck and trailer; (2) failure of defendant truckdriver, after notice to him that oil was leaking from the rear housing of his truck, to stop or examine the rear end; (3) failure to bank the truck at a point where defendant knew he could so do after rear end of the truck gave way."

In connection with the first of these matters there is evidence that when he was served with summons in this case Shuman stated that he had protested against taking the trailer without its air brakes connected with the truck and that he was told by his garage foreman that "it would be his job if he refused." The respondent also relies upon Shuman's statement on the witness stand that he knew at the time of starting with the truck and trailer that the brakes were not adequate for mountain travel in the absence of compression in the motor, and that it was not good trucking practice to "drive a motor vehicle without adequate brakes." It is argued from this that Shuman knew the braking facilities on his outfit were not adequate for the trip in question. But knowledge that brakes are not sufficient in the absence of motor compression is quite different from knowledge that they will be inadequate when used with compression in the usual manner. Shuman also testified that it is good trucking practice to depend on motor compression almost entirely in order to save the brakes. It is well known that this is not only good trucking practice but good practice with any motor vehicle. That one should expect to use, and should rely upon, motor compression in connection with his brakes is in accordance with universal experience. There is no evidence that the brakes on the truck were not adequate when used with motor compression, and the only evidence in the record on that matter is that they were in good condition. The fact that he asked to have the trailer brakes also connected, if true, would indicate a desire on his part to take every precaution for safety, and the order given him indicates that the foreman considered the equipment ample as it was. It is inconceivable that this truck and trailer were either ordered or taken out with the knowledge and expectation that they could not safely make the trip intended, and at that time no one knew that the respondent would become a guest on the journey. The undisputed evidence is that before starting out Shuman stopped and considered whether to proceed or to wait until an air connection with the trailer could be secured, and that he decided to go ahead. It is not questioned that the equipment on the truck itself was ample for that vehicle, and it could well be expected that equipment sufficient for a heavy truck when fully loaded would also handle the same when partly loaded and pulling an empty trailer. It appears that Shuman was familiar with this road and had frequently driven over it. Not only does the evidence show that, before starting, he came to the conclusion that he could safely proceed, but it shows that his judgment was correct since he found the equipment ample until he had nearly crossed the mountains, and since he had full and complete control of the outfit on all hills until something gave way, a thing which could not have been known or anticipated at the time of starting so far as shown by the evidence. There is no evidence indicating that any lack of brakes was responsible for what occurred, or that additional brakes would have saved the situation. If an error was made in starting without the air coupling, nothing more than negligence appears, and it cannot be said that Shuman knew or should have known that an injury would probably result.

With respect to the second matter the respondent testified that he noticed the grease and asked Shuman about it. When asked what was said he testified: "I said grease leaked out of the rear end. He said 'We are going to stop pretty soon and I will see about it.'" This occurred after they had entered the Ridge Route. After they had stopped at Gorman the respondent asked Shuman: "Did you look at the rear end?" To which Shuman replied: "No, I forgot it." The respondent also testified: "I believe that he thought it would be all right." Shuman testified that he had before seen truck housings leak slightly, and had had cars of his own with a small leak. This evidence indicates that the respondent did not inform

Shuman that any unusual amount of oil was leaking from the rear end. It is not uncommon for small amounts of oil and grease to leak and drip from the working portions of trucks and automobiles. The truck had operated perfectly for many miles after the respondent first spoke of the grease and the speed of the truck was slow. While it may have been negligence to fail to make an examination, there is nothing to show that Shuman realized the situation was unusual or dangerous, that he intentionally neglected to stop and look into the matter knowing at the time that an injury would probably result, or that he should have known this.

In the third matter referred to the respondent contends that the general rule of law that a person confronted with sudden danger is not to be held responsible for an error of judgment does not here apply, since Shuman's own negligence contributed to the emergency. While the rule relied upon might apply if the question of negligence was here involved, negligence alone is not sufficient to constitute willful misconduct. After the emergency arose the driver was confronted with the problem of trying to control the truck and prevent an accident and injury, with the truck increasing its speed on a down grade with rugged hills on the right and a steep pitch into Grapevine Creek on the left. The evidence discloses that Shuman was kept busy trying to keep the truck on the highway and dodging traffic, that it was dark at the time, and that with the curves in the road he was unable to see by the light of the headlights any place where he thought he could safely bank the truck. It fully appears from the evidence that, at the time, he was endeavoring to avoid consequences which he thought more dangerous than the course he took, and that he was making an honest effort to prevent injury rather than to cause it. The fact, if true, that an examination of this part of the road in daylight reveals that there may have been one or two places where the truck could have been banked in comparative safety is utterly insufficient to show willful misconduct in the action taken under the circumstances then present.

We are unable to agree with respondent's contention that the three matters referred to disclose "a deliberate and intentional violation" of section 93½ (a), as added by St. 1931, p. 2115, § 26, and section 139, as amended by St. 1931, p. 2130, § 53, of the California Vehicle Act. In addition to other circumstances, the facts that Shuman was himself injured and his son killed, that during the ride he gave the respondent a coat and blanket with which to keep warm, and that when danger became imminent he warned him to jump if he had the opportunity, are strongly indicative that no act was intentionally done or omitted with the knowledge or expectation that any injury was probable.

[8] The burden of proof is upon a guest to establish willful misconduct within the meaning of the statute. We think this burden was not here met, that the evidence is not sufficient to sustain a finding of willful misconduct, and that the facts of this case bring it squarely within the class of cases in which the Legislature intended to deny a right of recovery.

A motion made by respondents to correct the findings was also submitted. This was based upon the fact that the findings as verbally approved by the trial court consisted of five pages, while the findings as signed, by inadvertence, included two copies of page three and omitted page four. The view we take of the evidence makes it unnecessary to pass upon this motion.

For the reasons given, the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

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134 Cal.App. 612

PEOPLE v. COYLE.

Cr. 2392.

District Court of Appeal, Second District, Division 2, California.

Oct. 13, 1933.

Hearing Denied by Supreme Court Nov. 8, 1933.

1. Licenses 🔑42(4).

Evidence *held* to support conviction of violating Corporate Securities Act where defendant, without permit to deal in securities, bought and sold securities for others (St. 1917, p. 673, as amended).

2. Larceny 🔑62(2).

Evidence showing defendant secured stock, sold it and converted money, *held* to make case of larceny by trick and device.

3. Criminal law 🔑29.

In prosecution for violating Corporate Securities Act and for grand theft, separate offense was committed each time defendant induced another delivery of stock from persons with whom he dealt (St. 1917, p. 673, as amended).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Burr Coyle was convicted of violating the Corporate Securities Act, and of grand theft, and he appeals.

Affirmed.

Burr Coyle, in pro. per.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

STEPHENS, Justice.

[1, 2] The defendant below, appellant here, was charged in counts I, II, and III of the information with the crime of violation of the Corporate Securities Act (St. 1917, p. 673, as amended), and in count IV with grand theft. He was tried by the court without a jury, and was convicted and sentenced on each count. A motion for new trial was denied, and he appeals from all four judgments of conviction and the order denying a new trial.

The facts necessary to an understanding of count I are as follows: Appellant was working as a salesman of mining stock that was being advertised by radio. Through an answer of Mrs. Elsie E. Dusbabek, the complaining witness, appellant secured her name and called upon her. After several calls Mrs. Dusbabek, transferred and delivered to appellant twenty shares of "City Service" stock; appellant agreeing to convert the stock and invest and reinvest the money received for her. In connection therewith the following documents were executed in duplicate, each keeping one:

"Los Angeles, Calif. Oct. 22, 1931.

"I Elsie E. Dusbabek hereby appoint B. Coyle my lawful attorney with full power to buy, and to sell securities, and to collect such dividends that hereafter become due. This indenture shall be in effect for a period of one year from the above date.

"Elsie E. Dusbabek.

"I, B. Coyle, acknowledge the receipt of $140.00 from Elsie E. Dusbabek which I agree to invest in such manner as I consider to the best interests of Elsie E. Dusbabek for a period of one year from this 22 day of Oct., 1931. I further agree that one year from this 22 day of Oct., 1931, I shall pay to Elsie E. Dusbabek the sum of $140.00 together with such accumulations that accrue during the existence of this agreement, with interest at the rate of $4.00 monthly payable monthly.

"B. Coyle.

"Accepted: Elsie E. Dusbabek."

There were five of the $4 monthly payments made. Nothing further has ever been paid, notwithstanding demand has been made therefor.

At the time of this transaction appellant was without and ever since has been without any permit from the Corporation Commissioner to issue, sell, or deal in securities. In less than a month after this transaction appellant was back again, and this time under the same inducements and by exchange of similar papers secured the assignment and transfer of another block of forty shares of "City Service" stock which he negotiated for $290. The $290 was converted by appellant to his own use. These are the facts of counts III and IV; count III charging violation of the Corporate Securities Act and count IV charging grand theft. The monthly payment on this transaction was to be $8. Four payments were paid and demand has been made for the balance, but there has been no response. Later on in the same month under similar conditions and similar representations and exchange of documents appellant received the assignment and transfer of five shares of "City Service" stock from Margaret E. Dusbabek, daughter of Elsie E. Dusbabek. The monthly payment was to be $1.50, and four of such payments have been made. Demand has been made as in the other transactions, but neither stock nor the money has been returned. These are the facts of count II.

It seems to us that the judgments under counts I, II, and III, wherein appellant stands convicted of violation of the Corporate Securities Act, must be affirmed under the principles enunciated in People v. White, 124 Cal. App. 548, 12 P.(2d) 1078. It also seems to us that the forty shares of stock secured by appellant and sold and the money converted presents a complete case of larceny by trick and device.

[3] Appellant claims that the obtaining of the several certificates of stock at different times constitutes but one offense. It would seem impossible to make an argument to this contention as convincing as the mere statement of fact. That a separate offense was committed each time appellant went back and induced another delivery of stock to him is perfectly obvious.

The judgments and order appealed from are affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

134 Cal.App. 552

PETERSEN et al. v. LYDERS.

Civ. 9094.

District Court of Appeal, First District, Division 1, California.

Oct. 10, 1933.

1. Appeal and error 🔑**386(1).**

Trial court has function to fix amount of appeal bonds and pass upon sufficiency of sureties.

2. Appeal and error 🔑**479(1).**

Appellate court can restrain enforcement of judgment upon filing of proper undertakings therein, when supersedeas was not created because undertaking filed in lower court was insufficient.

3. Appeal and error 🔑**478.**

Judge of superior court directed by appellate court to pass on sufficiency of bond to stay execution, to be filed in appellate court, acts as officer of court in which appeal is pending.

Appeal from Superior Court, City and County of San Francisco.

Action by Inger Marie Petersen and others against Eric Lyders. From the judgment, defendant appeals. On exceptions to sureties on bonds to stay execution and motion to set aside orders approving bonds and justifying sureties.

Order in accordance with opinion.

Sawyer & Cluff, James F. Brennan, and John J. McMahon, all of San Francisco, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark and C. Coolidge Kreis, all of San Francisco, for respondents.

PER CURIAM.

Upon petition it was ordered that a writ of supersedeas issue in the above matter and that appellant present to the presiding judge of the superior court in and for the city and county of San Francisco for approval as to their sufficiency a bond or bonds to stay execution. Bonds were presented to said presiding judge and were by him approved and filed in that court.

Plaintiffs contend that the bonds were improperly filed. They have also filed exceptions in this court to the sufficiency of the sureties, and have asked for an order setting aside the orders of said judge of the superior court approving the bonds and justifying the sureties.

[1-3] While it is the function of the trial court to fix the amount of appeal bonds and pass upon the sufficiency of the sureties (Jameson v. Chanslor, etc., Oil Co., 173 Cal. 612, 160 P. 1066; Messenkop v. Duffield, 211 Cal. 222, 294 P. 715), nevertheless the appellate court has power to restrain the enforcement of judgments upon the filing of proper undertakings therein, where, by reason of the insufficiency of the undertaking filed in the court below, a statutory supersedeas has not been created. Messenkop v. Duffield, supra; Segarini v. Bargagliotti, 193 Cal. 538, 226 P. 2. As shown by the above and the following cases the practice of filing such bonds in the appellate court seems well settled (Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1, 76 P. 653; Halsted v. First Savings Bank, 173 Cal. 605, 611, 160 P. 1075; Foster v. Fernandes, 200 Cal. 274, 252 P. 726); and it is clear that where the matter of the sufficiency of such bond is referred to a judge of the superior court he acts as an officer of the court in which the appeal is pending.

It is accordingly ordered that said bonds be filed in the office of the clerk of this court; and that, pending such action, consideration of the other matters involved in said motions be continued.

PEOPLE v. VAILE.*

Cr. 1276.

District Court of Appeal, Third District, California.

Oct. 13, 1933.

Rehearing Granted Oct. 26, 1933.

1. Criminal law 🔑**1202(6).**

Judgment adjudging one an habitual criminal on information failing to allege that defendant served time for prior convictions *held* error, where it was not established that defendant served time (Pen. Code, §§ 644, 969).

2. Criminal law 🔑**1202(1).**

Judgment adjudging defendant an habitual criminal without right of parole *held* error, where one of three prior convictions charged was jail escape, an offense not included in habitual criminal statute (Pen. Code, § 644).

Appeal from Superior Court, Yolo County; Forrest A. Plant, Judge.

Alton H. Vaile was adjudged an habitual criminal, and he appeals.

Reversed, with directions.

Alton H. Vaile, in pro. per.

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*For subsequent opinion see 29 P.2d 233.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The defendant was charged in four separate counts with having committed certain lewd and perverted acts, as defined in sections 278, 286, 288, and 288a of the Penal Code. The information also charged defendant with three previous felony convictions, as follows: (1) Burglary in Los Angeles county; (2) assault with intent to commit murder in Los Angeles county; and (3) jail escape, a felony, in Trinity county.

In each case the information charged that the accused had been previously convicted of the particular felony, and "that judgment upon said conviction was pronounced, rendered, given and made on or about (specifying date) * * * and had never been reversed, annulled nor set aside." In no case did the information charge that the defendant had served a term in a penal institution, for any of the prior felonies. Upon arraignment, defendant entered pleas of not guilty to each count in the information, but admitted the prior convictions. Thereafter he was tried and convicted on two of the counts, and sentenced to the state prison. Later he was again brought before the court, and, after being arraigned for judgment on the prior offenses set forth in the information, the court proceeded to find the defendant to be an habitual criminal by reason of three prior convictions, and adjudged him to be an habitual criminal, and directed that he be confined in the state prison without right of parole. It is from this order and judgment that the defendant now appeals, claiming it was not alleged, in charging the fact of previous convictions, that the accused had served a term therefor in any state or federal prison.

In Ex parte Boatwright, 216 Cal. 677, 15 P. (2d) 755, it was held to be sufficient to charge the prior offenses in the language of section 969 of the Penal Code, which reads in part as follows: "In charging in an indictment or information the fact of a previous conviction of felony, * * * it is sufficient to state, 'That the defendant, before the commission of the offense charged, * * * was in (giving the title of the court in which the conviction was had) convicted of a felony (or attempt, etc., or of theft).'"

Section 644 of the Penal Code, pertaining to habitual criminals, provides: "Every person convicted in this state of any felony who shall have been previously twice convicted upon charges separately brought and tried, and served a term therefor in any state prison and/or federal penitentiary, either in this state or elsewhere, of the crime of robbery, burglary, burglary with explosives, rape with force or violence, arson, murder, assault with intent to commit murder, grand theft, bribery of a public official, perjury, subornation of perjury, train wrecking, feloniously receiving stolen goods, felonious assault with a deadly weapon, extortion, kidnaping, mayhem, escape from a state prison, forgery, conspiracy to commit any one or more of the aforementioned felonies, or any of the aforementioned felonies, shall be adjudged an habitual criminal and shall be punishable by imprisonment in the state prison for life and shall not be eligible for release on parole until he shall have served a minimum of at least twelve years. * * *" The section continues, and in similar language refers to persons who have been three times convicted of certain specified offenses, and provides such person shall be imprisoned for life without right of parole.

In Ex parte Boatwright, supra, the accused was charged with a petit theft with prior convictions. The information failed to charge that the defendant had served a term in any penal institution for any of the prior felonies set forth. Upon arraignment, he entered pleas of not guilty to the charge of petit theft, and admitted "said prior convictions, as charged in the information." No evidence was introduced at the trial concerning the prior convictions, but at the time of sentence, the court interrogated petitioner concerning the prior convictions, and elicited the information from him that he had been convicted of three former felonies, and had served time in penal institutions for each of them. Upon that showing, upon an application to the Supreme Court for a writ of habeas corpus, it was held sufficient to comply with the requirements of the statute. Mr. Justice Curtis, although concurring in the judgment, differed with his associates upon the bench as to the sufficiency of the pleading, upon the ground that the information, under which the accused was prosecuted, failed to allege that he had served a term of imprisonment under his previous convictions, and cited in support thereof the case of People v. Dawson, 210 Cal. 366, 292 P. 267, he contending that, as the requirements of the statute requiring service of time under previous convictions was one of the essential elements of the crime of which the petitioner was convicted, it would be violative of one of his substantive rights to punish him therefor without charging and proving these elements of the offense.

[1] In the instant case, however, it does not appear that at any place in the proceeding did the defendant admit, or was it established, as it was in the case of Ex parte Boatwright, supra, and in the case of People v. Sampson, 99 Cal. App. 306, 278 P. 492, that he had actually served any time for the prior convictions alleged.

[2] It is also to be noted that the court attempted to adjudge defendant an habitual

criminal without right of parole. To do so, the defendant must have suffered at least three convictions of specified offenses. One of the offenses charged against appellant here, however, to wit, jail escape, is not one of such offenses designated in section 644 of the Penal Code.

This leaves but two of the offenses charged against defendant as being of the class enumerated in the section, and he would therefore be entitled to parole after serving a minimum of twelve years.

The judgment adjudging defendant an habitual criminal is therefore reversed. It appears, however, that this is a case clearly within the purport and intent of the Legislature in enacting section 644, Penal Code, and the trial court is directed to return the defendant before the court, and, in view of People v. Dawson, proceed upon an amended information to determine whether or not the accused served a term in any penal institution, or institutions, for each of the felonies alleged, and to make its order in accordance with the facts so determined.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

PEOPLE v. HAYES et al.*

Cr. 2402.

District Court of Appeal, Second District, Division 2, California.

Oct. 10, 1933.

Hearing Granted by Supreme Court Nov. 6, 1933.

1. Criminal law 🔑1160.

Conviction, approved by trial judge in denying new trial, cannot be set aside for insufficiency of evidence unless it clearly appears that upon no hypothesis is there substantial evidence to support such conclusion.

2. Homicide 🔑253(1).

Evidence *held* to support conviction for first-degree murder.

3. Homicide 🔑305.

In murder prosecution, instruction that all persons concerned in commission of felony, whether they directly commit act or merely aid and abet its commission, can be prosecuted as principals, *held* not erroneous under evidence.

4. Criminal law 🔑778(1).

In murder prosecution, refusal of instruction that burden of proving defendant's presence at scene of murder devolved on prosecution *held* not error in view of statute relating to accessories (Pen. Code, §§ 31, 971).

5. Criminal law 🔑945(1).

In murder prosecution, denial of new trial for newly discovered evidence *held* not abuse of discretion, where result could not have been changed by such evidence.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

William Dulin was convicted, with Fred Hayes, of murder of first degree, and he appeals.

Affirmed.

J. P. Guerin, of Los Angeles, and A. H. McConnell, of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Appellant and Fred Hayes were jointly charged with the murder of Mickey Erno, by an information filed on February 23, 1933. Both were found guilty of murder in the first degree, with recommendation of life imprisonment. From the judgments of conviction entered on said verdict and from the orders denying their respective motions for a new trial both defendants appealed. Subsequently, on motion of the Attorney General, the appeal of Hayes was dismissed and the judgment and order appealed from by him were affirmed under section 1253 of the Penal Code.

Appellant Dulin urges: (1) That the verdict is contrary to the evidence; (2) that the court misdirected the jury in matters of law; (3) that the court erred in giving as well as in refusing certain instructions; and (4) in refusing to grant him a new trial on the ground of newly discovered evidence.

The evidence shows that a body was found at about 9:50 p. m. of January 17, 1933, from five to ten feet from the north end of a bridge located on East Spring street, about one mile west of the town of Los Alamitos and three or four miles east of Long Beach. It was identified as the body of Mickey Erno and was still warm when found. Erno died as the result of gunshot wounds.

[1, 2] 1. Appellant contends that the evidence fails to connect him with the murder charged. Without going into the evidence in detail, it is sufficient to say that the jury might well conclude therefrom that some time before the murder two men, one of whom was a friend of appellant for several years, brought a diamond ring to defendant Hayes to be disposed of; that Hayes gave it to Erno for disposition and that Erno and one "Socks" Brewer borrowed or raised a sum of money thereon and divided it between themselves; that Hayes thereafter spent some time look-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 30 P.2d 21.

ing for the ring and Brewer. That Dulin was interested with him appears from the testimony of the witness Mrs. Proctor, who went to Dulin's apartment the afternoon of the day of the murder to find Hayes, to see "if he had gotten Mickey's [Erno's] car." "Then," said she, "we drifted into a conversation about them using the car to find Socks, and they was trying to locate him on account of the ring." Dulin said he "didn't like the way things were going," and "I told him that I knew Mickey was trying to find him [Socks] * * * right away" and that Mickey "had been awful cross since this thing had come up"; that Dulin said there was "something crooked about the ring" and that "he didn't know what it was, didn't like the way Mickey was acting," and "asked me if I cared if he [Erno] went away." The evidence shows also that Hayes, Dulin, and Erno were together in Dulin's apartment from about 6:30 to about 8 o'clock the night of the murder, at which time one Josephine Bauer, who was there to meet a marine named Jess Holder, was taken by Hayes in Mrs. Proctor's car, which she brought over at the request of Hayes, to a street car, on which Mrs. Proctor and Miss Bauer went to the Ritz Hotel, conducted by Mrs. Proctor; that prior to that time a woman called "Nell," who lived with Dulin, was taken to the home of Dulin's mother; that Jess Holder found the three in Dulin's apartment when he arrived at about 7 o'clock p. m.; that he stayed twenty minutes or so and then left, Dulin giving him his key to the apartment, telling him to use it if he came back; that when Holder returned at about 9 o'clock p. m. he found a note telling him that Miss Bauer was at the Ritz Hotel. From the foregoing circumstances the jury could only conclude that the three men were left in the apartment and that Mrs. Proctor's car was in the street for their use. Hayes and Dulin appeared at the Ritz Hotel shortly after 10 o'clock. Hayes, a nervous individual and evidently more nervous than usual, came in first and then called Dulin in. Miss Bauer was taken by the two to Dulin's mother's home, where "Nell" put on her coat and went with the men to the Dulin apartment. The following Saturday evening Dulin came to Mrs. Proctor's and wanted to know if she was "for Shorty" (Hayes), who had been placed under arrest. He told her they were trying to get a car to go down to see Jess Holder at San Diego, to "prove an alibi"—prove that "Shorty" was with Jess, spending the evening in question at "speakeasies." At that time, Mrs. Proctor testified, she said to Dulin:

"Well, Bill, I would rather you told them that you boys had my car; and he said: 'No, don't tell them we had your car. Don't tell them about your car.' I said, 'Well, if Shorty pleads guilty he will tell them that he had my car,' and he said: 'Shorty will never plead guilty. He will never talk.' * * * I kept on insisting that they should tell them they had my car that night.

"Q. What night? A. On the night of the 17th"—the night of the murder.

In addition to the foregoing, some cartridges were found in a vest belonging to Dulin, which corresponded in caliber, and the lead bullets as to color and character of grease in the cannelures, with those taken from Erno's body.

Without going further into the evidence we will say that in our opinion it sufficiently connects appellant with Hayes and Erno at the time the murder must have been committed, and supports the conclusion that, believing Erno had "double crossed" them in the disposition of the ring they even things up in their own way. The jury having determined the facts in the first instance by their verdict, which was approved by the trial judge when he denied the motion for a new trial, we cannot set it aside on appeal on the ground urged here, unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support such conclusion. People v. Tom Woo, 181 Cal. 315, 184 P. 389. We cannot so conclude, after a careful examination of all the evidence.

[3] 2. In view of the evidence in this case we see no error in giving the instruction to the effect that all persons concerned in the commission of a felony, whether they directly commit the act or merely aid and abet its commission, can be prosecuted, tried, and punished as principals. If there had been no evidence tending in the slightest degree to establish a confederation between Hayes and Dulin to do the act, it would have been error to give such instruction. People v. Silva, 48 Cal. App. 728, 192 P. 330.

[4] 3. Appellant complains of the refusal of the court to give a requested instruction to the effect that the burden of proving the presence of himself at the scene of the murder devolved upon the prosecution, and that the burden was not upon him to prove that he was not there. In our opinion such requested instruction conflicts with sections 31 and 971 of the Penal Code, stating (a) who are principals and (b) abrogating the distinction between an accessory before the fact and a principal in felony cases, respectively. The court properly instructed the jury as to the burden of proof, the presumption of innocence and reasonable doubt, and in our opinion the instruction requested was properly refused. And in view of what we have heretofore said, no error was committed in refusing to direct a verdict in favor of appellant.

[5] 4. On the motion for a new trial the affidavit of defendant Hayes was presented as newly discovered evidence. In this affidavit Hayes in effect assumed all responsibility for the perpetration of the murder, stating that

he killed Erno on the bridge and then dropped the body over the side. There were counter affidavits from which the court could well conclude that this latter statement was impossible. The court also heard all the evidence, including that of Hayes, and was justified in ruling that the result of the trial could not have been changed if Hayes had so testified instead of telling the story he did. We see no abuse of discretion in denying the motion.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

PEOPLE v. HANSON et al.*

Cr. 2401.

District Court of Appeal, Second District, Division 1, California.

Oct. 18, 1933.

Hearing Granted by Supreme Court Nov. 16, 1933.

Assault and battery ⚷91, 92.

Evidence *held* sufficient to sustain conviction for simple assault, but insufficient to sustain conviction for assault with deadly weapon.

> The evidence disclosed that a police officer placed handcuff on defendant's hand and that, while officer was attempting to handcuff the other hand, defendant snatched officer's gun, and, in the struggle that occurred between the officer and defendant and his confederate, the gun was discharged. The evidence showed that the gun had been cocked by the officer and not by defendant, and that discharge thereof was merely an incident of the scuffle.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Harry A. Hanson and John H. Tillotson were charged with assault with a deadly weapon, defendant Hanson was convicted and he appeals.

Modified, and cause remanded, with directions.

Gerard Remington and Robert E. Crowley, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

YORK, Justice.

Defendants were charged in an information filed by the district attorney with the offense of assault with a deadly weapon. Upon trial, the jury returned a verdict of guilty of the crime charged in the information as to appellant, and of simple assault as to the defendant Tillotson. This appeal is taken by defendant Hanson from the order denying his motion for a new trial and from the judgment of conviction of assault with a deadly weapon.

It appears from the evidence that in the early morning of January 3, 1933, when returning home from delivering papers on a paper route of defendant Tillotson, the defendant Hanson got out of the car at the rear of a Safeway store in the city of Los Angeles, picked up a box of tomatoes from the rear platform of the store and placed it in the back of the car, whereupon a police officer stepped up to defendant Hanson and placed him under arrest. The officer marched appellant back to the machine and told defendant Tillotson to get out of the car. The officer then placed one handcuff on appellant, and holding his gun in his right hand attempted to handcuff the right hand of defendant Tillotson. Appellant snatched the officer's gun, at the same time calling upon Tillotson for help, and in the struggle that then took place between the officer and the two men, the gun was discharged, injuring the officer's hand. The officer was thrown to the ground and the two men with the gun in their possession left the scene of the crime, not to be apprehended until several weeks later, when they were placed on trial before a jury with the result above stated. Defendant Tillotson is not a party to this appeal.

It is contended by appellant that the evidence shows that the verdict of assault with a deadly weapon is not sustained by the facts, and that defendant could only be guilty of simple assault because of lack of intent or attempt; also, that intent is a necessary ingredient of the crime of assault with a deadly weapon or even simple assault, and that the court erred in refusing to so instruct the jury.

Appellant makes the point that the evidence clearly shows that the three men were struggling over the gun and during the struggle the gun was discharged. The officer testified: "The gun was cocked. My main idea was to keep that gun from going off. I had been trying to struggle for the gun. I wanted to keep it from going off. * * * The gun was taken completely away from me and the gun was pointed toward my head and it was in Hanson's hand and I pushed the gun away with my hand from my head, then the gun went off." The gun had been cocked by the officer, not by appellant.

A review of the evidence discloses that there was not sufficient evidence to find the defendant Hanson guilty of the charge of assault with a deadly weapon, but that the evi-

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*For subsequent opinion see 32 P.2d 134.

dence amply supports a verdict of simple assault. The evidence proves, not that Hanson actually intended to fire the gun, but rather that the discharge of the gun was merely an incident of the scuffle. The real assault was a simple assault committed with the fist.

The order denying motion for a new trial is affirmed. Judgment of conviction of assault with deadly weapon is modified, and cause is remanded to the trial court, with directions to enter a judgment against the defendant finding him guilty of assault, and to thereupon pronounce sentence as provided by law.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

134 Cal.App. 443

IRWIN v. PICKWICK STAGES SYSTEM, Inc., et al. (four cases).

Civ. 7822, 7821, 7820, 7819.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1933.

Hearing Denied by Supreme Court Nov. 27, 1933.

1. Carriers ⚷318(12).

Proof that, at time of accident, bus containing passengers was registered with state motor vehicle department in defendant corporation's name as its legal owner, made prima facie case that corporation owned bus and that driver was employed by it and acting within scope of employment (St. 1923, p. 522, § 36, as amended by St. 1927, p. 1423, § 8).

2. Carriers ⚷320(31).

To warrant directed verdict for corporation, evidence rebutting passengers' prima facie case that at time of accident corporation owned bus, and that driver was employed by it and acting within scope of employment, must be uncontradicted, clear, and free from reasonable suspicion (Code Civ. Proc. § 2061, subd. 7).

3. Appeal and error ⚷1011(1).

Where substantial conflict in evidence exists, trial court's decision on fact question is conclusive.

4. Carriers ⚷316(1).

Conclusive presumption is created by words "shall be deemed" in Motor Vehicle Act providing that title to vehicle shall be deemed not to have passed from legal owner to another until new certificates of registration and ownership are issued (St. 1923, p. 524, § 45(e), as amended by St. 1929, p. 514, § 13).

[Ed. Note.—For other definitions of "Deem," see Words & Phrases.]

5. Evidence ⚷158(26).

Corporation records were best evidence to establish fact that it did not operate busses over route where accident occurred (Code Civ. Proc. § 2061, subd. 7).

6. Carriers ⚷316(1).

Proof that at time of accident corporation owned bus raised rebuttable presumption that bus was being operated for purposes of corporation.

7. Appeal and error ⚷1005(3).

Appellate court cannot interfere after verdict and denial of new trial for insufficiency of evidence which was conflicting.

8. Evidence ⚷594.

Courts need not accept as true uncontradicted statement of witness.

9. Carriers ⚷320(31).

Evidence to rebut passengers' prima facie case that at time of accident bus driver was employed by corporation and acting within scope of employment, *held* insufficient to warrant directed verdict for corporation (Code Civ. Proc. § 2061, subd. 7).

10. Carriers ⚷283(1).

Driver *held* agent of corporation which owned bus and franchise by virtue of which it was being operated at time of accident, regardless who paid driver his wages and who was his immediate employer (Const. art. 12, § 10).

11. Trial ⚷228(1).

Each instruction need not contain all of the law bearing on particular phase of case.

12. Trial ⚷296(7).

Instruction on res ipsa loquitur doctrine that, if plaintiff made prima facie case, burden of proof was thrown on defendants to show that injuries were sustained without defendants' negligence, or by unavoidable accident, *held* not prejudicially erroneous, where jury were informed in other instructions that plaintiff must prove all material and affirmative allegations of complaint by preponderance of evidence.

Appeals from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Actions by William Richard Irwin, by Annie A. Irwin, by Florence B. Irwin, a minor, by Annie A. Irwin, her guardian ad litem, and by Betty B. Irwin, a minor, by Annie A. Irwin, her guardian ad litem, against the Pickwick Stages System, Inc., and another. From the judgments, defendants appeal.

Affirmed.

Prior opinion, 21 P.(2d) 981.

See, also, 115 Cal. App. 372, 766, 1 P.(2d) 1030; 115 Cal. App. 767, 768, 1 P.(2d) 1031.

B. P. Gibbs and George P. Kinkle, both of Los Angeles, for appellants.

George Appell and Earl Newmire, both of Los Angeles, for respondents.

CRAIG, Justice.

These are actions to recover damages for personal injuries claimed to have been suffered by the several plaintiffs through alleged negligence of Pickwick Stages System, a corporation, and R. I. Bailey, who was the driver of the stage known as St. Charles in which the plaintiffs were riding at the time of the accident. This took place November 23, 1929, in San Bernardino county, Cal., near a point called Baker. It appears that the plaintiffs were regular and paid passengers of the stage. The stage was being driven over a straight highway which was on a practically level grade, and as it was coming up out of a slight dip in the road it veered abruptly to the left and went off the highway and turned over. The plaintiffs sustained severe injuries. The answers in effect deny ownership or operation of the stage.

The principal issues involved the sufficiency of the evidence of ownership of the bus by the defendant corporation, and employment by it of defendant Bailey. These matters were first presented on motion for nonsuit; then by motion for a directed verdict for the defendant corporation, and later on motion for new trial and the appeal from the judgment.

[1] At the time of the motion for nonsuit, plaintiffs had placed in evidence proof that at the time of the accident the stage bus St. Charles was registered with the motor vehicle department of the state of California in the name of Pickwick Stages System as its legal owner. When the injuries to plaintiffs were sustained, it was established and stipulated that the plaintiffs were then passengers on said stage. We think this was a sufficient showing to constitute a prima facie proof of the defendant corporation's ownership of the bus and that the driver, Bailey, was then employed by it, and acting within the scope of his employment. Hence the motion for nonsuit was properly denied.

We proceed to consider the more difficult question as to whether this proof was sufficiently overcome by evidence introduced after plaintiffs' case had been rested.

It is conceded by the appellants that "this evidence on behalf of respondents created an inference that the driver of the bus, appellant R. I. Bailey, was acting as an agent and servant of the appellant Pickwick Stages System, Inc.," but with striking inconsistency it is declared in appellants' brief "that there was a total failure of proof that the appellant R. I. Bailey, driver of the bus involved in this case, at the time of the accident, was an agent, servant or employee of the appellant, Pickwick Stages System, Inc." If the first statement quoted is true, the second cannot be. Authorities cited by both the respondents and appellants establish that proof even if only regarded as consisting of the evidence above admitted to exist would constitute sufficient to be a prima facie showing on the point in question. Maupin v. Solomon, 41 Cal. App. 323, 183 P. 198; Judson v. Bee Hive Auto Service Co., 136 Or. 1, 294 P. 588, 297 P. 1050, 74 A. L. R. 944, and cases there cited.

[2, 3] The injuries were sustained on the 23d day of November, 1929. Plaintiffs' Exhibit I, which is a certificate of registration with the motor vehicle department of the state of California, indicates that the Pickwick Stages System was the legal owner of the stage St. Charles beginning with the 22d day of August, 1929, and that it was registered to that corporation for the year 1929. In many cases cited by the appellants, where a prima facie case was made out by the plaintiff as was done here, the defendant produced evidence conclusively showing that, notwithstanding the apparent ownership of the defendant, and in spite of the initial showing that the person whose negligence caused the injury was the employee of the defendant and acting within the scope of his employment. one or both of these essentials in truth did not exist when the accident occurred. Among such cases are Maupin v. Solomon, supra; Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 P. 697; Rock v. Orlando, 100 Cal. App. 498, 280 P. 377; Preo v. Roed, 99 Cal. App. 372, 278 P. 928; Fahey v. Madden, 56 Cal. App. 593, 206 P. 128; Burns v. Southern Pacific Co., 43 Cal. App. 667, 185 P. 875; Judson v. Bee Hive Auto Service Co., supra. However, in each of these instances the evidence introduced by the defendant was uncontradicted and free from reasonable suspicion, and so clear and convincing as to dispel the inferences created by the plaintiffs' prima facie showing, and to leave the state of the evidence such that there was in law no conflict for the jury to weigh and no course for the trial court to pursue except to instruct the jury to render a verdict for the defendant. Such must be the type of proof given by a defendant, otherwise an appellate court is bound by the familiar rule that, where there is a substantial conflict in the evidence, the decision of the trial court on a question of fact will not be disturbed.

[4] Here it is appropriate to observe that the plaintiffs' showing as to ownership of the

St. Charles by the defendant corporation amounted to more than an inference or a disputable presumption, as was the case in the decisions last mentioned. Here we have evidence of such a character as the law has decreed shall be held conclusive. By the Motor Vehicle Act, § 36 (as amended by St. 1927, p. 1423, § 8), it is required that the owner of every motor vehicle operated on the public highway be registered. The St. Charles was registered by the Pickwick Stages System, Inc., as owner. Section 45 of the same act (as amended by St. 1929, p. 514, § 13) provides a procedure required to be followed by the legal owner of such a vehicle who would transfer title thereto to another, and in subdivision (e) thereof it is enacted: "(e) Until said division shall have issued said new certificate of registration and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose." If authority is required as to the legal effect of the word "deemed," we have it in numerous decisions. That the words "shall be deemed" establish an absolute requirement and create a conclusive presumption is held in In re Green's Estate, 99 Misc. 582, 164 N. Y. S. 1063; In re Waldron's Estate, 84 Colo. 1, 267 P. 191; McCluskey v. Hunter, 33 Ariz. 513, 266 P. 18. In Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead, 85 Cal. 80, 24 P. 648, it is said: "The words, 'shall be deemed equivalent to a completion,' mean, 'shall be equal in legal effect to a completion;' that is, shall be treated, for the purpose of filing a lien, as an actual completion."

[5] We proceed to examine and consider the defendants' evidence on these issues. The witness Libby testified that he was secretary and general counsel for the Pickwick Stages System; that he kept the corporation records, and of his own knowledge knew that at the time of the accident Pickwick Stages System did not operate a fleet of busses between Salt Lake City, Utah, and Los Angeles. Of course, the records of the corporation would have been the best evidence to establish this fact, if it were true; but its weight was further affected by Plaintiffs' Exhibit 21. This is an application of the Pickwick Stages System to transfer a certificate of convenience and necessity theretofore granted the Pickwick Stages System to the Pacific Greyhound of California, Limited, and an order thereon permitting such transfer. From this exhibit it appears that such a certificate of convenience and necessity had been granted the defendant corporation before the date of such exhibit, to wit, in January, 1929; that it had been granted a franchise to operate busses over a route including the place where this accident occurred. The order permitting the transfer of this franchise is dated January 20, 1930, so that from this the inference would be justified that the Pickwick Stages System owned the franchise at the date of the plaintiffs' injury. While this transaction is not full and complete proof that at the time of the accident the Pickwick Stages System still held the franchise referred to in this application and order and was operating stages in its exercise, it is clear that, if the Pickwick Stages System had transferred said franchise to the Pickwick Stage Lines, Inc., in whose employ the appellant contends the driver was, and which corporation it is claimed was the owner of the St. Charles stage at the time of the accident, such transfer of franchise would have been a violation of the order of the Railroad Commission, as appears from the following quotation from said order:

"3. The rights and privileges herein authorized may not be discontinued, sold, leased, transferred, nor assigned, unless the written consent of the railroad commission to such discontinuance, sale, lease, transfer, or assignment has first been secured.

"4. No vehicle may be operated by applicant herein unless such vehicle is owned by applicant, or is leased by them under a contract or agreement satisfactory to the railroad commission."

[6, 7] Checks were introduced in evidence and identified by the driver of the car, Bailey, as having been received by him. They read: "Pay to the order of R. Bailey," and were signed "Pickwick Stage Lines, Inc., by Earl E. Wilson, By Geo. Martinson." The drivers' list of defendant company bearing names of its employees for a period from 1916 to March 21, 1929, one week before the accident, was received in evidence. It did not contain Bailey's name. A pay roll sheet of Pickwick Stage Lines, Inc., for November, 1929, showed the name of "R. Bailey." This was identified by the witness Martinson, who was director and manager of the accounting division of Pickwick Stage Lines, Inc. Also Warren E. Libby testified that he was director and secretary of the defendant corporation and kept its records; also that the defendant corporation had never operated cars between Salt Lake City and Los Angeles. If the jury had viewed this evidence in a light favorable to the defendant and as argued by its counsel, the logical and necessary conclusion would be that Bailey was not in the employ of Pickwick Stages System, Incorporated, at the time of the injuries of which complaint is made. From proof of ownership of this automobile a presumption arose that it was being operated for the purposes of its owner, the defendant. Randolph v. Hunt, 41 Cal. App. 741, 183 P. 358, 361. However, this presumption, unlike the one of ownership in this case, might have been overcome by substantive evidence refuting it; yet even as against such evidence it was sufficient

to create a conflict in the evidence. Randolph v. Hunt, supra; Perry v. Paladini, Inc., 89 Cal. App. 275, 264 P. 580, 584. Hence, of course, the decision of the jury evidenced by its verdict and of the trial court by its ruling on motion for a new trial are conclusive. Further, the verdict rendered indicates that the jury did not accept the defendants' evidence at its apparent face value, did not draw the inferences from the testimony given which defendant claims should have been drawn, perhaps even did not believe some of that testimony. As was said in Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, 407, Ann. Cas. 1916D, 1161, quoted with approval in Perry v. Paladini, Inc., supra, under similar circumstances as we have here: "The jury may * * * have thought that witnesses who would falsely disclaim ownership of a car would falsely disclaim responsibility for its management. These and like considerations were for them." Here the fact of ownership of the St. Charles by defendant corporation was established, although denied by it and its witnesses. As was said in the opinion of Perry v. Paladini, Inc., the case just mentioned: "The jury did have the right to discredit much testimony adduced, and the jury likewise had before them the manifest interest of the various witnesses." Much of the evidence in denial of Bailey's employment by defendant is only such as might give rise to an inference negativing such employment, as proof that another corporation paid him money; the rest was either not the best that might have been produced or otherwise of a character justifying suspicion as to its reliability. And so where, as here, both the jury and the trial judge must be presumed to have discredited the witnesses and refused to accept as true the evidence adduced in support of defendants' contention on this point of Bailey's employment, this court cannot hold that error has been committed without invading the province of both jury and trial court.

With the evidence in this state we have a record in which the showing is not comparable with that presented in the numerous cases cited by appellants in which there was held to be presented for the defense clear, positive, and uncontradicted evidence, free from suspicion to disprove agency or present ownership, and that as against such proof the inference based upon former ownership was overcome and failed to create a substantial conflict in the evidence of a character sufficient to sustain a judgment for the plaintiffs. Here ownership of the bus was conclusively established. The agency of the driver only remains subject to question.

[8] Throughout the decisions we find this to be the test: Was the proof against the inference in question uncontradicted, was it clear, positive and decisive? and, further, was it free from suspicion? And this is logically so, otherwise the law would stultify itself by compelling presumed belief in testimony which the minds of the jury or judge could not reasonably accept and believe. It is elementary that courts are not forced to accept as true a statement of a witness merely because it is uncontradicted. It may be highly improbable and yet incapable of contradiction. If the evidence submitted permits of suspicion as to its verity, if it is apparent that better, and more conclusive, evidence might have been offered, evidence which it was apparently within the power of the party relying upon weaker and less satisfactory evidence to produce, thoughtful and reasonable minds have a right to suspect that, had the best evidence been offered, it would not have sustained the inferior proof. The best evidence would have been clear and conclusive. Such was the case of Judson v. Bee Hive Auto Service Co., supra, principally stressed by appellant where the original written contract sustaining defendants' contention was before the jury. In each of the cited cases such direct, final, and best proof was in evidence. In these instances there was no room for the application of the wise presumption made a part of our law of evidence by subdivision 7 of section 2061, Code of Civil Procedure: "That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

[9, 10] We think the evidence given to overcome plaintiffs' affirmative showing was not above suspicion nor of that complete and final nature requiring or justifying a directed verdict in favor of the defendants. Again, regardless of who paid the driver his wages and of who was his immediate employer, since the jury must have believed that at the time of the injury to plaintiffs the defendant corporation owned the bus St. Charles and the franchise by virtue of which it was being operated, the law created the driver its agent. Lee v. Southern Pac. R. R. Co., 116 Cal. 97, 100, 47 P. 932; Johnson v. Southern Pac. R. R. Co., 154 Cal. 285, 97 P. 520, 524; Const. art. 12, § 10.

If some other person or corporation was lawfully operating the defendant corporation's stage or using its franchise in such manner as to relieve it from liability for negligence, it was incumbent on it to place before the court a frank, open, complete picture of its transactions in that behalf if it would make its case so far above suspicion as to require a directed verdict. As was said in Johnson v. Southern Pacific R. R. Co., supra: "It can only relieve itself from responsibility for injuries resulting from such operation by showing a lease made to the operating company under statutory authority." This it did not choose to do.

[11, 12] It is contended that an instruction given by the court upon the doctrine of res ipsa loquitur was erroneous, in that it indicated that, if the plaintiff had made a prima facie case as to injury, ownership of the conveyance, and agency, the burden of proof was thrown on defendants to show that such injuries were sustained without the negligence of the defendants or by unavoidable or inevitable accident. In other instructions given the jury, they were fully informed as to the necessity that the plaintiff prove all material and affirmative allegations of the complaint by a preponderance of the evidence. It is not necessary that each instruction contain all of the law bearing on a particular phase of the case. In this instance no prejudicial error occurred. Bonneau v. North Shore Railroad Co., 152 Cal. 406, 409, 93 P. 106, 125 Am. St. Rep. 68. As to the other instruction criticized by appellant, in view of our holding heretofore stated on the law governing the particular facts shown in this record, we think no error is shown.

The judgments are affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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134 Cal.App. 607

LUMBER & BUILDERS' SUPPLY CO. v. RITZ et al.

Civ. 1067.

District Court of Appeal, Fourth District, California.

Oct. 11, 1933.

1. Mortgages 🔑151(1).

Trust deed securing certain loan and "all future advances * * * up to and including $12,500" *held* sufficient to require subsequent incumbrancers to ascertain extent of lien created.

2. Mortgages 🔑186(4).

In action to foreclose materialmen's liens, where trust deed put materialmen on inquiry as to whether beneficiary was obliged to make future advances secured thereby, evidence of oral agreement to make certain future advance *held* admissible.

3. Mortgages 🔑151(3).

Lien of trust deed recorded before materials were furnished *held* superior to materialmen's liens as to subsequent advancement made to owner after materialmen's liens attached, where subsequent advancement was obligatory, though beneficiary had actual notice of materialmen's liens.

Appeals from Superior Court, San Diego County; Charles C. Haines, Judge.

Actions, consolidated for trial, by The Lumber & Builders' Supply Company and by G. Fayle against M. C. Ritz and others. From a judgment decreeing that property be sold subject to a certain trust deed in favor of defendant the Oceanside Finance Company, as trustee for the benefit of defendant the First National Bank of Oceanside, plaintiffs appeal.

Affirmed.

Maurice M. Myers, of Oceanside, for appellant Lumber & Builders' Supply Co.

O. E. Mark, of San Diego, for appellant G. Fayle.

Rorick & Cottingham, of Oceanside, for respondent First Nat. Bank of Oceanside.

D. L. Ault, of San Diego, for respondent Oceanside Finance Co.

JENNINGS, Justice.

The above-entitled actions, which were consolidated for trial, were instituted by the plaintiffs to foreclose materialmen's liens on certain real property. From a judgment decreeing that the property be sold and the proceeds realized from the sale be applied to the payment of plaintiff's claims, but that such sale should be subject to a certain trust deed executed by the owners of the land in favor of defendant Oceanside Finance Company, as trustee for the benefit of defendant First National Bank of Oceanside, the plaintiffs have appealed. There is no dispute as to the facts which were developed during the trial of the action, and the sole question of law which is here presented is whether the trial court was correct in adjudging that plaintiffs' liens are subordinate to the lien of the trust deed.

The facts which are pertinent to the above-mentioned question and whose narration is necessary for its intelligent consideration are contained in the following statement: The defendant M. C. Ritz was the owner of two vacant lots in the town of Encinitas in San Diego county. Desiring to clear the title to said lots and to erect a building thereon, he applied to an officer of the aforesaid bank for a loan of money. On March 20, 1930, the bank advanced him the sum of $400, and received from him a promissory note executed by him and his wife, Maude Ritz, in the amount of $400, payable six months after date. To secure payment of the note, Ritz and his wife executed a deed of trust whereby they conveyed title to the property to the finance company in trust for the benefit of the First National Bank of Oceanside. The trust deed was duly recorded on March 29, 1930. In addition to specifically securing payment of the aforesaid note, the instrument also contained the following provision: "And further as security for all future advances by beneficiary (the bank) to said trustor (or trustors jointly or severally) up to and including $12,500 and all indebtedness to beneficiary either as principal or surety, now existing or hereafter incurred by said trustor (or trustors jointly or severally), or any renewals, and all other present or future demands of any kind or nature, of the beneficiary against the trustor (or trustors jointly or severally) whether created directly or acquired by assignment, whether absolute or contingent, whether on an account or on obligation, whether due or not due or otherwise."

At the time the loan of $400 was made, Ritz stated to the officer of the bank that the money then advanced would be used to complete payments due on the lots and to pay taxes and to purchase an old house which he proposed to place upon the lots. He also stated that he would probably require more money, and, in response to an inquiry as to how much he would need, he replied that he would require $1,000 additional. The officer of the bank agreed that the bank would make additional advances up to the amount specified, and the borrower stated that he would secure payment of all moneys loaned by a mortgage on a pool hall owned by him and by the deed of trust on the aforementioned lots. On April 14, 1930, the plaintiffs commenced to furnish materials and labor in accordance with contracts theretofore made between them and Ritz. On May 23, 1930, the First National Bank of Oceanside loaned Ritz an additional $1,000, and in return therefor received a promissory note in this amount executed by Ritz and his wife. At the time this additional sum was advanced to Ritz, he stated to the officer of the bank with whom he dealt that the money would be used to pay for the labor and material "that went into the building." At this time he also stated that the building was half completed. On this same date Ritz executed a chattel mortgage on a pool hall and barber shop owned by him. He testified that the mortgage was executed "in connection with this matter."

The trial court found that, at the time the additional loan of $1,000 was made, the First National Bank of Oceanside had actual notice that the liens of plaintiffs for labor and material furnished for the construction of the building had attached. While respondents intimate that the evidence does not justify the making of such a finding, we entertain the opinion that the suggestion is not warranted. It is conceded that the bank had actual notice that the building was being constructed, and the evidence is undisputed that the officer of the bank with whom Ritz dealt was informed by him that the building was then half completed. In view of all the circumstances presented by the record, we think that the above-mentioned finding is not lacking in evidentiary support.

There is no dispute between counsel that a trust deed or mortgage which is given to secure payment of an indebtedness may include advances to be made in the future. Tapia v. Demartini, 77 Cal. 383, 19 P. 641, 11 Am. St. Rep. 288. Nor is it disputed that the rule is established in California that, if future advances are obligatory upon the mortgagee, the lien of the mortgage is superior to liens of other incumbrancers which attach subsequent to the execution of the mortgage but prior to the making of such future advances, but that, if the future advances are merely optional with the mortgagee, the lien of the mortgage as to such future advances is inferior to liens of incumbrances which have attached subsequent to the execution of the mortgage but prior to the making of such future advances, and of whose existence the mortgagee has notice. Tapia v. Demartini, supra; Hall v. Glass, 123 Cal. 500, 504, 56 P. 336, 69 Am. St. Rep. 77; Fickling v. Jackman, 203 Cal. 657, 265 P. 810; Valley Lumber Co. v. Wright, 2 Cal. App. 288, 84 P. 58; Fuller & Co. v. McClure, 48 Cal. App. 185, 191 P. 1027; Harper Reynolds Co. v. Hammond Lumber Co., 51 Cal. App. 74, 196 P. 97; San Francisco Lumber Co. v. Yates, 54 Cal. App. 109, 204 P. 423; Yost-Linn Lumber Co. v. Williams, 121 Cal. App. 571, 9 P. (2d) 324; Hayward Lumber & Inv. Co. v. Naslund, 125 Cal. App. 34, 13 P.(2d) 775.

In view of this rule, the single question presented upon this appeal is whether the trial court was justified in holding that the advance of $1,000 made by the First National Bank of Oceanside to Ritz on May 23, 1930, at a time when the bank had actual notice that the liens of the plaintiffs for labor and material had attached, was an advance which was obligatory upon the bank or whether it was purely optional.

[1] The trial court properly observed that the trust deed did not disclose on its face whether or not the bank was obligated to make the additional advance of $1,000 which was made on May 23, 1930. The language of the instrument states that it is given "further as security for all future advances * * * up to and including $12,500." This language contains no hint or suggestion as to whether the bank was under any obligation to make future advances.

The above-quoted language appearing on the face of the instrument did, however, disclose that the trust deed was given, not only to secure payment of an existing indebtedness, but that it was also intended to secure repayment of future advances. It was sufficiently definite to put subsequent incumbrancers on inquiry and imposed upon them the duty of ascertaining the extent of the lien created by the trust deed. Tapia v. Demartini, supra; Frank H. Buck Co. v. Buck, 162 Cal. 300–306, 122 P. 466; Machado v. Bank of Italy, 67 Cal. App. 769–775, 228 P. 369.

[2, 3] The trial court admitted evidence which showed that, at the time the $400 mentioned in the trust deed was advanced, the officer of the bank with whom Ritz dealt orally agreed that the bank would in the future, make a further advance of $1,000. This evidence was properly received without objection, and was competent. Tapia v. Demartini, supra; Fuller & Co. v. McClure, 48 Cal. App. 185, 191 P. 1027; Machado v. Bank of Italy, supra. It was thus made clearly to appear that the First National Bank of Oceanside was obligated by a binding promise to make the further advance of $1,000. Since this was the situation with respect to the said further advance, it is obvious that the trial court correctly applied the aforementioned rule and properly held the lien of the trust deed superior to those of the materialmen.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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134 Cal.App. 570

BANK OF ALAMEDA COUNTY v. HERING et al.

Civ. 8788.

District Court of Appeal, First District, Division 2, California.

Oct. 10, 1933.

1. Pleading 🔑8(7).

Allegation that defendant entered into contract for purchase of land and by such contract agreed to pay obligation created by note and trust deed *held* conclusion of fact not conclusion of law.

2. Pleading 🔑32.

Written instrument may be pleaded according to its legal effect or in hæc verba.

3. Mortgages 🔑280(5).

Purchase contract reciting cash payment and assumption of bank loan on property as consideration for land authorized finding that defendant agreed to pay note and trust deed, though no mention of note and trust deed was made in deed to defendant.

4. Mortgages 🔑280(3).

Agreement to assume obligations of note and trust deed may be made orally, in separate instrument, implied from transactions, or shown by circumstances of purchase and by language in instrument.

5. Mortgages 🔑292(1).

Agreement of assumption of note and trust deed obligation is "contract for benefit of third person," enforceable by third person at any time before it is rescinded (Civ. Code, § 1559).

[Ed. Note.—For other definitions of "Contract for Benefit of Third Person," see Words & Phrases.]

6. Mortgages 🔑292(1).

Fraud of defendant's grantor *held* no defense to action on defendant's agreement to assume obligation of note and trust deed, where defendant did not rescind agreement for such fraud.

7. Pleading 🔑52(2).

Plaintiff suing for deficiency judgment after sale under trust deed had one cause of action for unpaid balance after sale, and need not separately state causes of action upon note and upon deed.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by the Bank of Alameda County against M. L. Hering, W. W. Bottimore, and others. From a judgment for plaintiff, defendant W. W. Bottimore appeals.

Affirmed.

Ralph H. Lewis, of Sacramento, and Stanley Burke, of San Francisco, for appellant.

Fred B. Mellmann, of Oakland, for respondent.

SPENCE, Justice.

Plaintiff sought to recover a deficiency judgment after a sale of land under a deed of trust. From a judgment in favor of plaintiff, defendant appeals.

In 1922, defendant Hering executed in favor of plaintiff a note in the sum of $30,000 and a deed of trust to secure the same. In 1924, defendant Bottimore purchased the land described in the deed of trust from defendant Hering and by the written agreement of purchase signed by defendant Bottimore the sale was agreed to "at the price of Forty-two Thousand and no/100 Dollars, lawful money of the United States, on the following terms: $12,000.00 cash; balance by assumption of $30,000.00 bank loan at 7% interest." When defendant Bottimore put up the balance of the cash payment to consummate the transaction he received from the title company a receipt showing that the property was subject to the "Trust deed $30,000.00 in favor of The Bank of Alameda County." Defendant Bottimore went into possession of the land, paid interest on the indebtedness for several years, but subsequently became in default with respect to payment of both principal and interest. The land was sold under the deed of trust for $24,000, and this action was brought to recover the unpaid balance. Upon the trial of the cause defendants offered no evidence, and judgment was entered in favor of plaintiff and against defendants Hering and Bottimore.

[1-2] Appellant contends that the complaint does not state a cause of action against him, but in our opinion this contention is without merit. It was alleged in the complaint that appellant entered into a written contract for the purchase of the land, and "that in and by said contract the said W. W. Bottimore assumed and agreed to pay the obligations created by the aforesaid promissory note and the aforesaid deed of trust." It is claimed that the foregoing allegation amounts to a conclusion of law rather than an allegation of fact, but it is well settled that a written instrument may be pleaded according to its legal effect or in hæc verba. 21 Cal. Jur. 45. The further claim is made that there was no allegation that there was any amount "due, owing and unpaid from and by appellant," but the allegations of the complaint clearly show that liability was imposed upon appellant by the assumption clause of the agreement, and the allegations with respect to nonpayment are full and complete.

[3, 4] It is also contended by appellant that there is no evidence to support the finding that appellant agreed to pay the obligations created by the note and deed of trust. Here appellant states that the only evidence introduced on this subject was the written agreement which provided for a $12,000 cash payment and "balance by assumption of $30,000.-00 bank loan at 7% interest." We believe this agreement was entirely sufficient to support the findings and judgment. The fact that no mention of the note or deed of trust was made in the deed to appellant is immaterial for the agreement of assumption "may be made orally or in a separate instrument; it may be implied from the transaction of the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the instrument." White v. Schader, 185 Cal. 606, at page 608, 198 P. 19, 20, 21 A. L. R. 499, quoting from Hopkins v. Warner, 109 Cal. 133, 41 P. 868. See, also, Dutton v. Locke-Paddon, 37 Cal. App. 693, 174 P. 674; 18 Cal. Jur. 41, and following; 25 Cal. Jur. 46. It appears to be appellant's claim that even if the evidence was sufficient to support a finding relating to appellant's assumption of the obligations of the note, it was insufficient to support the findings with respect to the assumption of the obligations of the deed of trust. We believe that appellant's construction of the agreement of the parties is too narrow. The record shows that appellant had actual as well as constructive notice of the deed of trust securing the note and, of course, the security is but an incident of the principal obligation. 17 Cal. Jur. 710. The trial court was warranted in finding from the written assumption of the "bank loan" and the "circumstances under which the purchase was made," that appellant assumed the obligations of the deed of trust as well as those of the note itself.

[5, 6] It is further contended that the trial court erred in sustaining respondent's demurrer to the fraud defense set up in appellant's second amended answer. It is conceded that respondent was not a party to the alleged fraud, but it was alleged that appellant's grantor made certain fraudulent representations in 1924 at the time appellant purchased the property. Respondent urges several grounds in support of the trial court's action, but we need consider but one of them. An agreement of assumption is treated as a contract made for the benefit of a third person (Alvord v. Spring Valley Gold Co., 106 Cal. 547, 40 P. 27; Thomson v. Bettens, 94 Cal. 82, 29 P. 336; Case v. Egan, 57 Cal. App. 453, 207 P. 388), and such a contract may be enforced by the third person at any time before it is rescinded. Civ. Code, § 1559. In order to defeat respondent's rights under the agreement of assumption, it was necessary for appellant to allege and prove a rescission of said agreement. There was no such allegation in appellant's alleged defense, and the trial court therefore properly sustained said demurrer.

[7] Appellant mentions the order of the trial court overruling his special demurrer. As we understand appellant's argument in this connection, it proceeds upon the theory that it was necessary for respondent to separately state two causes of action; one upon the note and the other upon the deed of trust. No authority is cited. There was but one cause of action for the unpaid balance after the sale under the deed of trust, and we find no merit in the contention that appellant's special demurrer was improperly overruled.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

134 Cal.App. 785

Ex parte BOSWELL.

Cr. 1293.

District Court of Appeal, Third District, California.

Oct. 13, 1933.

Application for writ of habeas corpus prayed to be directed to the Warden of Folsom State Prison to secure release of petitioner on the ground of illegal detention.

Bertram Boswell, in pro. per.

PER CURIAM.

Upon the authority of the case of Application of Francis Woofter for a Writ of Habeas Corpus, 25 P.(2d) 859, filed in this court on October 10, 1933, the petition for a writ of habeas corpus in the above-entitled matter is hereby denied.

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134 Cal.App. 601

PACIFIC STATES SAVINGS & LOAN CO. v. HOFFMAN et al.

Civ. 8050.

District Court of Appeal, Second District, Division 2, California.

Oct. 11, 1933.

1. Mortgages ⚷372(4).

In action for unlawful detainer by purchaser of apartment house on sale under deed of trust, superior court had jurisdiction to appoint receiver for realty (Code Civ. Proc. §§ 1161, 1161a, and § 564, subd. 6).

2. Mortgages ⚷372(4).

Order appointing receiver for apartment house *held* not insufficient because allegedly relating only to income, where order directed receiver to take possession of premises with full power to care for, keep possession, operate, control, and manage.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by the Pacific States Savings & Loan Company against H. E. Hoffman and others. From an order appointing a receiver, Clara B. Turton appeals.

Affirmed.

Merrill L. Granger, of Los Angeles, for appellant.

John C. Campbell and John L. Mace, both of Los Angeles, and Orrick, Palmer & Dahlquist, of San Francisco (Christopher M. Jenks, of San Francisco, of counsel), for respondent.

CRAIG, Acting Presiding Justice.

A complaint filed by the purchaser, praying damages, possession of real property, and the appointment of a receiver following a sale under a deed of trust, and alleging that said property consisted of an apartment house with an income in excess of $1,200 per month, that the defendant was insolvent, and would collect and divert the proceeds, resulted in such appointment. One of the defendants, successor in interest of the obligors, appealed.

[1] It is contended that since said suit was formally in the nature of an unlawful detainer action it was not authorized by the Code of Civil Procedure, and that the trial court was without power to appoint a receiver therein. Section 1161 of said Code provided in part that a tenant of real property for a term less than life would be guilty of unlawful detainer when he (1) continued in possession after expiration of the term; (2) after a failure to pay rent; or (3) after a failure or neglect to perform other conditions or covenants of a lease or agreement under which the property was held. By section 1161a, one holding over after three days' notice as prescribed in the chapter on forcible entry and unlawful detainer might be removed where the property was so held and had been sold under execution, upon foreclosure of a mortgage, or of a deed of trust. And section 564, subdivision 6, of the same Code provided that a receiver might be appointed "in an action of unlawful detainer, in those cases in which the superior court has exclusive original jurisdiction." The jurisdictional requisites in this respect are not questioned in the instant case. Since this appeal it has been held that a suit filed under said section 1161a under similar circumstances was not subject to objection that it failed to present the circumstances or force or violence which may have accompanied the unlawful detainer, as contended. Faulkner v. Brooks, 125 Cal. App. 137, 13 P.(2d) 748. Subsequently, in a suit for possession of property so sold as in the case of execution (Civ. Code, § 2924), our Supreme Court held that the purchaser or the trustee under the incumbrance might maintain the action, and that a sale in compliance with section 692 of the Code of Civil Procedure pertaining to executions was authorized and proper. Alameda County Home Inv. Co. v. Whitaker (Cal. Sup.) 18 P.(2d) 662. Thereafter, in Hewitt v. Justice's Court of Brooklyn Township (Cal. App.) 21 P.(2d) 641, 642, a suit in unlawful detainer following a sale under a deed of trust was upheld. In the last-cited case it was said: "Since the remedy is purely statu-

tory, and no constitutional inhibition intervenes, the question whether unlawful detainer actions shall be extended to cover cases where the conventional relation of landlord and tenant does not exist is a legislative and not a judicial question. Because in their legislative inception such proceedings were limited to cases where that conventional relation existed does not at all prevent the Legislature from extending the remedy to other cases if it sees fit to do so." This we think answers both questions, since section 564 of the Code of Civil Procedure authorizes the appointment of a receiver "in an action of unlawful detainer, in those cases in which the superior court has exclusive original jurisdiction."

[2] It is insisted that the order of appointment if relating only to income would be insufficient. However, the plaintiff prayed a receiver "to take possession of said premises pending the determination of this action, with full power and authority to operate" the same. Said order appealed from directed that the receiver take possession "of the property more particularly hereinafter described and of improvements located thereon, with full power, under the control and subject to the order of the court, to take, care for and keep possession of the said property, operate, control and manage the same," etc. From the foregoing we think it must be held that the objection made is untenable.

The order is affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

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134 Cal.App. 604

PACIFIC STATES SAVINGS & LOAN CO. v. HOFFMAN et al.

Civ. 8054.

District Court of Appeal, Second District, Division 2, California.

Oct. 11, 1933.

1. Chattel mortgages 🔑63.

Chattel mortgage *held* not invalid because lacking mortgagee's signature to affidavit of good faith, where notarial certificate recited that all of parties including mortgagee deposed that mortgage was made in good faith and without design to defraud creditors.

2. Affidavits 🔑11.

Affiant's signature to otherwise regular affidavit is not necessary, in absence of statute or rule of court requiring it.

3. Chattel mortgages 🔑47.

Chattel mortgage *held* not invalid because omitting description of ownership, possession, or location, where personalty mortgaged was described as furniture and furnishings contained in property situated at a specified address.

4. Chattel mortgages 🔑47.

Description in chattel mortgage is sufficient if it is such as to enable third parties to identify property covered by mortgage.

5. Receivers 🔑19.

Failure to show insolvency of defendant *held* no ground for setting aside order appointing receiver.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by the Pacific States Savings & Loan Company against H. E. Hoffman and others. From an order appointing a receiver, Clara B. Turton appeals.

Affirmed.

Merrill L. Granger, of Los Angeles, for appellant.

John C. Campbell and John L. Mace, both of Los Angeles, and Orrick, Palmer & Dahlquist, of San Francisco (Christopher M. Jenks, of San Francisco, of counsel), for respondent.

CRAIG, Acting Presiding Justice.

This case and that of Pacific States Savings & Loan Company v. Turton et al. (Cal. App.) 25 P.(2d) 1006, this day decided, were instituted, tried, and appealed at the same time by the same parties, and questions argued in both need not be here restated. The former related to the real property, and the latter to personalty consisting of the furniture and furnishings contained therein, of all of which the appellant was in possession.

[1-4] The first ground of appeal herein concerns the validity of the chattel mortgage by which said personal property was incumbered. In an instance cited by the appellant it was indicated that a chattel mortgage, bearing no affidavit of good faith, was invalid as to a purchaser without notice. However, it does not here appear that the affidavit was omitted nor that the appellant purchased without notice. It does appear that the same was signed by both incumbrancers, but that the signature of the mortgagee was not appended thereto; but the certificate of the notary public recited that all of the parties including the mortgagee "each for himself both depose and say: That the afore-mentioned mortgage is made in good faith and without any design to hinder, delay or defraud any creditor or creditors." "In the ab-

sence of a statute or rule of court requiring it, the affiant's signature to an otherwise regular affidavit is not necessary." City of Petaluma v. White, 152 Cal. 190, 92 P. 177, 180; A. P. Hotaling & Co. v. Brogan, 12 Cal. App. 500, 107 P. 711; Fairbanks, Morse & Co. v. Getchell, 13 Cal. App. 458, 110 P. 331. It is further contended that said mortgage is subject to the objection that an omission in the description of ownership, possession, or location rendered the same so uncertain as to make it invalid. The property incumbered was therein described as "all that certain personal property situated and described as furniture and furnishings contained in the property situate on the northeast corner of Grace and Franklin avenues, Los Angeles, California." The appellant admits that she was in possession and that she did not make a showing of the invalidity for which she contends. "It has been held that a description is sufficient if it is such as to enable third parties or inquirers to identify the property covered by it." 5 Cal. Jur., § 12, p. 54, and cases cited.

[5] Finally, a failure to show insolvency of the defendants is asserted as a ground for reversal of the order of appointment, but since the statutes do not require proof of insolvency in such a case, it may not for that reason be set aside.

The order is affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

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134 Cal.App. 646

PEOPLE v. SIMPSON.

Cr. 1279.

District Court of Appeal, Third District, California.

Oct. 17, 1933.

1. Criminal law ⇨935(1).

Granting new trial is largely within discretion of trial judge, who has exclusive right to pass upon witnesses' credibility, and weight and sufficiency of evidence supporting verdict.

2. Criminal law ⇨1156(1).

Trial court's grant or denial of new trial is conclusive, absent clear abuse of discretion.

3. Criminal law ⇨1134(6).

Order granting new trial of charge of assault with deadly weapon *held* conclusive, in view of conflict of evidence, notwithstanding judge assigned incorrect reasons therefor.

4. Criminal law ⇨1134(6).

Where court's minute order merely recited that motion for new trial on all statutory grounds be granted, order, if proper on any of grounds, required affirmance, regardless of reasons assigned therefor (Pen. Code, § 1181).

5. Assault and battery ⇨56.

Ordinarily, manner in which it is used determines whether rifle is "deadly weapon" (Pen. Code, § 240).

[Ed. Note.—For other definitions of "Deadly Weapon," see Words & Phrases.]

6. Assault and battery ⇨56.

Automatic repeating rifle containing loaded cartridges in its magazine may constitute "deadly weapon," although cartridges must be transferred to firing chamber by operating lever before firing (Pen. Code, § 240).

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Leonora Simpson was convicted of an assault with a deadly weapon, her motion for a new trial was granted, and the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

H. W. McGowan, of Willows, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted of an assault with a deadly weapon, accomplished by thrusting the muzzle of a loaded rifle against the person of another with the threat to shoot him. The shooting was averted by wresting the weapon from the defendant and throwing it into a river near by. From an order granting a new trial, the people have appealed.

The evidence is undisputed that at the time of the alleged assault there were ten loaded cartridges in the magazine of the rifle, although the firing chamber was empty. It is therefore contended the rifle, in that condition, did not constitute a deadly weapon, for the reason that the defendant did not possess the present ability to commit a violent injury, by firing the rifle, without first transferring a cartridge to the firing chamber by the operation of a lever. In granting a new trial the trial court said: "As I see it, that whole present ability element contained in the section, 240, is the hub around which the whole question whirls. * * * The assault consisted in pressing of the gun against the witness' body and making threats, and the duration of that assault was only until the interruption came. Now during * * * the process of the assault, was the present ability there to discharge the gun? There remained something more to be done before the gun could be discharged."

The affray grew out of a quarrel respecting the use of a bridge which crosses a stream in the vicinity of the defendant's property. The roadway crosses this bridge at a considerable grade. The trucks of a business enterprise were accustomed to cross this bridge. In a prior conversation over the telephone, with Campbell, the employer of the truckmen, the defendant said: "You tell your men if they do any more stopping on that bridge or around the bridge, I am not going to fool with them any more, they will have to tell it to the undertaker." On the day upon which the assault occurred a truck and trailer accompanied by three men stopped at the bridge. They were searching for a wooden tongue which they had left there to adjust between the vehicles to prevent the trailer from running on to the truck while descending the grade. The tongue had been thrown into the river. While they were seeking for the tongue the defendant hurried across the adjacent field armed with a rifle. She encountered Roy Eiland on the bridge. They were standing about eight feet apart while they engaged in a heated controversy over the use of the bridge. The defendant was enraged. Eiland was unarmed. After a few moments the defendant stepped up to within three feet of Eiland, and, according to the testimony of two or three witnesses, she thrust the muzzle of the rifle "right up against Roy's stomach," with the finger of her right hand on or near the trigger and lever of the gun. She then said she was going "to shoot a hole through him." A squabble ensued for the possession of the gun. Eiland wrested it from her grasp and threw it into the stream. Within a few hours thereafter the rifle was recovered from the water by an officer. The magazine of the weapon was found to contain ten loaded cartridges. The lever which transfers the cartridges from the magazine to the barrel had been thrown down to an angle of about forty-five degrees. There is no dispute over the presence of the loaded cartridges or the position of the lever.

There is a conflict regarding the material question as to whether the defendant actually thrust the muzzle of the rifle against the person of Eiland with a threat to shoot him. There is also a conflict as to whether she made any effort to transfer a loaded cartridge from the magazine of the rifle to the firing chamber by operating the lever. Mr. Lance Papst, a friend and companion of the defendant, who arrived in his automobile at the scene of the conflict, testified: "When I brought the car to a stop I heard her say 'Oh beat it,' and she turned to walk by [Mr. Eiland] and as she passed he grabbed the gun and turned her around and drug her. * * * She had it [the gun] across her shoulders and behind her neck with the stock of the gun over her right shoulder. * * * I shut the motor off and pulled on the emergency brake and by the time I could get out they were at the hind wheel of the car, and as I stepped out she had lost her hold on the barrel of the gun with her left hand and it was coming down on top of her head and I threw up my left hand to stop the blow and it hit me across the left hand. * * *

"Q. Did you hear Miss Simpson say to Eiland 'I will blow a hole through your guts'? A. No. * * *

"Q. Was this the position of the gun [over her right shoulder] when Mr. Eiland grabbed the gun? A. It was."

It appears that two other men arrived at this critical moment and a general affray ensued. Eiland secured possession of the rifle and threw it into the stream. There was some attempt to impeach the testimony of Papst. His credibility and the weight to be given his evidence were, however, problems for the determination of the trial judge upon the motion for a new trial.

[1, 2] The granting or denial of a new trial is largely within the discretion of the trial judge, who has the exclusive right to pass upon the credibility of witnesses and upon the weight and sufficiency to be accorded the evidence in support of the verdict of a jury. The determination of a trial court to either deny or grant a new trial will therefore not be disturbed on appeal, except for a clear abuse of its discretion. 20 Cal. Jur. 27, § 13; 2 Cal. Jur. 905, § 533; People v. Skoff (Cal. App.) 20 P.(2d) 366; People v. Ferlin, 203 Cal. 587, 596, 265 P. 230.

[3] In view of the conflict of evidence which exists in the present case regarding the acts upon which the question of the defendant's guilt of the alleged assault with a deadly weapon depends, it becomes necessary to affirm the order granting the new trial, in spite of the fact that the trial judge may have assigned incorrect reasons therefor, since the discretion of the trial court with respect to the credibility of witnesses and the weight and sufficiency of the evidence may not be disturbed on appeal except for a clear abuse thereof.

[4] The motion for a new trial was made on all the grounds authorized by the provisions of section 1181 of the Penal Code. The minute order of the court merely recites that: "It is ordered that said motion for a new trial of the action be granted." It follows that if the new trial was properly granted on any of the grounds upon which it was presented, the order should be affirmed, regardless of the reasons assigned therefor by the judge. White v. Merrill, 82 Cal. 14, 22 P. 1129; Gordon v. Roberts, 162 Cal. 506, 123 P. 288; 20 Cal. Jur., p. 196, § 30. In the first case cited it is

said: "The court below may give an opinion, oral or in writing, upon any motion or question that arises in the course of proceedings before it, or upon the final determination of a cause, but such opinion constitutes no part of the record on appeal. No matter what reason the court below may assign for its action, this court is not bound by such reason. If this court finds that upon any ground, or for any reason, the action of the court below was correct, such action will be affirmed, regardless of the reason which the court may have given for it."

[5, 6] We are not in accord with the view expressed by the trial judge with respect to the question as to whether a rifle which contains loaded cartridges in the magazine and which requires only an instantaneous transfer of a shell to the firing chamber by operation of a lever, constitutes a deadly weapon with which the possessor has the present ability to commit serious injury by firing the weapon. In view of the necessity of a new trial in this case, for the guidance of the court, we therefore express our opinion regarding that problem as follows:

It has been held that an assault with a deadly weapon is not accomplished by merely pointing an unloaded weapon at one with a threat to shoot him, for the reason that the assailant then lacks the present ability to commit a violent injury upon the person of another in that manner. People v. Sylva, 143 Cal. 62, 76 P. 814; 3 Cal. Jur. 207, § 21. Section 240 of the Penal Code defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." In this case there is no contention that the defendant attempted or intended to assault Eiland in a manner other than by firing the rifle at him. Ordinarily the manner in which a rifle is used determines whether it is a deadly weapon in the accomplishment of an assault. Usually it becomes a mixed question of law and fact to be decided by the jury under proper instructions. 3 Cal. Jur. 206, § 21. In the present case, under proper instructions, the jury found, by inference, that the rifle was loaded, and that the defendant then had the present ability to commit a violent injury upon the person of Eiland by shooting him. The court assumed the defendant did not have the present ability to discharge the rifle because it was first necessary to transfer a cartridge from the magazine to the firing chamber of the gun by throwing down the lever. This could be done instantly. The operation of the lever automatically transfers a cartridge ready to be fired.

An automatic repeating rifle may not be termed an unloaded gun when its magazine contains loaded cartridges which may be instantly transferred to the firing chamber by the mere operation of a lever. It is unreasonable to hold that a rifle is unloaded and that it is not susceptible of immediate discharge under such circumstances. One may just as reasonably assert that a pistol with an automatic revolving cylinder filled with loaded cartridges does not constitute a deadly weapon, although the mere pressure of a finger upon the trigger releases a safety pin and adjusts a cartridge in position to be discharged. It is equally unreasonable to assert that an assailant has not the present ability to commit a violent injury upon the person of another by means of a sword or dagger because it is necessary to first withdraw the weapon from a scabbard which hangs by his side. We are of the opinion an automatic repeating rifle which contains loaded cartridges in its magazine may constitute a deadly weapon with which one may have the present ability to commit violent injury upon another person, by firing the weapon at him, although it is first necessary to transfer a loaded shell to the firing chamber by operating a lever. The question as to whether the accused person really intends to transfer the shell and fire the weapon are facts to be determined by the jury from the circumstances of the case. People v. Dodini, 51 Cal. App. 179, 196 P. 510.

For the reason that the record in the present case contains a substantial conflict of evidence regarding the commission of the alleged assault with a deadly weapon, the order granting the new trial is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

134 Cal.App. 616

PEOPLE v. AZBILL.

Cr. 1282.

District Court of Appeal, Third District, California.

Oct. 13, 1933.

1. **Burglary** ⚷41(1).

Evidence *held* to sustain conviction of first degree burglary (Pen. Code, § 460).

2. **Burglary** ⚷46(7).

Instruction that, if accused was found in possession of property stolen, it was circumstance tending in some degree to show guilt of burglary, but that mere possession was insufficient to justify conviction, and that there must be proof of corroborating circumstances of acts and conduct tending of themselves to show guilt, *held* proper (Pen. Code, § 460).

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

John Azbill was convicted of first degree burglary, and he appeals.

Affirmed.

J. Oscar Goldstein, of Chico, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The defendant was charged, tried, and convicted of the crime of burglary, and now appeals from that judgment. Counsel for appellant did not represent the defendant at the trial of the case.

[1] From the evidence on the part of the prosecution, it appeared that about 2 o'clock a. m. of April 25, 1933, a police officer of the city of Chico saw an automobile parked near an alleyway in one of the residential sections of that city, and, recalling that earlier in the evening he had seen the defendant riding about the city with that particular car, concealed himself nearby. Shortly thereafter defendant approached the car, carrying a can of gasoline and some tubing. The officer flashed his light in defendant's face, saying, "Hello, Johnnie"; to which the defendant replied, "Hello, Roy, you sure got me this time," and offered the officer some money to release him. The officer refused; whereupon defendant struck the officer over the head with a flash-light and started to run. As he ran, he threw away various articles, consisting of an overcoat, two $20 bills and one $10 bill, a remittance slip payable to A. R. Schluer, several handkerchiefs, and other small articles.

He was captured and taken to the police station. There he was searched, and among the articles found in his possession was a hunting license made out to A. R. Schluer and a small pocket knife.

An officer was sent to the home of Mr. Schluer, and certain articles were found to be missing. Upon the trial, Schluer identified the remittance slip and hunting license, which, together with a considerable amount of currency, were missing on the morning following the arrest of the defendant, and which had been in the possession of the complaining witness in his home the night of the arrest of the accused. Likewise a son of the complaining witness identified certain handkerchiefs dropped by the defendant in his flight as belonging to the witness, which were in a dresser drawer in the Schluer home on the night of the arrest, but were missing the following morning.

No one saw the defendant enter or leave the premises, but a board was removed from the basement window, from which it was possible to enter the upper portion of the house. The morning following the arrest of the defendant, the chief of police attempted to interrogate him. Defendant claimed the handkerchiefs and knife belonged to him, but, when confronted with the hunting license and remittance slip, refused to answer further questions, and stated he preferred to rest on his rights and consult counsel before answering. When asked why he struck the officer, he replied, "Well, if I got caught pulling the job I would get a pretty heavy rap." In his own defense, the defendant denied the burglary, denied that the articles were found in his possession, and claimed that he entered the alleyway to get gasoline which he had cached there earlier in the evening. He also called a witness, who testified that he had on that day paid to the defendant $50, in three bills, two $20 bills and one $10 bill.

Defendant also explained his attack upon the officer and his flight by saying he was intoxicated and afraid that the officer would beat him up.

The foregoing is a summary of the testimony taken at the trial.

Defendant urges two grounds for reversal: First, he contends the evidence is insufficient to justify the verdict of burglary in the first degree; section 460 of the Penal Code, defining first degree burglary, provides in part that "every burglary of an inhabited dwelling house or building committed in the night time * * * is * * * of the first degree."

We feel there is ample testimony to show the property was taken in the nighttime.

The defendant was apprehended about 2 a. m., a short distance from the house of the complaining witness, Mr. Schluer. Schluer testified he slept at home on the night in question and missed the articles about 10 a. m. on the following morning. "Q. Did you have that money when you went to bed that night? A. Yes, I did. Q. Mr. Schluer, where did you keep that money—in your wallet, you say? A. Yes, sir, in my hip pocket"—which, upon retiring, were left lying on a cedar chest in his bedroom. The remittance slip, hunting license, and pocketknife were also in the pockets of the trousers on the night in question. When asked at what time he went to bed that night, he replied he could not recall, but he positively testified he had the money when he went to bed that night, and from the previous question it is apparent the witness was referring to the night preceding April 25.

We believe the evidence justified the finding of the jury that Mr. Schluer's house was entered in the nighttime and that the personal property referred to was then taken therefrom.

[2] The second point urged for reversal is that the following instruction given by the

court at the request of the prosecution on possession of stolen property is incorrect and constitutes reversible error:

"The mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction; it is a circumstance which, taken in connection with other testimony, is to determine the question of guilt. Yet if you believe from the evidence that the defendant was found in the possession of the property described in the evidence, or claiming to be the owner thereof, after the alleged burglary, this is a circumstance tending in some degree to show guilt, but not sufficient, standing alone and unsupported by other evidence, to warrant you in finding him guilty. There must be, in addition to proof of possession of property stolen from the premises described in evidence, proof of corroborating circumstances tending of themselves to establish guilt. These corroborating circumstances may consist of acts, or conduct or declarations of the defendant, or other circumstances tending to show the guilt of the accused.

"If the jury believe from the evidence the property mentioned in evidence was stolen from the premises described in evidence, and was seen in the possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession (if there was such failure) or to show that such possession was honestly obtained, is a circumstance tending to show guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such possession."

Appellant attempts to show it is implied therein that, regardless of how or when the stolen property was received into the possession of the defendant, nevertheless his failure to account therefor is a circumstance tending to show guilt, and that he was bound to explain such possession in order to remove the effect of that being a circumstance of guilt, and that the possession was and of itself sufficient to convict the defendant of burglary, if he failed to explain his possession thereof to the satisfaction of the jury.

We cannot agree with counsel in that construction. The jury were told that mere possession unexplained was not sufficient to justify a conviction, but there must be proof of corroborating circumstances of acts and conduct, declarations or other circumstances, tending of themselves to show the guilt of the accused.

The jury were elsewhere told it was for them to determine from the facts shown whether defendant was found in the possession of the property referred to, whether or not they believed it to be stolen property from the premises in question, and whether or not the accused had failed to explain his possession thereof. They were also elsewhere told in the instructions that they were the sole judges as to the facts adduced, and were instructed as to the definition of burglary, presumption of innocence, etc.

Defendant relies upon the case of People v. Boxer, 137 Cal. 562, 70 P. 671, to show error in the instruction, but in that case the instruction read: "If the jury believe * * * that any of the property * * * was stolen * * * and received into possession of either of the defendants. * * *" The court said:

"As already stated, the defendants were upon trial charged with burglary, and, that being the case, the mere fact, if it be a fact, that subsequent to the burglary they received the fruits of the crime into their possession, cannot be said to be a circumstance tending to show their guilt of the crime of burglary. * * *

"This instruction assumes that the defendants may have received the stolen property into their possession after the burglary was committed by other parties. * * * Indeed, the instruction assumes the commission of the burglary by another prior to the possession of the property by these defendants."

We find nothing in People v. Haack, 86 Cal. App. 390, 260 P. 913, 916, that aids the accused here. There an instruction upon the question of possession of stolen property assumed the possession in the accused, and this court then said: "To make it a complete and accurate statement of the law it should have been predicated upon the jury believing from the evidence the fact of the recent possession of the stolen property by the defendant, and, then, that such possession, unless satisfactorily explained, was a circumstance tending to show the guilt of the defendant, and should be taken with other evidence in the case in determining the guilt or innocence of the defendant."

That the instruction under consideration stands as a proper statement of the law is shown by the following cases: People v. Gill, 45 Cal. 285; People v. Velarde, 59 Cal. 457; People v. King, 8 Cal. App. 329, 96 P. 916; and People v. Abbott, 101 Cal. 647, 36 P. 129.

We believe the jury were amply justified in finding the defendant guilty of burglary, and that it was committed in an inhabited dwelling house in the nighttime.

Judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

134 Cal.App. 630

SMITH et al. v. CALIFORNIA PORTLAND CEMENT CO.

Civ. 678.

District Court of Appeal, Fourth District, California.

Oct. 14, 1933.

1. Deeds 🔑38(1).

Deed failing to describe land so that it might be located, and furnishing no means by which description could be made more definite, *held* void.

2. Evidence 🔑343(3).

Record of deed written in Spanish containing purported translation *held* inadmissible in suit to quiet title, where deed failed to sufficiently describe property, translation was not shown to be correct, and no title in grantor was shown.

3. Quieting title 🔑44(3).

In suit to quiet title, evidence *held* to sustain findings and judgment for defendant.

> Evidence showed that plaintiff's predecessors in interest had not been in possession or paid any taxes for over 60 years; that defendant had been in possession for 16 years and its predecessors in interest 40 years; that a patent from the United States was recorded nearly 2 years before the deed under which plaintiffs claimed; that chain of title from patentee to defendant was unbroken; and that judgment quieting title in defendant, in action brought by it, was entered in 1924.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action to quiet title by Petra Valencia Smith and another, administrators of the estate of Ramon Valencia, deceased, against the California Portland Cement Company. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Willedd Andrews, of Los Angeles, for appellants.

Call & Murphey and Walter E. Bennett, all of Los Angeles, and William Guthrie, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

In this action both parties sought to quiet title to a certain parcel of real property. From a judgment in favor of the defendant, the plaintiffs have appealed.

The sole ground of reversal urged is that the court erred in refusing to admit into evidence the county recorder's record of a certain deed. It appears that this deed was written in Spanish, and at the bottom thereof was what purported to be an English translation of the same. The deed was dated September 30, 1869, was acknowledged October 6, 1879, and was recorded May 5, 1882, with the certificate of the recorder that the same was "a full, true and correct copy of that part of the original which is written in English." Omitting the acknowledgment, the purported translation of the deed reads as follows:

"San Bernardino, Sept. 30th, 1869.

"Be it known that by these presents, I, the undersigned sell and convey to Mr. Ramon Valencia all my right, title and interest in all my land which I possess and bounded as follows: On the north by the Cerrito X; on the south by the land of Mr. Ygnacio Molla; on the east by a piece of land of the Jurupa Rancho; on the west by the Chamisal, and containing about 15 or 20 acres, together with house and improvements thereto appertaining, also one day of water, the right to which I have in the artegria (water ditch) Meeks and Daley.

"In testimony whereof I execute this instrument at Sait, Salvador, this 30th day of September, 1869.

"His
"Manuel X Quintana
"Mark

"Witness: M. Carlos Lugan."

This purported translation was read into evidence, and, at the request of counsel for both sides, the court's ruling on its admissibility was reserved and other evidence received. At the close of the appellants' case, the court stated that, in order to clear up the record, the objection to the admission of the deed would be sustained.

[1, 2] A surveyor of long experience, who was a witness for the appellants, testified that it was not possible from the description in this deed to locate on the ground the land attempted to be described therein. No evidence to the contrary was offered. Under these circumstances, and since the writing itself furnishes no means whereby the description could be made sufficiently definite to locate the property, the purported deed was void. Scott v. Woodworth, 34 Cal. App. 400, 167 P. 543. No evidence was offered to the effect that the purported translation into English was a correct translation of the original. Wilson v. Corbier, 13 Cal. 166. Although ample opportunity was given, no evidence was received or offered by the appellants tending to show title in their claimed grantor (Rockey v. Vieux, 179 Cal. 681, 178 P. 712), nor did the appellants offer any proof which would have made the deed, if admitted, of any value to them.

[3] On the other hand, the evidence on behalf of the respondent amply sustains the

findings and judgment. From this it appears that the Ramon Valencia mentioned in the deed died in 1869, and that none of his heirs had been in possession of the property or paid any taxes thereon during a period of more than sixty years prior to the beginning of this action. See, Chapman v. Bank of California, 97 Cal. 155, 31 P. 896; Stevenson v. Boyd, 153 Cal. 630, 96 P. 284, 19 L. R. A. (N. S.) 525; Garrity v. Miller, 204 Cal. 454, 268 P. 622. There was also evidence that the respondent had been in possession of the land continuously for sixteen years, and that its predecessors in interest had been in possession thereof for an additional forty years. While the deed in question was not recorded until May 5, 1882, a patent from the United States government dated May 3, 1879, was recorded on July 10, 1880, and the record shows an unbroken chain of title from the patentee to the respondent.

The court found that the estate of Ramon Valencia, deceased, is not the owner of and has no interest in the real property claimed; that the respondent is, and for a long time has been, the owner thereof; that the respondent and its predecessors for more than twenty years prior to the commencement of this action have been in the continuous, actual, open, notorious, and exclusive possession and occupation of all of said property, claiming to own the same in fee against the whole world; that the same has been improved and used and occupied for farming purposes and for the operation of a cement manufacturing plant; that the land has been fenced for more than twenty years; that all taxes have been paid by the respondent for more than five years continuously next preceding the commencement of this action; that the predecessors in interest of the respondent have successively conveyed the property for a valuable consideration; that in each instance the grantee has been placed in possession of the property, and that all deeds have been recorded; that the respondent and its predecessors in interest, without any notice or knowledge of claims on the part of the appellants, have within the past thirty years made valuable improvements on all of the property claimed; and that during all of said time the heirs and successors in interest of Ramon Valencia, with full knowledge of the construction and making of said improvements, have made no protest against the same and have asserted no claim to the property. The court further found that the appellants are now estopped from asserting any right, title, or interest in or to the property, and that their claims are barred by the various statutes of limitation.

It also appears that long prior to the beginning of this action this respondent brought a quiet title action under the appropriate statute against all persons claiming any title, estate, lien, or interest in this real property, and that under date of August 15, 1924, a judgment was entered quieting its title.

Not only was the deed referred to not admissible in evidence in the state of the record at the time the order complained of was made, but it fully appears that the appellants were in no way injured by the order.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

134 Cal.App. 147

GREGG v. MANUFACTURERS' BLDG. CORPORATION.

Civ. 8847.

District Court of Appeal, First District, Division 2, California.

Sept. 12, 1933.

Rehearing Denied Oct. 11, 1933.

Hearing Denied by Supreme Court Nov. 8, 1933.

1. Divorce 🔑156.

Reconciliation of parties to divorce suit after entry of interlocutory decree embodying property settlement agreement restores their mutual obligations without court proceedings to set aside settlement.

2. Divorce 🔑156.

Evidence in widow's action for her husband's death *held* to sustain trial court's findings that plaintiff and deceased became reconciled after entry of interlocutory divorce decree embodying property settlement agreement.

3. Appeal and error 🔑1050(1).

Erroneous admission of plaintiff's testimony in action for her husband's death that they considered property settlement agreement, embodied in interlocutory divorce decree, void after their reconciliation, *held* not prejudicial to defendant, in view of other evidence.

4. Appeal and error 🔑1008(1).

Findings on ultimate facts cannot be ignored because trial court also made findings on probative matters.

5. Appeal and error 🔑1008(1).

Whether elevator used by tenant's employee, killed by fall down elevator shaft, was passenger elevator, freight elevator, or both, and whether landlord exercised utmost care, *held* for trial court.

6. Landlord and tenant 🔑169(6).

Evidence supported findings that elevator used by tenant's employee, killed by fall down elevator shaft, was passenger elevator, and that landlord did not exercise utmost care.

7. Landlord and tenant 🔑169(6).

In action for death of one falling down elevator shaft, evidence supported implied finding that burr on latch tongue of lock of elevator door could have been discovered upon careful examination by landlord.

8. Negligence 🔑122(1).

Contributory negligence is affirmative defense.

9. Death 🔑58(1).

In death action, presumption exists that decedent used due care for his own safety and was not contributorily negligent, absent direct evidence thereon.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Anna M. Gregg against the Manufacturers' Building Corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 25 P.(2d) 43.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

W. N. Mullen, of San Francisco, for respondent.

PER CURIAM.

The petition for a rehearing is denied. The opinion filed September 12, 1933 (Cal. App.) 25 P.(2d) 43, is modified to read as follows:

This is an appeal from a judgment for the plaintiff in an action for damages for personal injuries.

On the 7th day of February, 1931, Oliver T. Gregg was employed by the Standard Plating Works, a corporation, at 288 First street, San Francisco. He had been employed by that company for about four years in the lacquer spraying room on the fourth floor of the annex to the building. On the morning mentioned he died as the result of injuries received at about 8 o'clock when he fell into the elevator shaft. The deceased had been accustomed to take the elevator to and from his place of employment. He was a married man, and left him surviving Anna M. Gregg, his wife. The husband was at the time of his death about forty years of age and the plaintiff forty-one years of age. They were married on the 1st day of June, 1927. There were no children of the marriage.

At the time of the death of the deceased, the defendant, the Manufacturers' Building Corporation, was the owner of the building which contained the elevator shaft in which the accident happened. There were in the building two elevator shafts. One was in the front part of the building, and in that shaft an elevator was operated for passengers only. In the rear of the building was another elevator shaft which was equipped with automatic devices, and at times was used for freight, and at other times four of the employees of the Standard Plating Works used that elevator for the purpose of going to and coming from their work. The Manufacturers' Building Corporation had a contract with Spencer Elevator Company under which the latter serviced and maintained the elevator last mentioned. That elevator was used by the three tenants and their employees. Jesse Seward, an employee of one of the tenants, was authorized to act as safety man. If the lights in the elevator went out, he replaced them; if other repairs became necessary, he notified the Spencer Elevator Company, and it attended to such repairs. On the morning of the accident, and shortly prior thereto, the deceased was seen on the first floor passing toward the door of the elevator. Shortly afterwards one of the witnesses saw two hands extended and going down the elevator shaft. Those were the hands of the deceased. The elevator in question was so constructed that the elevator door would not open if the apparatus was in proper working condition when the elevator was not at that floor. When the elevator left any floor going up or coming down, the elevator was so constructed that the doors automatically closed. If the closing was effective, the doors could not be opened until the elevator was again brought to that floor. The elevator was equipped with lights, and, when it was opposite a certain floor, the light was visible through the translucent pane of glass located in the outer door. There was also an inner door constructed of lattice work, but it did not greatly obstruct the rays of light. At the time of the accident, the elevator was at the fourth floor. One desiring to use it could do so from the first floor only by manipulating a rope which extended up and down to the left of the elevator door. About sixteen hours before the accident the representative of the Spencer Elevator Company inspected the elevator. After the accident had happened, W. J. Cove, the deputy state inspector, and certain other experts, soon went to the building to make another inspection. Immediately after the accident, and when the elevator was examined, the lights were burning. When the experts were making their examination, they examined the apparatus for the purpose of seeing whether the doors locked at the first floor when the elevator was moved. On some tests the doors locked and on some tests they did not. On one occasion they forced the lock to open. Thereafter in making a careful examination they found a burr on the latch tongue of the lock. As to when that burr was created the evidence did not accurately disclose. When the burr was removed, the locking device operated properly.

The plaintiff brought this action as the surviving widow of the deceased. It was tried before the court sitting without a jury, and it made findings against the defendant and fixed the damages in the sum of $14,000. The defendant made a motion for a new trial, which was denied, and thereupon it appealed from the judgment.

[1-3] The first point made by the defendant is that the judgment was excessive. In this connection it calls to our attention that the plaintiff and deceased were unhappily married; that the plaintiff's husband was cruel to her; that he was not affectionate toward her; that he stated he did not love her; and that for several weeks in the year 1930 he did not live with her. Continuing, the defendant states that the plaintiff commenced an action for a divorce and an interlocutory decree was entered on September 13, 1930. Prior to the entry of the decree the parties entered into a property settlement agreement. The decree was based on the grounds of extreme cruelty, and by the terms of the decree the property settlement agreement was approved and made a part of the decree. Prior to the date of the accident no proceeding had been brought in court to set aside the interlocutory decree, but there was testimony that the parties had been reconciled and were living together as man and wife on the day of the accident. The plaintiff testified over the objection of the defendant that the parties had considered the property settlement as null and void. In reply, the plaintiff calls to our attention that during the trial she took the stand as a witness in her own behalf and gave evidence which, if the trial court believed it, clearly sustained the findings made by the court. In this connection she testified that for several weeks immediately preceding the accident she and the deceased were living together as man and wife. In corroboration of her testimony, she also produced the evidence of some of her neighbors who testified to facts tending to corroborate her testimony. In making this point, the defendant lays much stress on the property settlement and the fact that no court proceeding had been brought to set it aside. No doubt a court proceeding is one proper method, but it has been held that, if the parties become reconciled, their mutual obligations are, for the time being at least, restored. Gould v. Superior Court, 47 Cal. App. 197, 200, 201, 191 P. 56; Estate of Boeson, 201 Cal. 36, 42, 43, 255 P. 800. In short, the evidence on the point was such that the trial court might have found the fact either way; but it may not be said the finding that the plaintiff and deceased had become reconciled is not sustained by the evidence. As a part of this point, the defendant also complains of one ruling on the admission of evidence. It asserts that the plaintiff should not have been allowed to testify that the husband and wife after the reconciliation considered the property settlement agreement as null and void. That contention is not without merit. However, if we take into consideration all of the other evidence which was properly admitted, it is perfectly clear the error complained of is not shown to be prejudicial.

[4-6] The defendant attacks the findings that the instrumentality was a "passenger elevator" and that "defendant did not use the utmost care and diligence of very cautious persons." The attacks as made have no merit. The plaintiff filed a complaint in which she alleged that "the defendant carelessly and negligently failed and neglected to properly keep said elevator and said apparatus for operating the same in order and repair." The defendant filed an answer in which it interposed many denials. It also pleaded that the decedent was guilty of contributory negligence. No other issues were presented by the pleadings. The trial court made findings on all of the material issues. It also made the findings now attacked by the defendant. But the latter findings are but findings of probative facts. The findings on the ultimate facts support the judgment. Those findings may not be ignored because findings on probative matters were also made. Rankin v. Newman, 107 Cal. 602, 40 P. 1024, 41 P. 304. As to the exact nature of the instrumentality and how it was used, much evidence was introduced. Whether it was a passenger elevator, a freight elevator, or both, was a question of fact addressed to the trier of the facts. Wilmarth v. Pacific Mut. Life Ins. Co., 168 Cal. 536, 143 P. 780, Ann. Cas. 1915B, 1120; 10 Cal. Jur. 211. During the trial the plaintiff assumed the burden of proof and introduced evidence supporting or tending to support her allegations. The defendant introduced evidence which it claimed showed or tended to show that it exercised the utmost care and diligence of very cautious persons. A conflict arose, and the determination of that conflict rested with the trial court. Examining all of the evidence that was before the trial court, we are not inclined to say that court erred in holding the instrumentality was a carrier of persons, and that defendant was bound to exercise the utmost care. In Treadwell v. Whittier, 80 Cal. 574, at page 585, 22 P. 266, 269, 5 L. R. A. 498, 13 Am. St. Rep. 175, the court said: "The defendants used their elevator in lifting persons vertically to the height of forty feet. That they were carriers of passengers, and should be treated as such, we have no doubt. The same responsibilities as to care and diligence rested on them as on the carriers of passengers by stage-coach or railway." Then on page 591 of 80 Cal., 22 P. 266, 271, 5 L. R. A. 498, 13 Am.

St. Rep. 175, the court said: "The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of very cautious persons, and responsible for the slightest neglect." In Springer v. Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464, the Supreme Court of Illinois cited and quoted from Treadwell v. Whittier, supra. Continuing, the court quoted from other cases that the operator of a freight train is bound to exercise the same care for passengers being carried as is exercised by a train that is wholly a passenger train. See, also, Fisher v. Southern Pac. R. R. Co., 89 Cal. 399, 405, 26 P. 894. Thereupon the court ruled that there was no reason, in principle, why the analogy held to exist between passenger and freight trains as common carriers does not exist between passenger and freight elevators, in cases where the owners of freight elevators invite the carriage of passengers thereon for hire, and that the proprietor of an elevator run for the use of tenants of an office building is a carrier of passengers for hire. The proprietor's compensation is the rental paid him by the tenant. To the same affect, see Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929; O'Rourke v. Woodward, 201 Ala. 265, 77 So. 679; McKnight v. S. S. Kresge Co., 285 Pa. 489, 132 A. 575. Our attention has not been called to any authorities to the contrary. Blanco v. Marian Realty Co., 204 Cal. 145, 266 P. 798, contains nothing to the contrary. In that case the court was considering a so-called sidewalk elevator which was used for freight purposes only and was not a passenger elevator in any sense of the term.

[7] Calling attention to the burr hereinabove mentioned, the defendant asserts that the defect was not discoverable upon careful examination. Much evidence on that subject was introduced. The defendant does not claim any error was made in ruling on the admission or exclusion of evidence. There was some evidence that the door had sagged and the sagging of the door caused the latch in the lock to hit the plate; that in hitting the plate the burr was made on the end of the latch. Clearly it may not be said as a matter of law that these defects could not have been discovered by the exercise of care. It follows that the implied finding against the defendant may not be disturbed.

[8, 9] The next point made by the defendant is that the decedent was guilty of contributory negligence as a matter of law. That is an affirmative defense. As shown above, no witness saw anything except two hands going down the shaft. There was not therefore any direct evidence that the decedent was or was not guilty of contributory negligence. If we resort to indirect evidence, then it must be conceded at once that it will be presumed the decedent used due care for his own safety, and, secondly, it will be presumed he was not guilty of contributory negligence. In the case of Jacobi v. Builders' Realty Co., 174 Cal. 708, at page 710, 164 P. 394, 395, L. R. A. 1917E, 696, speaking of a self-locking automatic elevator, the court said: "Specifically, as to this elevator, there was no attendant, nor even any sign to warn a passenger of this defect either in its construction or operation, or both. No person using it was informed that a door which was presumed to be tightly locked unless the cage was at its floor could be opened when it was not there. Ignorant of this, persons intending to use the elevator come to rely, and to a certain extent were entitled to rely, upon the fact that if they could open the door at all it would be because the cage was there." And thereafter the court stated as follows: "Under its second proposition appellant contends that the negligence of the deceased is established by virtue of the fact that if on opening the door she had used her eyesight, as she was in duty bound to do, she would have perceived that the cage was not there, and that it was therefore contributory negligence upon her part to have made the fatal step. We have hereinbefore sufficiently outlined the course of conduct which the deceased doubtless pursued, and also the conditions which prompted her to that course of conduct. It has thus been made to appear, and indeed the positive evidence is to that effect, that people, using such an elevator and finding that in general practice when such an elevator was operating properly a door could not be opened unless the cage was at that floor, had come to rely, in determining the presence or absence of the cage, upon their ability or inability to open the door. The deceased unquestionably opened this door or found it open. In either case (there being no attendant to warn or any other kind of warning given) it was not at least unnatural that she should have placed reliance upon the conditions which she found. Whether under these circumstances she should also have looked, or be convicted of negligence, presents a question of reasonable argument before a jury, but one which cannot be resolved against plaintiffs as matter of law. The language of the Supreme Court of New York is here appropriate: 'An elevator for the carriage of persons is not, like a railroad crossing at a highway, supposed to be a place of danger to be approached with great caution; but, on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen, or make a special examination.' Tousey v. Roberts, 114 N. Y. 312, 11 Am. St. Rep. 656, 21 N. E. 399." A similar ruling was made as to an elevator having an

inside door as well as an outside door and a light within the elevator. McKeon v. Lissner, 193 Cal. 297, 304, 223 P. 965; and, see, Chambers v. Slattery, 147 Wash. 538, 266 P. 185, 57 A. L. R. 959, and notes.

We find no error in the record. The judgment is affirmed.

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134 Cal.App. 634

LANE MFG. CO. v. RAYMOND GRANITE CO.

Civ. 9105.

District Court of Appeal, First District, Division 2, California.

Oct. 16, 1933.

Rehearing Denied Nov. 15, 1933.

Appeal and error ⚿1008(1), 1011(1).

Findings on conflicting evidence, or in accordance with uncontradicted evidence, in action on contract for sale of machinery parts, *held* conclusive.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Lane Manufacturing Company against Raymond Granite Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Treat & Ogden, of San Francisco, for appellant.

Bronte M. Aikins and Oliver B. Wyman, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on an express contract for the sale of certain machinery parts for use upon a rotary stone saw and upon an implied contract for freight paid for parts shipped by defendant to plaintiff. The defendant had judgment.

The complaint alleged: "That said machinery or parts of machinery above mentioned were ordered by the defendant for the purpose of replacing the trucks, boxes, glands and axles at that time in use upon the said Parker rotary stone saw. The said defendant agreed to pay for the said machinery so ordered at the time that the old parts which were to be replaced as aforesaid had been repaired and placed back on said Parker rotary stone saw by the said defendant and did represent that said replacement of said parts would be within a period of one (1) year."

On August 18, 1925, these parts were shipped to defendant but were not used until some time in the year 1928. On May 14, 1928, the defendant shipped the old parts to plaintiff, freight charges collect. The plaintiff paid the freight, and this amount, added to the invoice price of the new parts, fixes the sum sued for.

In its answer the defendant denied that it had represented to plaintiff that the old parts would be replaced by the new within one year or at any time other than as became necessary in the due course of its business. By way of affirmative defense the defendant pleaded that, prior to the 21st day of July, 1925, defendant agreed to purchase from the Parker Rotary Stone Saw Company a certain stone saw equipped with certain parts all according to specified dimensions; that the saw company contracted with the plaintiff for the manufacture of such parts according to such specifications; that the plaintiff manufactured and delivered to defendant such parts; but that, through the carelessness of plaintiff, the parts so manufactured and delivered were defective and not according to the specifications; that thereafter the defendant installed the saw and for the first time discovered that the parts were not in accordance with the agreement; that, in reliance upon its said contract, the defendant made agreements to deliver a large quantity of cut granite and was compelled to use the defective parts; that defendant complained to the plaintiff of the defective condition of the parts delivered and that the plaintiff thereupon agreed to furnish new parts on the condition that the defendant would return the old parts to plaintiff for alteration to conform to the specifications, and that defendant would pay for the new parts when the old or original ones had been returned to defendant in proper condition. It was then alleged that the old parts were returned to the plaintiff in accordance with this agreement, that the new parts were installed on the saw, but that they were at no time replaced by the old parts. The charge for freight is answered by the allegation that the shipment was made to the plaintiff at its special request.

The trial court, upon evidence which is in some parts conflicting, found in accordance with these pleadings: That the machinery which is the subject of the action was delivered to defendant upon the express understanding that it should be paid for "when the old parts which were so to be replaced as aforesaid had been repaired and placed back on" the stone saw by the defendant; that this time was not reached because the old parts were returned to plaintiff at its own request and were not repaired and placed back on the saw. The findings and judgment are therefore founded strictly on

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

the issues raised in plaintiff's complaint, with the exception that it was there pleaded that the replacement should occur within a period of one year. This latter allegation the trial court found to be untrue and there is no evidence which would support a contrary finding.

The appeal is a simple retrial of the questions of fact tried by the lower court. The questions of law assigned and argued by the appellant are not applicable to the issues alleged in the complaint and before the court. The complaint alleged an express contract which fixed the time of payment dependent upon a certain condition. The trial court found the allegation true and that the fulfillment of the condition was prevented by plaintiff. Upon this the evidence is not contradictory. The findings support the judgment and are conclusive on this appeal.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

CALIFORNIA REPORTER

IN VOLUME

26 PACIFIC REPORTER
SECOND SERIES

219 Cal. 292

ANSELMO et al. v. SEBASTIANI et al.

Sac. 4733.

Supreme Court of California.

Oct. 27, 1933.

1. Mechanics' liens 🔑93.

In action to foreclose mechanic's lien, whether building was adequate to serve purposes for which built *held* immaterial, where it was erected according to plans and specifications furnished by lessee having contract to purchase.

2. Appeal and error 🔑983(3).
Mechanics' liens 🔑291(6).

Area to be included in order of sale on foreclosure of lien for erection of building is fact question determinable largely within trial court's discretion, which will not be disturbed unless abused (Code Civ. Proc. § 1185).

3. Mechanics' liens 🔑182.

Determination of area to be covered by mechanic's lien for erection of building must take into consideration intended use for which building is erected (Code Civ. Proc. § 1185).

If building is erected for use as a separate and distinct unit, area of land required for its convenient use may properly be limited to an area necessary for ingress and egress, but, if its use is dependent on, and connected with, uses made of other buildings or uses made of other portions of tract on which it is situated, then, if all the larger tract is required for "the necessary and convenient use" of building involved, such larger tract may properly be included in order of sale.

4. Mechanics' liens 🔑281(1).

Evidence sustained finding that entire 8-acre tract on which preserving building erected for use in connection with other buildings used in winery was necessary "for convenient use and occupation" of preserving building, within statute (Code Civ. Proc. § 1185).

There is a difference between the "necessary and convenient use" within Code Civ. Proc. § 1185, which includes the purpose for which the building is erected, and a distinct and separate use which may prove profitable in the operation or use of the building on which the lien is sought to be foreclosed. The fact that the use might prove profitable cannot be considered unless it is a "necessary and convenient use" and one contemplated in the erection of the building.

[Ed. Note.—For other definitions of "Convenient Use" and "Necessary," see Words & Phrases.]

5. Mechanics' liens 🔑161(4).

In action to foreclose mechanic's lien for erecting building under cost plus contract, interest *held* properly allowed from date of filing of complaint, though time of payment was not mentioned in contract (Civ. Code, § 3287).

Record showed that, shortly after filing of complaint, plaintiffs, mechanic lienors, furnished to defendants a bill of particulars showing every item of cost incurred in erection of building, and, since amount of indebtedness or amount owing could be calculated and determined from statement rendered, and statement was found to be true and correct, it was a matter of mere calculation within statute, accuracy of bill of particulars rendered by plaintiffs not being questioned at trial.

In Bank.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Angelo Anselmo and another against Samuel Sebastiani and others. From an adverse judgment, named defendant and a certain other defendant appeal.

Affirmed.

Prior opinion, 23 P.(2d) 105.

Charles M. Jones, of Stockton, and Albert Picard, of San Francisco, for appellants.

Glenn West, of Lodi, for respondents.

PER CURIAM.

After consideration of this cause, we hereby adopt as our opinion herein a portion of the opinion prepared by Mr. Justice Plummer for the honorable District Court of Appeal, Third Appellate District, as follows, to wit:

The plaintiffs had judgment against appellants for the foreclosure of a lien for and on account of the erection by the plaintiffs of a certain building upon a tract of land belonging to the defendants situate in the town of Woodbridge, county of San Joaquin. From this judgment the defendants Sebastiani and Woodbridge Vineyard Association prosecute this appeal.

It appears from the record that on or about the 6th day of December, 1929, the defendant Salvatore Castorina entered into an agreement with the plaintiff to erect a certain structure known as a "preserving building," to be situate on the premises belonging to the appellants. The building was erected on a portion of the premises which had been leased by the owners to Salvatore Castorina. It appears that at the time mentioned the appellant Sebastiani had a contract for the purchase of the premises, from the appellant Woodbridge Vineyard Association, and on January 28, 1930, the premises involved herein were conveyed by the Woodbridge Vineyard Association to the appellant Samuel Sebastiani. The premises involved are described as two parcels of land, one containing 5.49 acres and the other as containing 2.5 acres. The parcels, however, are contiguous, and really constitute one tract, and at all the times herein mentioned was known as the "Woodbridge Winery." The premises upon which the preserving building was erected contained five other buildings, all used in connection with the winery. The building erected by the plaintiffs was to be used as a part of the plant. It was not, and is not, in addition to any building theretofore erected and being used by the Woodbridge Winery, but was a building designed to be used in connection therewith in the storing and preservation of pumice, until such time as the pumice might be used in the manufacture of alcoholic and such other by-products as might be obtained therefrom. The pumice to be stored in the preserving building was the refuse of grapes, such as seeds and skins, after the juices had been extracted therefrom in the process of making grape juice and wine, carried on in the other buildings, the pumice then being conveyed from the building just referred to and stored in the building, and to be stored in the building erected by the plaintiffs known as the preserving building.

The contract for the building was oral, and was upon a cost plus basis, to wit: That the plaintiffs were to furnish all the material, labor, etc., erect the building according to plans and specifications furnished by an architect, and were to receive as compensation 10 per cent. in addition to the cost.

After the completion of the building, payment not having been made therefor, the plaintiffs filed a lien in which it is set forth that the building cost the sum of $4,527.80, plus 10 per cent. agreed to be paid to the plaintiffs for erecting the building, making a total sum of $4,980.58. Not having received payment, this action was begun for the foreclosure of the lien filed by the plaintiffs. Judgment went for the plaintiffs for the full amount of the lien plus 10 per cent., as just stated, together with interest from the date of the beginning of the action, less the sum of $500 paid on account.

Upon this action the appellants contend that the building was not completed substantially according to the plans and specifications, and that the building was useless for the purposes for which it was constructed, etc.; that the area of land decreed to be sold was far in excess of the land containing a convenient space about the building required for its convenient use and occupation.

It is further contended that the court was in error in allowing interest from the 18th day of March, 1930, the date of beginning of the action, and that the interest should have been allowed only from the date of the entry of judgment.

[1] The court found, upon conflicting evidence, that the building was erected according to the plans and specifications. Whether the building erected according to the plans and specifications was or was not, or is or is not, adequate to serve the purposes for which it was built, is immaterial. The defendant Castorina furnished the plans and specifications, and directed the modifications thereof. The plaintiffs, as found by the court, constructed a building, as we have just stated, according to the plans and specifications. It would serve no useful purpose to review the conflicting testimony relative to certain alleged defects, and it suffices to state that a review of the testimony shows that the findings of the court are amply supported. The testimony is not set out in the briefs, but reference is made to the transcript which we have examined.

The real controversy presented by the appellants relates to the area of land ordered sold, and the allowance of interest. The complaint, after describing the land upon which the buildings to which we have referred are situate, and the erection of the preserving building, contains the following allegation: "That all of said land is required for the reasonable and convenient use of said improvements and addition to said building and structure, to-wit: The addition to said winery and fruit juice factory."

We will set forth the testimony showing the intended use of the building erected by the plaintiffs, as it relates to the other buildings situate and used on the same tract of land, being testimony of John T. Hunt, witness for plaintiff:

"Q. You have looked over this property, have you? A. Yes, sir.

"Q. Approximately 8 acres that is called for in the description set out in the claim of lien? A. Yes, sir.

"Q. And the buildings are on that property all told? A. Well, there is a big place where they keep all the wine vats, a winery in general.

"Q. And then there are office buildings? A. Yes, sir. A still house and the sherry house and this pulp house.

"Q. And there are roadways into the winery and out? A. Yes, sir; there would have to be to get around those buildings.

"Q. And also a spur-track? A. Yes, sir.

"Q. And this preserving house which was built on these plans and specifications, which you and Anselmo built, is situated right next to the winery and the other buildings? A. Yes, right where they crush the grapes, within 16 or 20 feet.

"Q. How was it used in connection with the winery? A. You mean what they use the pumice for?

"Q. What is its connection with the rest of the building? A. In order to preserve the pumice after the juice is taken out of the grapes.

"Q. That is taken out of the grapes in the winery part? A. Yes, sir, and then this pumice is conveyed over a distance of about 15 or 20 feet and then dropped into this preserving house.

"Q. That is the house that you and Anselmo constructed? A. Yes.

"Q. How is it conveyed over? A. It has a little conveyor there.

"Q. Kind of an endless belt? A. And chain.

"Q. Do the winery and the preserving house use the same spur track? A. They would have to.

"Q. And the same offices? A. Yes.

"Q. And the same roadways where the trucks drive in there? A. Yes, sir.

"Q. Now, these buildings and improvements which you have mentioned, including the winery, office buildings and preserving house building and all other improvements which you have mentioned, practically cover the entire 8 acres? A. Yes, sir, the entire 8 acres.

"Q. Also a part of the 8 acres there used for dumps, pumice piles? A. Yes, sir; instead of it being put out like that, it is put into this house."

The ground floor of the preserving house was approximately 26x63 feet in area. We do not find any statement of the height of the building. From the testimony which we have quoted it is clear that the preserving building was intended for use in connection with the other buildings constituting the plant known as the "Woodbridge Winery," that the roadways, spur tracks, and drives referred to were and are all necessary for the use of the preserving building, and that at least a portion of the unoccupied tract of land described in the complaint was and is necessary for the piling of pumice and refuse matter after the alcoholic content and other by-products should be extracted therefrom. The pumice out of which the alcohol and by-products were to be extracted must come from other portions of the plant. The only testimony offered by the appellants on this question was that the preserving building stood at a distance of some 25 or 30 feet from the nearest structure on said tract of land. Not one word is offered concerning what might be necessary or convenient for its use, or as to any use to which said building might be devoted other than it was intended for preserving purposes, as we have stated. The preserving house, standing alone under the conditions disclosed, would have neither use nor salable value.

Section 1185, Code of Civil Procedure, authorizes the court to include in the order of sale in foreclosing a lien, not only the land upon which the building or structure is erected, but also a convenient space about the same, or so much as may be required for the convenient use and occupation thereof. We may here state that the record shows the building was erected with the knowledge of the owner of the premises, and that no limiting notice as to responsibility was ever posted on the premises or filed as required by law. The lease under which the defendant Salvatore entered upon the premises contemplated the erection of the building involved in this action.

[2, 3] Determining the area of land that shall be included in the order of sale upon the foreclosure of a lien for the erection of a building is largely within the discretion of the trial court, and, unless abused, will not be disturbed. The determination of this area must take into consideration the intended use for which the building is erected. If erected for the purposes of use as a separate and distinct unit, then the area of land required for its convenient use may properly be limited only to an area necessary for ingress and egress, but, if its use is dependent upon and connected with the uses made of other buildings or the uses made of other portions of the tract of land upon which it is situate, then, if all of the larger tract is required for the "necessary and convenient use" of the building involved, such larger tract may properly be included in the order of sale.

In the case of California Corrugated Culvert Co. v. Stewart, 215 Cal. 120, 8 P.(2d) 1013, the facts show the erection of a barn and the construction of an elevator to store a crop of rice that might be grown upon a tract of land embracing 729 acres. The trial court ordered a sale of the entire 729 acres. Subsequent thereto it made an order limiting the number of acres that should be sold. From this subsequent order the plaintiffs appealed. The last order was vacated and the cause remanded to the trial court to do one of two things: First, enter judgment for the plaintiffs on the findings of fact and conclusions of law as originally made; or, second, to again proceed and determine the extent of the area required for the convenient use and occupation of the barn and elevator. The cause just referred to was, as here, tried upon the theory that the whole of the farm was necessary for the convenient use and occupation of the buildings. The elevator could not be used for conveying rice into the barn for storage purposes unless there was rice raised for that purpose; nor could the barn be used for the storage of rice without the rice first being produced. In other words, the holding of the court in such cases should find a basis in the uses and purposes for which the building is erected, in determining the area of land necessary and convenient for its use. A residence might only require sufficient land to afford ingress and egress, which would not be a rule applicable to buildings intended for other uses.

The arguments of the appellants herein appear to be based upon the theory that all the land that can be included in an order of sale is only such as may be required for ingress and egress. As stated, the land required is a question of fact to be determined by the trial court. California Corrugated Culvert Co. v. Stewart, supra.

[4] As stated in 17 California Jurisprudence, 154: "The land about a building, required for its convenient use and occupation, is such as is necessary to the enjoyment of the building for the purpose of its construction. Accordingly, the use to which a building is to be put may determine the land necessary to its convenient use and occupation, but this does not include adjacent areas or structures necessary merely to create business or custom or furnish supplies for the enterprise conducted in the building." The purpose for which the building in question was erected is intimately and directly connected with the operations carried on in the adjacent buildings as to become an essential part and parcel of the plant known as the "Woodbridge Winery." The work carried on in the preserving house could not be carried on disconnected with the processes conducted in the other buildings. Nor could the complete process of extracting all of the commercial elements from the grapes crushed be completed in the adjacent buildings without the use of the preserving house.

Appellants call our attention to the case of Gregg v. H. & M. Drilling Co., a Corporation, et al., 92 Cal. App. 189, 267 P. 903, where it was sought to enforce a lien upon a larger tract of land for the value of gravel placed upon a short strip of roadway leading thereto. The conclusion was that the strip of land could be used as a roadway, disconnected with the larger tract of land. In that case reference is first made to Cowan v. Griffith, 108 Cal. 244, 41 P. 42, 49 Am. St. Rep. 82, where an attempt was made to establish a mechanic's lien on a forty-acre tract of land upon which a residence had been constructed. Likewise, reference is made to the case of Tunis v. Lakeport, etc., Ass'n, 98 Cal. 285, 33 P. 63, 447, where an attempt was made to foreclose a mechanic's lien on a sixty-acre tract of ground upon which an hotel had been erected.

In the case of Cowan v. Griffith, supra, the facts show that the residence could be occupied and used conveniently without any reference to the forty-acre tract. Likewise, in the case of Tunis v. Lakeport, etc., Ass'n, supra, the facts show that the hotel could be used irrespective of the race track, corrals, etc., situate upon the sixty-acre tract of land. There is a difference between the "necessary and convenient use," which includes the purposes for which the building is erected, and a distinct and separate use which may prove profitable in the operation or use of the building on which the lien is sought to be foreclosed. The fact that the use might prove profitable cannot be considered, unless it is a "necessary and convenient use," and one contemplated in the erection of the building.

Thus, as epitomized in 18 Ruling Case Law, p. 948: "Generally, however, a mechanic's lien is enforceable against the land on which the building or improvement stands and also the land thereabout, used with it, and necessarily or reasonably convenient to its use. As illustrating the different applications of this rule, it has been held in one case, under a statute extending a mechanic's lien on a building to the land necessary for the convenient use and occupation thereof, that the court cannot set aside forty acres with a dwelling as necessary for its convenient use, the court saying that the statute does not contemplate that the dwelling shall include lands sufficient to support the owner while living therein, while on the other hand, and on the idea that a farm is a unit and that it is immaterial whether it is large or small, a lien has been granted for farm buildings erected on a contiguous tract of 350 acres made up of several farms owned originally by different owners, where it was the intention to use the whole of the land with such buildings."

The question of use and purpose for which the improvement is intended, and therefore the area of land that should be included in the order of sale, is well illustrated in the case of Western Well Works, Inc., v. California Farms Co., 60 Cal. App. 749, 214 P. 491, where it was held that a small circle of land surrounding a well capable of furnishing 2,000 gallons per minute did not meet the requirements of "necessary and convenient use," and the whole tract of land upon which the well was dug, and for which the well had a capacity of furnishing sufficient water, should be included within the order of sale. A mere showing that the nearest building to the structure erected by the plaintiffs is 25 or 30 feet away has no bearing upon the question of "necessary and convenient use" or the purposes for which the structure was erected. That the purposes and intended use for which the building is erected or improvement made is to be considered in determining the tract of land necessary and convenient for its use is fully sustained by the extended notes appended to the case of Wirsing v. Pennsylvania Hotel & Sanitarium, 226 Pa. 234, 75 A. 259, as reported in 26 L. R. A. (N. S.) 831.

[5] Was it error for the court to allow interest from the date of the filing of the complaint? The record shows that, shortly after the filing of the complaint, the plaintiffs furnished to the defendants a bill of particulars showing every item of cost incurred in the erection of the preserving building. Section 3287, Civil Code, reads: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day," etc. The contention is made that the amount which the plaintiffs are entitled to recover in this case is unliquidated, and therefore interest should not be allowed until the entry of judgment. This contention, however, is not determinative of the question of interest. If the amount of the indebtedness or the amount owing can be calculated and determined from the statements rendered by the plaintiffs to the defendants, and that statement is found to be true and correct, it is a matter of mere calculation. The court in the instant case found the costs just as set forth by the plaintiffs in their bill of particulars furnished the appellants.

In 8 California Jurisprudence, 791, we find the following: "The fact that proof of the market value of goods is required to establish the amount of a claim does not render it incapable of being made certain by calculation, so as to prevent the allowance of interest under section 3287 of the Civil Code. Nor will the proof of two market values, as of goods if uninjured, and goods as injured, do so. The fact that the amount due depends upon whether the plaintiff had a third or a half interest in a partnership, but is certain in either case, does not render the amount unliquidable. And the existence of a setoff or counterclaim does not create such an uncertainty as will prevent the allowance of interest, even though it be itself unliquidated. A dispute as to the price agreed, or as to the amount of work done or its cost, will not prevent the allowance of interest. * * * Where the data necessary to determine the amount due are supplied to the debtor by an invoice or statement, he will be charged with interest for failure to pay."

Again, in 15 Ruling Case Law, 7, the rule is thus stated: "While, as a general rule, interest is not allowable on unliquidated demands, yet it has frequently been held that interest may be allowed as damages, even in the case of unliquidated demands, where the latter are capable of ascertainment by calculation or where they may be determined by reference to well-established market values, together with computation."

It does not appear that the accuracy of the bill of particulars rendered by the plaintiffs to the appellants was questioned at the trial of this action. It was urged that certain work was not done, and that the work done was not of the value set forth in the bill of particulars, and a counterclaim was set up in the answer. All of these matters were found against the contention of the appellants. This brings the circumstances within the case of McCowen v. Pew, 18 Cal. App. 482, 123 P. 354, where, under similar circumstances, interest was allowed.

The action in this case is not based wholly upon quantum meruit; it is based primarily upon the contract to pay the cost of the building, plus 10 per cent. The value of the building after its construction, or its adaptability to the uses and purposes intended, are immaterial. The item of costs being presented, the amount thereof was easily ascertained. It appears that there was a payment of the sum of $500 made to the plaintiffs after the completion of the building, and some promises made as to the payment of the amount still remaining due to the plaintiffs. This we need not consider, further than to state that the court allowed a credit of $500 on the amount claimed by the plaintiffs. There is a difference between the amount claimed by the plaintiffs and the amount allowed by the court in the sum of $23.08. Appellants urge that this shows appellants' claim to be unliquidated and incapable of ascertainment by calculation. This sum is so negligible in quantity that we pass it by without further mention.

The case of Combs v. Eberhard, 120 Cal. App. 25, 7 P.(2d) 338, may be distinguished from the case at bar. In that case interest was allowed on account of claims and liens filed against the property belonging to the defendant, other than for work and labor and materials furnished by the contractor under the contract, and involved the question of quantum meruit only.

Nor is the case of Kimes v. Davidson Investment Co., 101 Cal. App. 382, 281 P. 639, controlling here. In the case just mentioned the defendant had breached its contract, and the plaintiff was suing for the value of the work and labor performed. It was clearly a case of quantum meruit. The amount due could not be calculated nor ascertained until the judgment of the court was entered.

It may be considered that time of payment was not mentioned in the contract, but under the rule enunciated in 17 California Jurisprudence, p. 220, the time would run from the date of filing the complaint, which date was taken by the trial court as the time from which interest should be calculated.

Nor do we think that the case of Mabrey v. McCormick, 205 Cal. 667, 272 P. 289, precludes the allowance of interest to the plaintiffs in this action. The contract in that case was not upon a cost-plus basis, as is shown by the following statement: "Plaintiffs claim interest from the date of the third bill rendered by them, at which time they state the amount due became certain (section 3287, Civ. Code). Had the court found for them, this contention would be sound. Here, however, the record shows no refusal of defendants to settle with plaintiffs under the true contract. Defendants being ready and willing to settle thereunder, were not at fault, because plaintiffs not only abandoned the work, but insisted on recovery upon a different basis. In other words, by reason of the action of plaintiffs, the amount due was unliquidated until determined by judgment of the court; hence interest prior to judgment, as damages, was not allowable"—citing cases. The opposite is the truth in the instant case as found by the trial court. We conclude that interest was properly allowed.

The judgment is affirmed.

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219 Cal. 290

MONSON et al. v. FISCHER.

S. F. 14889.

Supreme Court of California.

Oct. 27, 1933.

1. Appeal and error 🔑1180(1).

Reversal of judgment sets case completely at large except as restricted by opinion of appellate court.

2. Costs 🔑247.

Defendant, as part of costs on appeal after reversal of judgment for plaintiffs, *held* not entitled to allowance of item incurred as costs at trial (Code Civ. Proc. § 1024).

3. Appeal and error 🔑82(4).

Order taxing costs on appeal after reversal of judgment is "special order made after final judgment" and, therefore, appealable (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Olof Monson and another, copartners, etc., against Martha W. Fischer. From an order taxing costs on appeal after reversal of judgment in favor of the plaintiffs, the plaintiffs appeal.

Order modified, and, as modified, affirmed.

For prior opinion, see 19 P.(2d) 269.

Leicester & Leicester and Norman A. Eisner, all of San Francisco, for appellants.

Percy E. Towne, Richard tum Suden, and Peter A. Breen, all of San Francisco, for respondent.

PRESTON, Justice.

This is an appeal from so much of an order taxing costs on appeal as allows to defendant an item of $116 incurred by her as costs on trial of the action in the court below.

The trial on its merits resulted in judgment for plaintiffs, which was reversed on appeal. Monson v. Fischer, 118 Cal. App. 503, 5 P.(2d) 628. Under section 1034 of the Code of Civil Procedure and within the time allowed, defendant filed a memorandum covering her costs on appeal and included therein the aforesaid item. Plaintiffs moved to retax said costs by striking from the bill said item. This motion was denied, and plaintiffs thereupon appealed from so much of the order as included the item.

[1-3] This item could properly be allowed only after a final judgment for defendant in the trial court (section 1024, Code Civ. Proc.); it was no part of her costs on appeal. The reversal of the judgment sets the case completely at large, except as restricted by the opinion of the appellate court. Central Savings Bank v. Lake, 201 Cal. 438, 443, 257 P. 521; Estate of Pusey, 177 Cal. 370, 371, 170 P. 846. An order taxing costs on appeal is a special order made after final judgment within the meaning of section 963 of the Code of Civil Procedure and is appealable. Markart v. Zeimer, 74 Cal. App. 152, 239 P. 856.

The order taxing costs of appeal in this action is therefore modified by striking therefrom said item of $116 and, as so modified, the order is affirmed, appellants to recover their costs on this appeal.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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219 Cal. 284

BOCK et al. v. HAMILTON SQUARE BAPTIST CHURCH.

S. F. 14575.

Supreme Court of California.
Oct. 27, 1933.

1. Landlord and tenant 🔑164(2).

Landlord is liable to tenant injured through landlord's negligent failure to keep in repair portion of premises reserved for use in common by landlord and tenants.

2. Landlord and tenant 🔑169(6).

Evidence *held* to show landlord reserved rear stairway and platform for common use of tenants, both as means of ingress and egress and as means of access to clotheslines surrounding platform.

3. Landlord and tenant 🔑169(6).

Evidence that landlord's agent had actual knowledge of defective condition of rear stairway, but did not repair it, sustained finding of negligence in action by tenants against landlord.

4. Landlord and tenant 🔑169(6).

Evidence *held* sufficient to show that landlord's negligent failure to repair defective rear stairway was proximate cause of injuries to tenant, precipitated to ground when she leaned against railing.

5. Abatement and revival 🔑69.

Death of plaintiff in personal injury case pending appeal does not abate right of action.

6. Appeal and error 🔑877(6).

Landlord is not entitled, as of right, to segregation of damages in action by married tenants for injuries to wife, and cannot complain where amount awarded to tenants is sustained by evidence.

7. Damages 🔑132(3).

$11,000 *held* not excessive for internal and other injuries sustained by wife who fell 18 feet from back stairway.

> Wife was 41 years of age and in good health. The injuries sustained included a concussion of the brain followed by a state of disorientation which might be permanent, fracture of left foot, including the second and third metatarsal bones, a broken nose, multiple contusions and abrasions of the body and legs, lacerations of face and hands, together with internal injuries and a severe shock to her nervous system. She was in bed for five or six months, and at time of trial, approximately two years after the accident, she still had swelling, discoloration, and cyanosis of both legs, still used a cane, and was unable to perform her household duties.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Georgia Bock and L. A. Bock against the Hamilton Square Baptist Church. From judgment for plaintiffs, defendant appeals.

Affirmed.

Prior opinion, 20 P.(2d) 710.

Robert B. Gaylord and Gaylord & Lovell, all of San Francisco, for appellant.

Raymond D. Williamson, of San Francisco, for respondents.

PRESTON, Justice.

After consideration of this cause, we hereby adopt as our opinion herein, the following opinion prepared by Mr. Justice Spence, Acting P. J., for the honorable District Court of Appeal, First Appellate District, Division 2:

Upon a trial by the court sitting without a jury, plaintiffs recovered judgment in the sum of $11,000 as damages resulting from personal injuries sustained by plaintiff Georgia Bock. From this judgment defendant appeals.

The plaintiffs were husband and wife. The defendant corporation was the owner of a three-story apartment house located on the southeast corner on Post and Steiner streets in San Francisco. Plaintiffs rented from the defendant through Mrs. Hungate, defendant's manager, the rear apartment on the second floor. This apartment could be entered through the main hallways from the front entrance of the building on Post street or by means of a stairway in the rear of the building. Said rear stairway was not leased to any tenant, but was retained by defendant for the common use of the tenants in the three rear apartments. The record on appeal does not contain a detailed description of said stairway, and the photographs which were introduced in evidence are not before us. It appears, however, that there was a railing at the sides of the steps and also at the sides of a platform which was located about opposite the rear door of plaintiffs' apartment. This railing was about 3½ feet high, and consisted of perpendicular boards surmounted by a grooved railing, the top of the boards fitting into the groove in the railing.

When plaintiffs rented the apartment there were clotheslines paralleling the railing on three sides of the platform. These lines were about a foot and one-half or two feet above the railings, and were attached to the posts at the corners of the platform. They were old and dirty, and the plaintiff L. A. Bock replaced them. These clotheslines were actually used by both plaintiffs and Mrs. Hungate, the defendant's manager, who resided in the rear apartment on the first floor, but it does not appear that other tenants made use of them. There was also located on this platform a garbage can furnished by the owner.

The accident happened on June 24, 1928. The plaintiff Georgia Bock went out onto the rear stairway from plaintiffs' apartment, went up a few steps to the platform, and was in the act of hanging a tea towel on one of the clotheslines when she fell approximately 18 feet to the ground below. There was no other witness to the accident, and the injured woman could not tell what had happened from the time she was hanging out the towel until the time she regained consciousness. Her husband was attracted by the loud crash and found his wife unconscious on the ground. He also found there the garbage can and its contents, together with portions of the boards and railing. The railing and boards were introduced as exhibits in the trial court. Plaintiffs state that these exhibits establish the fact that, due to decay and corrosion, the boards and nails were in an unsafe condition. Defendant replies that the portion of the transcript relating to the introduction of the exhibits does not so state. These exhibits are not before us, but we do not believe that defendant seriously questions the unsafe condition which existed. It appears that long before the accident Mrs. Hungate, defendant's manager, knew that certain portions of the stairway were in bad condition, as the carpenter who had been engaged to do some repairing thereon had told her that "the whole back stairway should be reconditioned because it was in poor condition."

[1-3] On this appeal numerous authorities are cited, but few of which are at all analogous in their facts. The general rule applicable in cases like the present one is that, "where a portion of the premises is reserved by the landlord for use in common by himself and tenants, or by different tenants, a duty is imposed upon him to use ordinary care to keep those particular portions of the premises in a safe condition; and if he is negligent in this regard, and a personal injury results to a tenant by reason thereof, he is liable therefor. * * *" Hassell v. Denning, 84 Cal. App. 479, 482, 258 P. 426, 427. See, also, Spore v. Washington, 96 Cal. App. 345, 274 P. 407. Appellant does not apparently question this general rule, but argues that the situation here is similar to the one presented in Walsh v. Frey, 116 App. Div. 527, 101 N. Y. S. 774, and falls within the exceptions to the general rule discussed in De Motte v. Arkell, 77 Cal. App. 610, at pages 623 to 625, 247 P. 254. As stated in the last-mentioned opinion, at page 623 of 77 Cal. App., 247 P. 254, 259, the authorities referred to are "cases having to do with the misuse of platforms and guard rails in cases where the landlord actually retains control." We cannot say that there was any misuse of the platform or guard rail in the present case, and we believe that the trial court was justified in impliedly finding that the stairway and platform was reserved by appellant for the common use of the tenants, not only as a means of ingress and egress, but also as a means of drying linen on the clotheslines surrounding the platform. While it may be true, as contended by appellant, that there were clotheslines in the basement for the common use of the tenants, it is likewise true that there were clotheslines on said platform apparently for such common use when respondents rented their apartment. We are therefore of the opinion that the facts in the present case bring it within the general rule above stated rather than the exceptions relied upon by appellant; and, as appellant's manager had actual notice of the defective condition of the entire stairway and, as nothing was done to remedy the condition, there was ample evidence to sustain the finding of negligence.

[4] Appellant further contends that "the burden is upon plaintiffs to establish defendant's negligence as the proximate cause of the accident; the plaintiffs have failed to establish the cause of the accident." Under this heading appellant discusses the doctrine of res ipsa loquitur, and claims that it was not applicable. Respondents do not discuss this doctrine, and we know of no reason for their doing so, as we do not believe they were compelled to rely upon it in support of the findings and judgment. Appellant's contention embraces the further claim that, even assuming negligence on the part of appellant, respondents failed to establish that such negligence was the proximate cause of the injury. It must be conceded that the precise cause was not established by direct evidence, but in our opinion there was sufficient evidence from which it might be inferred that the negligence of appellant was the proximate cause. From the evidence before the court it could be properly inferred that the injured woman leaned against the defective railing while in the act of hanging out the towel and that said railing gave way, thereby precipitating her to the ground below.

Appellant further contends that, even assuming that a defective railing caused the accident, still respondents cannot recover. In this connection appellant argues that, if the defects were patent, respondents are chargeable with contributory negligence; while, if the defects were latent, there is no proof of lack of care on the part of appellant. The trial court found generally against appellant's claim of contributory negligence and further found that the defective condition of the railing was not known to or apparent to the injured woman and was "entirely concealed from her view." We believe these findings as well as the findings relating to negligence on the part of appellant are sustained by the evidence.

[5, 6] The next contention is that appellant was entitled to a segregation of general damage as between the two respondents. Appellant requested such segregation before the findings were filed, but the trial court made its findings covering the general damage found to have been sustained by both respondents collectively. In support of its contention appellant cites Bloomberg v. Laventhal, 179 Cal. 616, 178 P. 496; Murphy v. Stelling, 8 Cal. App. 702, 97 P. 672, and Phelps v. Arnold, 112 Cal. App. 518, 297 P. 31, but a reading of these cases shows that none is in point. Appellant then states that there are two reasons why such segregation should have been made in the present case. The first reason advanced is that, if respondent Georgia Bock should die pending this appeal, her right of action would abate. This alleged reason is based upon an erroneous conception of the law. Fowden v. Pacific Coast Steamship Company, 149 Cal. 151, 86 P. 178; Blackwell v. American Film Company, 48 Cal. App. 681, 192 P. 189; 1 Cal. Jur. 76. The second reason advanced is that, by failure to separately fix the amount of damage suffered by the husband and wife respectively, it is impossible to determine the propriety of the award so far as it concerns either. In our opinion, appellant is not entitled as a matter of right to such segregation, and may not complain if the amount awarded to cover the general damage sustained by both respondents finds support in the evidence.

[7] It is finally urged by appellant that the damages awarded were excessive. We find no merit in this contention. The special damages found by the court amounted to $869.40, leaving a balance of $10,130.60 as general damages. Briefly stated, the evidence shows that at the time of the accident respondent Georgia Bock was an active woman, 41 years of age, and in good health; that she sustained serious injuries in her fall, including a concussion of the brain, followed by a state of disorientation which may be permanent; fracture of the left foot, including the second and third metatarsal bones; a broken nose, multiple contusions, and abrasions of the body and limbs; lacerations of the face and hands, together with internal injuries and a severe shock to her nervous system; that she was in bed for five or six months following the accident; that at the time of the trial, which was approximately two years after the accident, she still had swelling, discoloration and cyanosis of both legs, being marked on the left leg, and was still using a cane; and that she was still unable to perform her household duties or engage in other activities in the way she had prior to the accident. On the trial the condition of the injured woman's left leg was exhibited to the court. Considering all of the evidence covering the nature of the injuries, the long confinement, the pain and suffering, and the probable permanency of the effects of said injuries, we cannot say that the amount awarded to cover the general damages to both respondents was excessive.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; IRA F. THOMPSON, J.

MAYER v. STATE BAR OF CALIFORNIA.*

L. A. 14222.

Supreme Court of California.

Oct. 23, 1933.

Rehearing Granted Nov. 20, 1933.

1. Attorney and client ⚿38.

Attorney inserting newspaper advertisements, exhorting public to read about Mexican and Nevada divorces by him, *held* guilty of unethical conduct in advertising to procure divorces (St. 1927, p. 42, § 29, as amended by St. 1929, p. 1258; Code Civ. Proc. § 287, subd. 5; Pen. Code, § 159a).

2. Attorney and client ⚿38.

Words "free information" in attorney's newspaper advertisement, exhorting public to read about Mexican divorces by him, *held* forbidden advertising as meaning information respecting divorces, not book to be published (St. 1927, p. 42, § 29, as amended by St. 1929, p. 1258; Code Civ. Proc. § 287, subd. 5; Pen. Code, § 159a).

3. Attorney and client ⚿58.

Suspension from practice for year *held* proper penalty for attorney's unethical advertising to procure divorces (St. 1927, p. 42, § 29, as amended by St. 1929, p. 1258; Code Civ. Proc. § 287, subd. 5; Pen. Code, § 159a).

In Bank.

Proceeding by Joseph Mayer to review an order of the Board of Governors of the State

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 39 P.2d 206.

Bar of California, recommending petitioner's disbarment as an attorney at law.

Petitioner suspended for one year.

Joseph Mayer, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

This proceeding was instituted for the purpose of reviewing the action of the board of governors of the State Bar of California in recommending the disbarment of petitioner as an attorney at law in this state. The local administrative committee before whom the charges against petitioner were originally heard made its findings that the petitioner had violated section 29 of the State Bar Act (as amended by St. 1929, p. 1258) by willfully breaching rules 2 and 3 of the rules of professional conduct; that petitioner had committed acts involving moral turpitude, as defined by section 287, subdivision 5, of the Code of Civil Procedure in the course of his relations as an attorney at law; and that petitioner had committed a misdemeanor in violating section 159a of the Penal Code of the state of California; and recommended his suspension from the practice of the law for one year. The board of bar governors adopted the findings of the local administrative committee, but made the recommendation to this court that petitioner be disbarred from the practice of the law.

Rule 2 of the rules of professional conduct of the State Bar reads as follows: "A member of The State Bar shall not solicit professional employment by advertisement, or otherwise. This rule shall not apply to the publication or use of ordinary professional cards, or to conventional listings in legal directories." 204 Cal. xci. Rule 3 relates to the employment by an attorney of another to solicit professional employment for him. Section 287, Code of Civil Procedure, enumerates the causes for which an attorney may be removed, and subdivision 5 specifies: "For the commission of any act involving moral turpitude. * * *" Section 159a of the Penal Code reads as follows: "Whoever advertises, prints, publishes, distributes, or circulates, or causes to be advertised, printed, published, distributed, or circulated, any circular, pamphlet, card, hand-bill, advertisement, printed paper, book, newspaper, or notice of any kind, offering to procure or obtain, or to aid in procuring or obtaining, any divorce, or the severance, dissolution, or annulment of any marriage, or offering to engage or appear or act as attorney, counsel, or referee in any suit for alimony or divorce, or the severance, dissolution, or annulment of any marriage, either in this state or elsewhere, is guilty of a misdemeanor. * * *"

[1] Practically all of the charges against petitioner center around the offense of inserting certain advertisements in newspapers in Los Angeles, which, it is claimed, were advertisements for the procurement of divorces. Petitioner admits that such advertisements were inserted by him, were paid for by him, and that they ran over a period of several months. Clippings from the newspapers were introduced as exhibits by the State Bar to indicate the actual set-up of the advertisements. The following are fair examples:

"READ about
MEXICAN DIVORCES
Are they legal?
Also
PROPERTY RIGHTS HUSBAND &
WIFE IN CALIFORNIA
By
JOSEPH MAYER

Practicing Attorney, 20 years, Los Angeles, Also Mexican & Nevada Offices,
Joseph Mayer, Ltd., 426 S. Spring.
Rm. 201. TU 6140. Free information."

This advertisement appeared under the heading of "Personals." Two columns over and further down on the same page, appears under "Professional Services" the following advertisement:

"Attorney
JOSEPH MAYER
426 S. Spring, Los Angeles, TU 6140.
Also MEXICAN & NEVADA OFFICES."

In one type of advertisement, which undoubtedly appeared on different occasions, the insertion of petitioner's name and address follows immediately after the insertion of the large advertisement with no line of separation between the two advertisements. Thus:

"READ WHY SOME
MEXICAN AND NEVADA
DIVORCES
'Are Knocked Out'

Learn what the eminent Joseph Mayer
L. A. lawyer of 20 years' practice has
to say about it.
Joseph Mayer & Alice Mayer, Ltd.,
Warner Theater Bldg., 7th & Hill.
After many years at old address
ATTORNEY JOSEPH MAYER
has moved to
Warner Theater Bldg., 7th & Hill.
Suite 406 Tucker 6239."

The following is another example:

"READ ABOUT
MEXICAN DIVORCES
ARE THEY LEGAL?
Answered by
JOSEPH MAYER
Practicing Los Angeles Attorney
20 years, Also Mexican offices
JOSEPH MAYER, LTD.,
426 S. Spring Rm. 201. TU 6140."

The petitioner's defense in answer to the charge that he has been guilty of unethical conduct in advertising to procure divorces is that there is in fact no actual word of solicitation in the advertisements. He explained the purport of the advertisements by explaining that he had organized a corporation, "Joseph Mayer, Ltd.," which was later changed to "Joseph Mayer & Alice Mayer, Ltd.," for the purpose of printing and publishing books and pamphlets which would have a wide public appeal; that, although no book or pamphlet had in fact been printed or published, the idea was to work up a demand for such books by means of the above-mentioned advertisements, and the insertion of his name as author in bold type, and the description of himself therein as the "eminent Joseph Mayer" was merely for the purpose of increasing the demand for the to be published in the future books. The officers of the corporation were himself, as president, Harrington, a young woman stenographer in his office, and Alice Mayer, his wife, as treasurer. The directors were his sister, her husband, and Harrington, each of whom had subscribed for a $1 share in the corporation. Petitioner's testimony with reference to the phrase "Free information," the use of which was condemned in the case of Barton v. State Bar, 209 Cal. 677, 289 P. 818, as being improper advertising, was that such phrase was intended to inform the public that further information relative to the book would be furnished upon inquiry.

We think the conclusion inescapable that the corporation was organized for the deliberate purpose of affording a cloak for illegal advertising on the part of petitioner. A copy of the proposed pamphlet for which the advertisements purport to create a demand has been included in the record. It is entitled,

"LEGAL MEXICAN DIVORCES WITHOUT GOING THERE IN ONE WEEK.

WHEN SHOULD A DIVORCE BE SOUGHT
by
Joseph Mayer

Joseph Mayer is a Los Angeles Attorney of twenty years practice. He has handled Thousands of Domestic Relation Cases as well as other cases and KNOWS what he says."

It consists of seven double-spaced typewritten pages, one and one-half pages of which is taken up with a quotation which is alleged to be from a book by Fannie Hurst. We do not believe that petitioner, if he be a person of ordinary intelligence, could have honestly believed that a popular demand could be created for such a pamphlet. Petitioner testified that, during the period of time during which the advertisements were being run, persons came to his office for the purpose of procuring Mexican divorces, that about 75 per cent. of them he had never seen before, and that he had received retainers from them. There can be no doubt, therefore, that persons were in fact attracted to his office by the advertisements and engaged his professional services, despite the fact, as he claims, that the advertisement was merely for the purpose of advertising a book. It should perhaps be noted with reference to the advertisement, which simply contained the announcement that he had Mexican and Nevada offices, that he was not licensed to practice law either in Mexico or Nevada, and that he had merely written to a lawyer in Mexico and one in Reno, Nev., asking them if he might have the use of their offices when he was in Mexico or Nevada. Although it may be true that there is no direct word of solicitation of professional employment for the securing of divorces in said advertisements, when the object of such advertisement appears so patently on the face of the advertisements themselves as it does in this case, we have no hesitation in holding that petitioner is guilty of unethical conduct. The fact that he devised such an elaborate scheme in order to stay just within the boundary line adds in our minds to the seriousness of the offense.

[2] We are not prepared to say that, if a book possessing some merit, and which in fact did contain accurate information relative to divorces, whether Mexican, Nevadan, or Californian, had in fact been published by the petitioner, he would not have been entitled to advertise such book legitimately. This is not the situation here. The fact that the book had not been published is a convincing argument that the advertisements were not bona fide for the purpose of advertising a book, but were in fact advertisements for Joseph Mayer, not as an author, but as an attorney specializing in divorce business. We are not impressed with the claim that "Free information" was intended to mean that information relative to the book would be furnished. It seems to us that any one reading the advertisement would conclude that free information relative to Mexican and Nevadan divorces would be furnished by Joseph Mayer as an attorney. The advertisement in this particular, therefore, comes within the category of forbidden advertising set out in Barton v. State Bar, supra.

[3] The board of bar governors were of the opinion that, because the petitioner had on a previous occasion prior to the formation of the State Bar been called to task for advertising, he should suffer the extreme penalty of disbarment. We are of the opinion, however, that petitioner may be made to realize the seriousness of his offense through the imposition of a lesser penalty, and may in the future refrain from such objectionable practice. We are willing to give him the opportunity. We are of the opinion that a suspension for one year is the proper penalty. It is, therefore, ordered that petitioner be, and he is hereby, suspended for a period of one year beginning on the 30th day from and after the filing of this order.

219 Cal. 276

FESTA DO DIVINO ESPERITO SANTO DE MANTECA, MANTECA, CAL., Inc., et al. v. MENDES et al.

Sac. 4764.

Supreme Court of California.

Oct. 25, 1933.

1. Corporations 🔑56.

Amendments of corporation by-laws cannot be adopted without acknowledgment of pre-existent original.

2. Corporations 🔑56.

Word "approval," used by framers of corporation by-laws, *held* sufficient to validate them as meaning "adoption."

[Ed. Note.—For other definitions of "Approval," see Words & Phrases.]

3. Injunction 🔑128.

Evidence *held* to support judgment enjoining enforcement of corporation by-laws, alleged to have been adopted after those under which plaintiffs claimed to be directors.

In Bank.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Festa Do Divino Esperito Santo De Manteca, Manteca, California, Incorporated, and others, against Frank A. Mendes and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

A. Q. Lomba, of Oakland, and Case & Forslund, of Stockton, for appellants.

Law T. Freitas and Charles H. Epperson, both of Stockton, for respondents.

SEAWELL, Justice.

Respondent plaintiff, Festa Do Divino Esperito Santo de Manteca, a semireligious association, filed its articles of incorporation in the office of the secretary of state on April 17, 1925, and has since existed as a nonprofit corporation, with its principal place of business at Manteca, Cal., pursuant to the provisions of title 12, part 4, division 1 (section 593 et seq.) Civil Code. Its corporate purposes, as set forth in its articles of incorporation, are to celebrate on proper days the Feast of the Divine Holy Ghost and the Feast of the Divine Holy Trinity and to perpetuate the precepts of the religion of its members, as practiced by their forefathers; to hold such real and personal property as the purposes of the corporation may require, and to that end lease, mortgage, hypothecate, sell, and otherwise dispose of lands, tenements, hereditaments, and personal property; to make by-laws for the management of its properties, and the regulation of its affairs, and its membership; to admit persons into membership, and to hold periodical or occasional conventions and general assemblies of both members and delegates.

The number of directors was fixed at five, and J. J. Machado, M. M. Alameda, J. A. Mendosa, George Williams, and J. S. Marks were named as the original five directors. Many years before any steps were taken to incorporate, it had been the annual custom of the Portuguese population in the neighborhood of Manteca, which seems to have been quite numerous, to meet and celebrate the feasts above named. It was also the custom to meet in frequent social assemblage at other times during the year. The celebration of the Feast of the Divine Holy Ghost was a religious ceremony in the form of a thanksgiving acknowledgment for divine favors. It also had a social and good-will aspect. At other times during the year said persons of Portuguese birth and extraction met purely for social purposes. Prior to filing articles of incorporation the voluntary association or assembly seems to have been governed by five directors or trustees. It also had certain executive or administrative officers, to wit, a president, vice president, secretary, and treasurer. The association during its noncorporate existence grew in numbers and accumulated quite a sum of money from donations made by its members and those in sympathy with its social and religious activities. With these accumulated funds a building site was purchased in Manteca, upon which an eating house and chapel were erected. Thereafter there remained on hand a surplus of approximately $4,000. Immediately upon incorporation, on April 17, 1925, the directors or trustees of the association—the holders of title—conveyed said real property and transferred such moneys and personal property as had come into their possession to the corporation. Said corporation continued to conduct the business of the association in much the same manner after incorporation as it had been conducted before incorporation until the adoption of the by-laws, which it was claimed by respondents, and found by the court, was consummated at the meeting held on the evening of April 24, 1929.

Whether said by-laws were legally adopted is conceded to be the question decisive of the rights of the contending parties. The appellants take the stand that said by-laws were never legally adopted and that respondents, who assert themselves to be the lawful directors of said corporation by virtue of the provisions of said by-laws, are not such in right, and therefore are not entitled to manage or control the property of said corporation. Appellants further claim that the only bona fide by-laws of the corporation are those which they allege were adopted on

March 22, 1931. They claim the right to exercise corporate power under said alleged by-laws. The soundness of this claim will receive notice in the course of our opinion. Appellants, with the apparent cooperation of a large number of followers, took by force the possession of the real and personal property of said corporation, to the exclusion of respondents, changed the locks on the doors of the halls and other buildings; committed waste by breaking locks and doors and damaging personal property; reported falsely to the bank in which said corporation deposited its moneys and transacted its business that said respondent directors were without authority to transact any business whatsoever in behalf of or in the name of said corporation, and circulated false reports which affected the credit of said corporation, and which tended to confuse the public mind as to the legal status of the bona fide directors of said corporation. The effect of appellants' acts was undoubtedly such as would tend to impair the credit of said corporation, obstruct said respondent directors in the transaction of the business of the corporation, and confuse the public mind as to respondents' right to manage or control the business of the corporation.

It is not necessary to dwell upon the extent of the schism which divided the two factions contending for control, except to state that that which seemed at first to be but mere differences of opinion as to matters of fraternal policy developed into a state of belligerency which exhibited itself in violent and boisterous fashion at several meetings called for the purpose of determining which faction was properly in control of the directorship and the offices of the corporation.

The trial court, responsive to the prayer of the complaint, upon allegations fully sustained, issued its decree enjoining the appellants from enforcing or attempting to enforce the provisions of the by-laws pretended by appellants to have been adopted March 22, 1931, and from circulating said by-laws as the by-laws of said corporation, and, in brief, without enumerating specifically the many acts enjoined, it is sufficient to observe that the decree enjoins the interference by appellants with the government, control, or the transacting of the business of plaintiff corporation by plaintiff directors and their successors in office, or the management and control of the real property of said corporation by them. No damages were allowed on account of the breaking of the doors of the buildings and the waste committed by appellants as alleged in the amended complaint, for the reason that said claim was withdrawn and dismissed by respondents. The decree found that waste had nevertheless been committed and the appellants were enjoined from the commission of future waste.

[1, 2] At this point an inconsistency in the position of appellants may be pointed out, in that they challenge by their arguments herein the existence of the original by-laws adopted April 24, 1929, under which respondent board claims to deraign its powers, or the existence of any by-laws whatever, prior to the adoption of appellants' alleged by-laws, notwithstanding their pleadings and the language of the by-laws under which they assume the right to administer the affairs of the corporation are in fact premised upon the by-laws as amended. The final paragraph of the articles adopted March 22, 1931, upon which appellants assert their right to control the affairs of the corporation, contains the following language: "We, the undersigned, members of the special committee named at the last annual meeting, at Manteca, California, on the 27th day of July, 1930, to *correct, amend, alter and modify the by-laws of the* Festa Do Divino Esperito Santo de Manteca, * * * have the pleasure of submitting for your *approval* the laws above mentioned, which we expect will contribute to the progressive development of the said society." (Italics supplied.) The only attempts made by said nonprofit corporation at adopting by-laws were the two above set forth.

Amendments cannot be adopted without the acknowledgment of a preexistent original. We have italicized the word "approval" as an answer to the objection made by appellants to the use of the same word used by the framers of the by-laws of April 24, 1929, as being insufficient to give validity to said by-laws. Appellants' by-laws would fail tested by the same rule which they would apply to respondents. It is very clear from the context of the by-laws and the nature of the proceeding that the word "approved" was given the meaning of the word "adopted." Read in connection with the subject-matter no other reasonable construction can be placed upon it.

It would seem that prior to incorporation the membership of the association was indefinite as to the personnel, as those only who contributed a small membership fee of not less than 50 cents annually or its equivalent in provisions, to be consumed at the feast, were regarded as members during the particular year for which the payment was made. No permanent record of the membership was kept. The membership fluctuated with each year during the noncorporate existence of the association. The annual attendance upon the feast, however, was usually quite large.

[3] The property interests of the association and its general affairs had grown to such proportions in 1929 that it became essential, especially in view of the plan to borrow money, and properly to conduct its affairs that the corporation, which had existed approximately for a period of four years without having

adopted any by-laws or rules of conduct, should take that necessary step. In fact, the bank with which the association was negotiating for a loan of $6,500 required the adoption of by-laws before it would consider the loan proposition. The directors who had been elected at the regular annual meeting held in 1928, and who were still serving as such, called a meeting for the purpose of adopting by-laws by mailing postal cards to each person affiliated with the organization. The notices were mailed out April 8, setting April 24 as the day on which said meeting would be held. On the appointed day some fifty or sixty members responded to the call. Lengthy and acrimonious discussion featured the session. Article XVII, which prescribed the qualifications of membership, was the particular article around which the discussion centered. The trial court found upon conflicting and confusing evidence that said article was adopted, after some revision, with the other articles, all of which together constituted the by-laws of the corporation. During the sessions the inquiry was made whether the signers of the by-laws would be liable for the debts of the corporation, and it being openly stated that they would be liable for the corporation's indebtedness, a large number of the participants refused to sign the by-laws and left the meeting. Some twenty-nine members, including a majority of the directors, signed the by-laws which governed the corporation without challenge until a short time before the present action was filed by plaintiffs for injunctive relief, which was more than two years after the adoption of said by-laws. Said by-laws were thereafter accepted by common consent as the by-laws by the officers and members of the association without question, and all the business of the corporation was transacted in the manner therein provided.

As the result of the adoption of the by-laws the directors were enabled to negotiate a loan from a local bank for the benefit of the corporation in the sum of $6,500, secured by a trust deed of the corporation's property. Said directors pledged their personal credit as additional security for said loan. Moneys were collected and disbursed, all manner of business was transacted, officers were elected to various stations, and the property of the corporation was held, managed, and controlled by the corporation acting by virtue of the authority conferred by said by-laws until the forcible ejection heretofore mentioned. At no time has a direct attack been made by appellants by the assistance of a writ of quo warranto or any other appropriate writ to test the eligibility of the corporation's officers, or the validity of said original by-laws.

In view of the finding of the court upon conflicting evidence that the original by-laws were legally adopted and have not since been superseded by any other by-laws, or amendments thereof, it is unnecessary to discuss the method by which said by-laws of March 22, 1931, were adopted.

It is not improbable but that this whole matter has become moot. The controversy arose more than two years ago, involving a transient matter, to wit, as to which set of directors was legally in control and management of the affairs of a nonprofit corporation. The officers are elected annually, and the by-laws are subject to change at the will of the members. At least two elections have since been held, and the by-laws, if not framed to serve the interests of the membership, could have and should have been changed to reflect the will of the majority.

We do not assume to pass judgment upon the merits of the controversy which gave rise to the disputes between the parties. Upon an examination of the record we are of the view that, while the evidence is conflicting, it is sufficient to support the trial court's judgment.

The attempt of the appellants to dismiss the action was unauthorized and therefore properly denied.

Judgment affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

219 Cal. 271

MAUER v. STATE BAR OF CALIFORNIA.

L. A. 14185.

Supreme Court of California.

Oct. 25, 1933.

1. Attorney and client 🔑53(2).

Evidence sustained local committee's finding that attorney was guilty of acts involving moral turpitude, dishonesty, and unprofessional conduct in fraudulently misrepresenting location and value of lots to prospective purchaser.

2. Attorney and client 🔑54.

Decision in disbarment proceeding *held* not contrary to law because ten months elapsed between submission of charges and recommendation of committee.

3. Attorney and client 🔑53(2).

Evidence sustained local committee's finding that attorney collected $50 from one not his client as attorney's fee in case where complaint sought no attorney's fee, and applied it to own purposes.

4. Attorney and client ⚷58.

Attorney's fraudulent misrepresentation of location and value of lots to prospective purchaser, inducing purchase, and collection and application to own purposes of $50 as attorney's fee from one not his client, warranted suspension for three years.

In Bank.

Application by A. H. Mauer to review a recommendation of the Board of Governors of the State Bar of California that petitioner be disbarred.

Petitioner suspended for three years.

A. H. Mauer, Charles W. Cradick, and James V. Brewer, all of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

In this proceeding to review the recommendation of the board of bar governors that petitioner be disbarred from practicing law, there are involved two distinct and separate complaints which were consolidated before the recommendation of the board was voted. In our treatment of them we shall first consider solely the charges contained in the complaint verified by Mrs. A. H. Sheldon, after which we shall detail the circumstances and contentions arising out of the second complaint preferred by one C. J. Pfiffner.

The Sheldon Complaint.

In effect petitioner was accused of having falsely and fraudulently represented the value of four certain lots in San Diego, their location with respect to the city itself, their availability as a part of property to be chosen for a municipal airport, and that they were clear of incumbrance. The charges were substantially those upon which the complaint for rescission was based in an action between Zelda Sheldon and petitioner in which judgment was rendered against the petitioner and on appeal affirmed by the court. Sheldon v. Mauer, 215 Cal. 327, 9 P.(2d) 833. The charges were heard before local administrative committee No. 8, which found petitioner represented to Mrs. Sheldon that the lots were worth $1,800 each, when in fact they were of a value not to exceed $50 each, and further that they were a part of acreage which "would in all probability be accepted as the site of the proposed Lindbergh airport in San Diego," when that site had been selected at a point some miles distant about a year previous to the time of the conversations with Mrs. Sheldon. It also found that petitioner was guilty of acts involving moral turpitude, dishonesty, and unprofessional conduct, because he had "knowingly and willingly, and with intent to defraud and cheat the complainant, misrepresented the location and the value of his properties in San Diego." As a result the committee recommended his suspension for a period of eighteen months. In the meantime the other complaint, which we will discuss later, had been filed.

The petitioner contends with respect to this first complaint that the evidence is not sufficient to support the findings; that the decision and recommendation are contrary to law because the committee concluded the taking of evidence on October 27, 1931, but did not arrive at a recommendation until August 17, 1932, and further he asserts that the conclusion of the board upon both charges would, if sustained, inflict upon him extreme, cruel, and unusual punishment.

[1] The major portion of petitioner's briefs, however, is devoted to an effort to show that the evidence is insufficient to sustain the findings, and in this undertaking he endeavors to show discrepancies between the testimony of Mrs. Sheldon in the civil action and in the hearing now under consideration. While we are not inclined to detail the evidence, all of which we have carefully read, it is but just to say that the testimony of petitioner and his witnesses is in sharp conflict with the testimony of Mrs. Sheldon and those produced to corroborate her statements. Yet the so-called inconsistencies relied upon by petitioner are, to say the least, no less explainable than are those in the evidence relied upon by him. These facts remain undisputed. Petitioner inserted in a Los Angeles newspaper an advertisement reading substantially as follows: "Have four lots S. D. Valuation 1800 ea. Will trade one or more for equity L. A. home, quick deal. * * *" These lots were entirely unimproved in a paper subdivision of low marsh land, five or six miles from the center of San Diego, with no known sales for cash ever having occurred. The deal was consummated in Los Angeles where the parties resided. The San Diego airport site had been selected about a year before. As already indicated, we are not inclined to set down further details. Petitioner had ample opportunity in the tribunal which heard the civil action, as well as on appeal, to demonstrate the claimed lack of merit in the testimony adduced against him, and also had a full and complete hearing before the administrative committee. Furthermore, our reading of the transcript discloses that the findings were fully justified.

[2] There is no merit in the contention, because ten months elapsed between the submission of the charges and the recommendation of the committee, that the decision is contrary to law. Our attention has been directed by both sides to the case of Sheldon v. Mauer, supra, and volume II of the transcript there-

in was introduced here. Aside from all other considerations, we may well surmise that the committee was waitin; (and properly so) the final determination of that cause, which was decided March 31, 1932.

The contention that petitioner will be subjected to cruel and unusual punishment if the recommendation be approved will be considered after discussing the remaining charges.

The Pfiffner Complaint.

[3] So far as this branch of the case is concerned, and because the others were found to be untrue, we will consider only the charge and the finding by the local administrative committee No. 9 to the effect that petitioner collected from one Christine Grady on August 11, 1931, the sum of $50, as an attorney's fee in a case entitled Pfiffner v. Leggett, the complaint in which sought no attorney's fee, and the contract upon which action was founded provided for no such fees, and did not account therefor to Pfiffner until January 4, 1932, the further finding being made that Mrs. Grady was at no time his client, and she believed the $50 was being applied upon the debt due from her mother, Mrs. Leggett, to Pfiffner. It was also found that the money was applied by petitioner to his own uses and purposes. The committee recommended a private reprimand.

Petitioner says in his brief: "The determination of the propriety of the discipline in this matter rests, we believe, wholly in the determination of who is to be believed." In other words, as in the preceding case, he argues that the testimony is insufficient in certain particulars, but yet he admits that he collected the sum from Mrs. Grady as an attorney's fee for himself, "in consideration," as he says, "of the extension of time of payment and the additional work incidental thereto, and for the fact that client had already been put to suit and entailed the expense and in order to protect client's interests." He insists, however, that his testimony should be believed with respect to reporting the collection to his client Pfiffner, instead of that which is opposed to it. The administrative committee, like any other fact-finding body, was in a position to properly weigh the testimony, and no sufficient reason has been presented why we should disturb that finding. From a reading of the transcript and a review of all the circumstances attending this appeal we have no hesitancy in accepting its conclusion.

[4] We now come to the recommendation of the board of bar governors. We should revert momentarily to the following facts: One local committee recommended a suspension of eighteen months as a result of the Sheldon charges. Another and a different committee advised reprimand as a result of the one charge found to be true in the Pfiffner case; and the board of bar governors after consolidating the two concluded that disbarment ought to result. According to the testimony of petitioner, three other charges have been preferred against him and after investigation dismissed. He is not inexperienced in the profession. He practiced law in Illinois from 1913 to 1925, and from 1926 in California. According to the testimony of Mrs. Grady, he exacted the $50 from her because of her fear that he would garnishee her mother's wages and cause the latter to be discharged from her employment, and took from Mrs. Grady a note for $177.85, the entire sum for which action was brought, including court costs. Petitioner knew that Mrs. Leggett and Mrs. Grady were both working and in meager circumstances. Hence we fail to find any mitigating or extenuating circumstances in the particular transaction. If we turn back to the other complaint, we discover from the testimony of Mrs. Sheldon that one of the very first questions petitioner asked of her was her familiarity with San Diego, and, as soon as he discovered that she had been there but once, and that occasion was several years before, he represented that Mrs. Sheldon had passed by his lots on her trip from the Grant Hotel to Coronado. As we read the record, she was about five miles away. Undoubtedly the board considered this testimony as indicating a designing, scheming mind—one which it felt in both instances proved itself lacking in that first essential—common honesty. However, bearing in mind that local administrative committee No. 8, which heard the witnesses and was in a better position to judge the certainty of the offense than we are, or the board of governors before whom he failed to appear, recommended suspension for eighteen months, and that the second administrative committee, in like favorable position, recommended a reprimand only, it would seem that suspension for a period of three years should convince petitioner and any other person with similar inclinations that such transactions will not be tolerated in the profession. If so, the double purpose of protecting the public and keeping the profession clean and wholesome would be sufficiently served.

It is therefore ordered that petitioner be suspended from the practice of the law for the period of three years, commencing thirty days after the date of the entry of this order.

219 Cal. 283

MARTIN et al. v. CALIFORNIA INVESTMENT & FINANCIAL CO. et al.

L. A. 14398.

Supreme Court of California.
Oct. 26, 1933.

Appeal and error 🔑627(2).

Where appellants, in default for failure to file transcript within time, continued in default without application for relief therefrom, dismissal of appeal *held* required on motion (Rules for Supreme Court and District Courts of Appeal, Rule 5).

In Bank.

Appeal from Superior Court, Kings County.

Action by John Alanson Martin and others against the California Investment & Financial Company. From an adverse judgment, defendants appeal. On motion to dismiss the appeal.

Appeal dismissed.

Aitken & Aitken, of San Francisco, for appellants.

Ernest Klette, of Fresno, for respondents.

WASTE, Chief Justice.

Motion to dismiss appeal for failure to file transcript within time. The clerk's certificate offered in support thereof indicates that the notice of appeal was filed May 27, 1933, and that proceedings have not been instituted for the preparation of a record to be used on the appeal. The motion to dismiss was noticed for September 5, 1933, at which time appellants offered, in opposition thereto, two orders of this court purporting to extend their time for the filing of the transcript. Upon the hearing, the respondents urged that the original order of extension had spent its force, and the time therein provided for had expired prior to the signing of the second order of extension. We find it unnecessary to pass on this point for, granting full effect to both orders, we discover upon an examination of our files and records that the time provided for in the second and final order of extension had expired on the day preceding the one on which the motion was noticed. In other words, this court by its two orders purported to extend appellants' time only to September 4, 1933, for the filing of the transcript. This being so, and conceding full effect to both orders of extension, it appears that appellants, not having filed their transcript, were in default on September 5, 1933, when the motion came on for hearing. Inspection of the record further discloses that such default continues to the present time, and appellants have made no application for relief therefrom. Under the circumstances, we have no alternative but to dismiss the appeal. Rule V; Union Trust Co. v. Novotny, 125 Cal. App. 417, 13 P.(2d) 974; Id., 125 Cal. App. 418, 13 P.(2d) 974. It is so ordered.

We concur: SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; IRA F. THOMPSON, J.

219 Cal. 236

In re GRIGSBY'S ESTATE.

MacLENNAN et al. v. HARDWICK et al.

L. A. 14078.

Supreme Court of California.
Oct. 20, 1933.

1. Judgment 🔑328.

Executor was "party against whom order was taken" within statute authorizing court to relieve party from order by reason of his mistake, inadvertence, or excusable neglect where order vacated order correcting order of probate (Code Civ. Proc. § 473).

2. Judgment 🔑328.

Affidavits for relief from order nunc pro tunc correcting order admitting will to probate *held* to sufficiently show prejudice (Code Civ. Proc. § 473).

> Affidavits in and of themselves failed to disclose prejudice which might have been suffered by any of legatees or devisees named in will, though stating that their rights and interests might be adversly affected.

3. Judgment 🔑328.

Court *held* not to have abused its discretion in vacating order nunc pro tunc correcting order admitting will to probate to state will was admitted only by virtue of ratification and republication in codicil (Code Civ. Proc. § 473).

> It was contended that affidavit failed to disclose inadvertence and mistake sufficient to authorize relief under Code Civ. Proc. § 473, and that court for that reason abused discretion.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate of Lewis Eugene Grigsby, also known as Lewis E. Grigsby and L. E. Grigsby, deceased. Petition by Stewart P. MacLennan and another, as executors of the last will and testament of Lewis Eugene

Grigsby, deceased, opposed by Ella Hardwick and others, heirs at law and beneficiaries under the last will and testament of Lewis Eugene Grigsby, deceased. From an order vacating an order nunc pro tunc correcting an order admitting the will to probate, objectors appeal.

Affirmed.

Salisbury & Robinson and Gerald R. Knudson, all of Los Angeles, for appellants.

William H. Horine, of Los Angeles (Walter M. Campbell, Jr., of Alhambra, and Walter M. Campbell, of Los Angeles, of counsel), for respondents.

IRA F. THOMPSON, Judge.

In this action the respondents presented to the court for probate the last will and testament of Lewis E. Grigsby, bearing date September 25, 1926, and a codicil executed January 27, 1932. The will was the mutual last will and testament of Lewis Eugene Grigsby and Emma Alvina Grigsby, his wife. Mrs. Grigsby predeceased her husband. The codicil in the first paragraph thereof reaffirmed and republished the last will and testament except in the particulars mentioned, one of which was the nomination of respondents as the executors and "trustees under said will and this codicil." Upon the hearing the respondents presented the usual proof with respect to the execution of the codicil, and that the deceased was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence. The court made its order admitting the will and codicil to probate "as the last will and codicil" of the deceased, on the 3d day of March, 1932. On the 25th day of April the court made a nunc pro tunc order correcting and amending the order admitting the will and codicil to probate, wherein it was recited that the order theretofore entered by the clerk did not correctly set forth the order of the court, and that said order should be changed and the last will and testament "admitted to probate as the last will and testament of Lewis Eugene Grigsby, deceased, as of the date of the execution of said codicil, to-wit, as of the 27th day of January, 1932, and that said document bearing date September 25, 1926, is admitted to probate herein only by virtue of its ratification, confirmation, incorporation and republication in and by said document dated January 27, 1932, and as forming a part of said last-mentioned document, and not otherwise, and is not admitted to probate as a testamentary instrument independent of said document dated January 27, 1932, and as depending for testamentary effect upon its own due and proper execution." Thereafter the respondents made a motion under section 473 of the Code of Civil Procedure to be relieved of the nunc pro tunc order, setting forth that they had inadvertently understood the court to decide, on March 3, 1932, that both instruments should be admitted to probate, and also stating that, had they not so misunderstood the order, they would have requested the court to continue the hearing in order that they might produce the testimony of one of the subscribing witnesses to the will, and further setting forth that the rights and interests of the legatees, devisees, and beneficiaries might be adversely affected by the failure of the court to admit to probate the will independently of the codicil. The motion was granted. The court heard the testimony with respect to the execution of the will, and on the 13th day of May, 1932, made an order admitting the will to probate. This is an appeal by three of the heirs at law from the order vacating the nunc pro tunc order as of March 3, 1932, and admitting the will to probate.

[1] Appellants contend that respondents were not parties against whom any judgment or order was taken, within the meaning and intent of section 473 of the Code of Civil Procedure, and that, in order for a person to move under that section, his rights must be injuriously affected by the order complained of. There is no merit in this contention. In Estate of Layton (Cal. Sup.) 19 P.(2d) 793, 797, it was said that the section "authorizes the court to relieve a party from an order or other proceeding in probate by reason of his mistake, inadvertence, or excusable neglect." And it has been announced that it is the duty or at least the privilege of the person named as executor to propose the will for probate. Estate of Hite, 155 Cal. 448, 101 P. 448. Being his duty to and having proposed the will he was a party against whom the order was taken.

[2] It is also contended that the affidavits for relief under section 473 of the Code of Civil Procedure fail to show prejudice to any person. The affidavits in and of themselves fail to disclose the prejudice which might have been suffered by any of the legatees or devisees named in the will. However, the transcript does disclose certain charitable bequests in the will, and certain substituted charitable bequests and other charitable bequests, provided for in the codicil. It may, therefore, become important that the will be probated independently of its republication by the codicil.

[3] Upon the first hearing the respondents contended that the will was entitled to probate upon the proof of due execution of the codicil and the republication of the will, and therefore they made no great effort to locate one of the subscribing witnesses to the will. Appellants, therefore, urge that the affidavits fail to disclose an inadvertence and mistake sufficient to authorize relief under section 473 of the Code of Civil Procedure, and that the court, for that reason, abused its discretion

in vacating the order nunc pro tunc as of March 3, 1932. They argue that it was a question, at most, of newly discovered evidence which should have been produced upon a motion for new trial. It is our opinion that the court did not abuse its discretion under the facts of this case.

The order is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

219 Cal. 218

PETERS v. STATE BAR OF CALIFORNIA.

S. F. 14898.

Supreme Court of California.

Oct. 20, 1933.

1. Attorney and client ⚷58.

Attorney's gratuitously offensive attacks, in disqualification affidavits and other papers filed in probate proceeding, upon various judges and opposing counsel, *held* to warrant three months' suspension from practice (Code Civ. Proc. §§ 170, 278; § 282, subds. 2, 6; § 287, subd. 2).

2. Attorney and client ⚷54.

Requirement that disciplinary proceeding against attorney be heard in county of his residence *held* not jurisdictional and may be waived by attorney (St. 1927, p. 42, § 34, as amended by St. 1929, p. 1259).

3. Attorney and client ⚷54.

Attorney submitting, without objection, to hearing in disciplinary proceeding, held in county other than required by statute, could not raise the objection on petition to annul recommendation of Board of Governors of State Bar for suspension from practice (St. 1927, p. 42, § 34, as amended by St. 1929, p. 1259).

In Bank.

Proceeding on the petition of C. E. Peters to review and annul the recommendation of the Board of Governors of the State Bar that petitioner be suspended from the practice of law for a period of three months.

Petitioner suspended as recommended.

C. E. Peters, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a petition to review and annul the recommendation of the Board of Governors of the State Bar that the petitioner be suspended from the practice of law for a period of three months.

The petitioner was charged by a notice to show cause with violations of the provisions of subdivision 2 of section 282 of the Code of Civil Procedure. That subsection provides that it shall be the duty of an attorney to maintain the respect due to the courts of justice and to judicial officers. Section 287, subd. 2, of the same Code specifies as a cause of removal or suspension a violation by an attorney of his duties as such. There is also involved the alleged violation by the petitioner of his oath "to faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability" (section 278, Code Civ. Proc.), including also the duty to abstain from all offensive personality (section 282, subd. 6, Code Civ. Proc.).

The petitioner as attorney represented Mrs. Edna Gertrude Sullivan, a devisee under the will of George A. Gamache, deceased. Proceedings for the probate of the will were pending in the superior court of Alameda county. The Bank of Italy was the executor of the will. The testator devised to Mrs. Sullivan a lot of land in Alameda county. At the time of the purchase of the lot by the decedent it was incumbered by a deed of trust securing a promissory note of the testator's grantor in the sum of about $2,200, which at the decease of the testator had not been discharged. The purpose of the petitioner's employment by Mrs. Sullivan was to secure distribution to her of said property free of the incumbrance of the deed of trust.

[1] On October 31, 1929, the attorney filed Mrs. Sullivan's petition seeking to have the existing debt paid and discharged from the residue of the estate. On the hearing before the Honorable Lincoln S. Church, presiding in the probate department, the petition was denied on November 19, 1929. On December 7th the attorney filed a notice of intention to move for a new trial. On January 14, 1930, the former order was set aside by stipulation. Subsequently the issues were decided by Judge Church adversely to the petitioner's contentions.

Thereafter and in June, 1930, the petitioner, on behalf of his client filed a petition for partial distribution of the devised property free and clear of the existing incumbrance. Objections were filed by the executor. Before this matter could be heard by Judge Church and on September 10, 1930, the petitioner filed an affidavit seeking to disqualify Judge Church on the ground of bias and prejudice. The attorney recited in his affidavit that upon the former hearing before Judge Church the petitioner had asked that the deed of trust involved be returned to the files of the court as an exhibit. He then states that Judge Church "had the effrontery to ask affiant to make a copy in the recorder's office," and that when Mrs. Sullivan was on the stand, "Judge Church, instead of listening to her, held up the deed of trust in his hands very conspicuously, turned it around by the corners, and in a very ostentatious, very childlike, and very foolish manner, pretended to be reading the deed of trust with great interest; at the same time rolling his eyes from side to side and around like a boy in school pretending to study his lesson." In the same affidavit the attorney also stated that "it is common knowledge" that M. C. Chapman of the firm of Chapman & Trefethen, representing the owner of the trust deed, "is presumed to have undue influence with Judge Church," and that "Judge Church has placed himself under political obligation to said M. C. Chapman recently." He concluded with a request to the judicial council to name a judge, "if possible, who is not tainted with Transamerica or Bank of Italy stock."

The charges of bias and prejudice were tried before another judge, who found Judge Church not disqualified. At the request of Judge Church that the hearing on the petition for partial distribution be assigned to another department, the matter was transferred to Judge Stanley Murray, a superior judge of Madera county then sitting in Alameda county pursuant to an order of the judicial council. On the subsequent hearing Judge Murray announced his ruling that the petition for partial distribution was granted, but subject to the subsisting incumbrance on the ground that the question involved was previously decided and was res adjudicata. Later during the same morning Judge Murray reopened the matter to be continued to the following day to take evidence as to distribution. Before that hearing, however, the petitioner on October 27, 1930, filed an affidavit seeking to disqualify Judge Murray. In this affidavit it is stated that Judge Murray, "wilfully and in wanton disregard of plaintiff's rights" and "in wilful and wanton violation of his oath of office as a judge" decided "plaintiff's position without one iota of evidence"; that it "would be highly dangerous and improper and a travesty on justice to allow or permit Judge Murray to hear or act upon the petition"; and that the affiant had "importuned and tried to persuade Judge Murray to hear the case in a manner befitting a court of justice, and Judge Murray wilfully and wrongfully declined to hear evidence."

This charge of disqualification was heard before Judge T. W. Harris, who found Judge Murray not disqualified. By stipulation and at the suggestion of Judge Harris the matter of the hearing on the petition for partial distribution was transferred to Judge E. C. Robinson. The latter, on March 4, 1931, decreed partial distribution of the estate and entered an order that the property devised to Mrs. Sullivan be distributed to her subject to the deed of trust.

The petitioner then, on March 30, 1931, filed in the matter of the estate a paper sworn to by him entitled, "An affidavit in the matter of notice of petitioner's intention to move for a new trial upon decree of partial distribution dated and filed March 4, 1931." This affidavit contained a charge that Judge Harris, when he heard the disqualification charges directed against Judge Murray and when he transferred the case to Judge Robinson, was disqualified on the ground that at that time he was a member of the advisory board of Bank of America. Therein the attorney characterized the various rulings as "judicial oppression and misconduct of the most amazing character, thus depriving a weak and helpless citizen of her right to impartiality and justice"; alluded to Judge Murray as a "peripatetic" judge, and ended that, in the affiant's opinion, "it was not done of a good conscience."

The motion for a new trial was denied. Thereafter the executor filed its final account and petition for final distribution. On February 2, 1932, the petitioner filed his client's objections to the final account, together with a petition to set aside and vacate the former orders, judgments, and decrees of the court in the pending probate proceedings on the ground that the same were obtained by fraud. All of the foregoing charges made by the petitioner in respect to said several disqualification proceedings and motions are repeated in much the same vein, with the difference that "in order to preserve the respect due to the superior court" the attorney "was obliged to designate" said four judges as "X, J, K and L." Said four judges were accused of individually and separately being negligent and careless in performing their duties "to such an extent that such acts constituted a wilful and unjust deprivation of petitioner's rights."

The attorney filed written points and authorities in opposition to the executor's demurrer and motion to strike. From this the following is quoted: "There is so much law to refute the executor's points and authorities, so laboriously worked out, to try to bolster up a wretchedly degraded piece of business that the executor and his crew has been trying to put over, that we cannot quote all of it. * * * The foregoing is a DELIBERATE ATTEMPT TO MISLEAD THE COURT. Only another example of what the unscrupulous gentleman who appears in court for the executor will do to attempt to bolster up a bad case and defeat justice. * * * The judge who influenced a stipulation that the case go before Judge Robinson * * * should be as anxious as anybody to undo the wrong. The most that can be said in his favor is that * * * he forgot that he was a member of the local advisory board of the Bank of America, Bank of Italy, etc. Why, of course, what good would it do to bring such matter to the attention of a judge of his own choosing. Banks acting as executors might nearly always have their own way, if they could get matters before judges chosen by their own agents and pseudo-officers."

Upon the first hearing before the local administrative committee of Alameda, the petitioner moved that the proceeding be transferred to a local administrative committee of another county because of his belief that he could not have a fair and impartial trial before said committee. The petitioner filed his affidavit based on said grounds and the members of the committee filed counter affidavits. The motion for transfer was referred by that committee to the Board of Governors. The latter appointed local administrative committee No. 3 of San Francisco as a special local administrative committee for Alameda county for the purpose of hearing and reporting to the Board of Governors upon the present charges. The latter committee conducted the hearings. It recommended the suspension of the petitioner for a period of one year, which the board reduced to three months.

The petitioner is a native of Nevada and now nearly 62 years of age. He was admitted to practice law in this state in 1898. His registration card shows that he was also admitted to practice in the state of Nevada, and that he was district attorney of Eldorado county in 1903–1906. He testified that for several years prior to 1923 he lived in San Francisco and that in 1923 he removed to Alameda county and for about two years worked for title companies. It appears in the record from the petitioner's oral testimony that prior to the filing of the first affidavit herein mentioned, but subsequent to said adverse rulings of Judge Church, the petitioner entered his opposition to Judge Church in the election contest for the office of superior judge of Alameda county. The petitioner admits that the only basis for his statement that Judge Church was under political obligation to M. C. Chapman was the fact that the latter had been the first to sign as one of Judge Church's sponsors in that election. It appears that the petitioner also opposed Judge Harris in another election.

The petitioner makes numerous contentions in his briefs filed in support of his petition, almost none of which, however, has any relevancy to questions which may be the appropriate subjects of investigation or review on this proceeding. The petitioner has made no showing that the findings and decision of the board are unlawful or erroneous. Section 26, State Bar Act, St. 1927, c. 34, p. 41, as amended by St. 1929, p. 1257.

The petitioner's testimony of the judges' demeanor and the events occurring in the courtroom was contradicted. No evidence tending to prove the truth of the petitioner's statements bearing on the issue of bias and prejudice, the accusations of political influence and the like, was offered. On the contrary, it may be said that the record shows affirmatively that all such statements were false, and if not made deliberately with a consciousness of their falsity, that they were made with at least a conscious carelessness as to their truth or falsity so as to present an equally grave and unfortunate situation. That this attitude and state of mind of the petitioner existed and has continued even up to the present time is further borne out by his conduct on the hearing and his arguments on this proceeding. Without noting further specific instances, we may say that the record fully supports the committee's comments and conclusions that: "There is no retraction, no apology, no excuse as to what was said and done. The transcript of 170 pages following a considerable period of possible retrospection offers no glimmer from respondent of possible regret or palliation. * * * There is nothing in the record which permits us to overlook or condone respondent's attacks on the dignity of the courts." Indeed, we may add that it is a sad commentary on the state of the record that it discloses a pertinent application for and evident truth of the petitioner's statement included in his closing brief that if the lodgment of the complaint in this proceeding "was designed to suppress me, it failed."

The petitioner relies on the case of Works v. Superior Court, 130 Cal. 304, 62 P. 507, in complete justification of his conduct in pursuit of his right to make a showing in proceedings under section 170 of the Code of Civil Procedure, relating to the disqualification of judges. Many other statements contained in the affidavits and papers filed by the petitioner in the probate proceedings, which at first blush appear gratuitously offensive, were not alluded to by the committee in its findings, apparently for the reason that the statements were considered material to the alleged grounds of the charges of disqualification and were therefore apparently within the attorney's rights as defined by the case relied upon. But the opinion in that case also declares that an attorney may not go "out of his way to introduce something purposely and gratuitously offensive." Works v. Superior Court, supra, 130 Cal. 307, 62 P. 507, 508. That the attorney's statements quoted herein fall within the prohibition cannot successfully be controverted on this record. That they are offensive can admit of no doubt. The gratuitous character of some is established by the lack of any materiality to the issues involved; that of others by the failure of even a shadow of proof to support them. This situation, in addition to what has already been said, sufficiently supports a conclusion that offense was intended.

[2, 3] The petitioner, relying on section 34 of the State Bar Act, as amended by St. 1929, p. 1259, makes the objection that any jurisdiction herein of the board or of the court is lacking because the hearings before the committee whose findings the board adopted were held in San Francisco, when Alameda county was the only proper county wherein the hearings could be conducted. Section 34 of the act provides that the hearings shall be held either in the county where the attorney maintains his principal office as such, or where he resides, or where the offense is committed. It may be conceded that under this provision the petitioner could not be compelled against his objection to attend hearings except in Alameda county. The petitioner does not question the power of the board to appoint a special local administrative committee for Alameda county (section 30, State Bar Act, as amended by St. 1929, p. 1258, supra), nor that that committee had full power or jurisdiction to conduct hearings and compel the attorney's attendance thereon. We may, therefore, properly dispose of this contention by concluding that the provision was not intended to affect any question of jurisdiction, but was intended solely for the benefit of the attorney charged, and that it is a benefit which the attorney may waive. The petitioner without objection submitted to having the hearings conducted in San Francisco. He may not therefore be heard to make the objection on this proceeding.

The record shows affirmatively that the petitioner has had a full and fair hearing on the charges involved and that no opportunity to present any matter essential to the preservation of his rights was denied him.

It is ordered that the petitioner be suspended from the practice of the law in this state for a period of three months from and after thirty days after the filing of this order.

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219 Cal. 304

MOORE v. WEBB, Atty. Gen., et al.

S. F. 14781.

Supreme Court of California.

Oct. 27, 1933.

1. **Constitutional law 🔑230(1).**
   Licenses 🔑7(1).

Provision excepting attorneys acting in usual course of profession from application of Motor Club Service Act *held* not invalid as discriminatory, since attorneys furnishing services defined by act, and not acting in such usual course, are subject to it (St. 1929, p. 1732, § 13).

2. **Constitutional law 🔑230(1).**
   Licenses 🔑7(1).

Provision expressly excepting insurance, bonding, and surety companies from application of Motor Club Service Act *held* not invalid as discrimination in favor of agents and brokers operating under insurance regulations, since they are not excepted expressly or by implication (St. 1929, p. 1732, § 13).

3. **Constitutional law 🔑70(1).**
   Licenses 🔑5.

Amount of cash or securities to be deposited or of bond by motor club service agencies to insure observance of statute rests solely with Legislature, absent showing that amount required is unreasonable or arbitrary (St. 1929, p. 1730, § 2).

4. **Licenses 🔑26.**

$100,000 deposit required of those furnishing motor club service *held* not unreasonable or arbitrary as regards association with more than 10,000 members (St. 1929, p. 1730, § 2).

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by John C. Moore, doing business under the firm name and style of the Pacific National Automobile Association, against U. S. Webb, as Attorney General, and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

John C. Moore, in pro. per.

Frank L. Guerena, of San Francisco, for respondent E. Forrest Mitchell.

Robert W. Harrison, Chief Deputy Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for respondent U. S. Webb.

Matthew Brady, Dist. Atty., and M. L. Choynski, Asst. Dist. Atty., both of San Francisco, for respondent Matthew W. Brady.

PER CURIAM.

Appeal from a judgment entered on an order sustaining without leave to amend the several demurrers of the defendants to the plaintiff's complaint.

The plaintiff furnishes a motor club service under the name of Pacific National Automobile Association. In 1929 (St. 1929, c. 818, p. 1728, amended 1931, c. 165, pp. 230, 232), the Legislature passed an act defining and regulating so-called motor club service. By section 1 of the act such service is defined as the "rendering, furnishing or procuring of towing service, emergency road service, insurance service, bail bond service, discount service, financial service, buying and selling service, theft service, map service and touring service, or any one or more thereof, as herein defined, to any person or persons in connection with the ownership, operation, use or maintenance of a motor vehicle by such other person or persons in consideration of such other person or persons being or becoming a member or members of any company, rendering, procuring or furnishing the same, or being or becoming in any manner affiliated therewith, or being or becoming entitled to receive membership or other motor club service therefrom by virtue of any agreement or understanding with any such company."

Section 2 requires the deposit with the insurance commissioner of the sum of $100,000 in cash or securities approved by the insurance commissioner, or a bond with a corporate surety approved by the commissioner, to insure faithful performance in the sale or rendering of motor club service and the payment of any fines or penalties levied for failure to comply with the act. A certificate to be issued by the commissioner is required, for which an annual license fee of $10 is exacted.

The commissioner is given the power for cause shown, and after a hearing and determination that a company has violated the provisions of the act, or that it is insolvent, or that its assets are less than its liabilities, or that it or its officers refuse to submit to an examination, or that it is transacting business fraudulently, to revoke or suspend its certificate.

A provision required to be inserted in every service contract is that the contract may be canceled at any time by either party and the holder be entitled upon cancellation to a refund of the unused portion of the consideration paid calculated on a pro rata basis without any deductions.

Section 13 states: "Nothing in this act shall apply to a duly authorized attorney at law acting in the usual course of his profession, nor to any insurance company, bonding company, or surety company, now or hereafter duly and regularly licensed and doing business as such under the laws of the State of California."

The plaintiff alleges in his complaint that the Pacific National Automobile Association has more than 10,000 members in this and other states who hold service contracts with the plaintiff; that the principal competitors of the plaintiff are certain attorneys at law and certain insurance, bonding, and surety companies who are furnishing a motor club service; and that said act was intentionally drawn so as to except the plaintiff's competitors, and thus place an onerous and almost prohibitive burden on the plaintiff which his competitors are not required to meet. The usual constitutional grounds of alleged invalidity of the act are set forth. The plaintiff sought a decree that the act is unconstitutional and void, and an injunction restraining the defendants from attempting to enforce the act as against him.

The grounds of alleged invalidity are directed principally against section 13 of the act, which, it is claimed, provides a classification which is an unreasonable and unlawful discrimination. We conclude that any inquiry into any alleged ground of unconstitutionality directed against the other provisions of the act is answered adversely to the contentions of the plaintiff by the case of United States Automobile Service Club v. Van Winkle, 128 Or. 274, 274 P. 308, wherein provisions similar in practically all respects to the provisions of the act involved here, with the exception of the provisions of section 13, were held constitutional and valid. The plaintiff relies on that case to support his contention that said section 13 renders the present act invalid. The provisions of section 13 were not enacted into the Oregon statute; or, rather, when our statute was enacted, the classification features were dissimilar to those involved in the cited case. By section 4 of the Oregon statute any company which had been in continuous operation for a period of more than five years, with a paid membership of more than 5,000 members within the state, and shown to have financial responsibility, was exempted from making the $25,000 cash or bond deposit otherwise required. It was held in that case that the classification provided was not founded upon any substantial difference, and that section 4 of that act was invalid. That case, therefore, is not an answer on the exact point involved here.

[1] The plaintiff's argument that section 13 of the act passed by the California Legislature is unreasonably discriminatory as to attorneys at law is based on the premise that attorneys who conduct a motor club service are exempted from regulation under the act. This is not the case. The section excepts "a duly authorized attorney at law acting in the usual course of his profession." The rendering or furnishing, in the manner defined by the act, of any one of the types of service designated, constitutes the person or company so operating amenable to the provisions of the act. Thus the Legislature saw that the act might be construed to include within its purview attorneys who, in the course of their usual service to clients, might be called upon to render, for instance, a bail bond service. The Legislature therefore apparently considered it necessary to refute any intention which might be read into the act to classify such service as exclusively motor club service. On the other hand, in no wise may the language be construed to permit an

attorney at law, merely because he is an attorney at law, to furnish a motor club service as defined by the act without complying with all of its provisions. That is to say, clearly it is not within the usual course of the profession of an attorney at law to render, furnish, or procure any one or more of the several services defined for any person in consideration of such person's becoming a member of any club or company which furnishes such service. In the case of In re Raleigh, 177 Cal. 746, 171 P. 950, a proviso in the Real Estate Broker's License Law of 1917 (St. 1917, p. 1579), that the act should not be construed to interfere in any way with services rendered by an attorney at law, was questioned. The question was expressly not determined, for the reason that other discriminations involved were held sufficient to invalidate the act. When the same class was again the subject of legislative regulation (St. 1919, p. 1252), the language was amended to exclude any attorney at law acting in his professional capacity. In the case of Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A. L. R. 418, the 1919 act was upheld, although without special comment on the foregoing exclusion provision noted in the opinion. The difference in the language used in the above two acts and the reasons for questioning it in the one case and not in the other are sufficiently obvious without further discussion thereof. We conclude that the appropriate language used in the present act does not create an unreasonable discrimination as to attorneys.

[2] The plaintiff concedes that, if there is similarity between the regulations and requirements under the law affecting insurance companies as such and the regulations prescribed by the present act, the exemption of such companies does not constitute an unreasonable classification. The plaintiff does not question that the requirements and regulations under the insurance law, which apply as well to insurance companies, surety companies, and bonding companies (section 594, Pol. Code), including the provisions specifying the amount of paid-up capital stock or actual deposit required, are sufficient to insure their honesty and financial responsibility, and are sufficiently similar so that not to except them from the provisions of the present act when otherwise amenable thereto would constitute duplicate regulation. The plaintiff's argument that section 13 of the Motor Club Service Act excepting such companies thus creates an unreasonable discrimination proceeds upon the assumption that the exemption also includes agents and brokers operating under the insurance regulations. Were such the fact, there might be some merit to the contention under the case relied upon that the discrimination at least as to them was not founded upon any substantial difference. But the premise of the plaintiff is without foundation. The language of the exception refers expressly to insurance companies, surety companies, and bonding companies. It is but an elementary proposition that any others, when otherwise acting as members of the general class within the purview of the act, unless expressly excepted from its provisions, may not be included in the exception by implication, especially when, as here, the implication is unnecessary.

[3, 4] The foregoing discussion answers all of the plaintiff's contentions, with the exception of the contention that the cash or bond deposit prescribed is excessive and that it is illegal because the requirement is imposed on all alike without any inquiry into the size of the company or the possible extent of its financial liabilities. The power to impose this requirement in a proper case is not questioned. In re Cardinal, 170 Cal. 519, 150 P. 348, L. R. A. 1915F, 850; U. S. Automobile Service Club v. Van Winkle, supra. The specific inquiry, outside of any showing that the exercise of the power is arbitrary or unreasonable, is one of economics for the Legislature and not subject to review. Central Lumber Company v. South Dakota, 226 U. S. 157, 161, 33 S. Ct. 66, 57 L. Ed. 164. However, in passing, we note that the facts alleged in the complaint show that the deposit required does not seem to be disproportionate to the present size and the possibilities in growth of the plaintiff's membership and its possible financial liabilities. No contention is made that the deposit required, compared to the regulations to insure financial responsibility on the part of insurance companies, is disproportionate, unreasonable, or arbitrary.

The judgment is affirmed.

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219 Cal. 239

CRANGLE v. CITY COUNCIL OF CITY OF CRESCENT CITY et al. (HARVEY, Intervener), two cases.

S. F. 14603, 14783.

Supreme Court of California.

Oct. 23, 1933.

Appeal and error ⚷781(4).

Appeal from judgment for defendants in proceeding to cancel city council's resolution, awarding contract for improvement, completed and paid for by issuing bonds in hands of innocent purchasers, not parties to proceeding, since filing thereof, must be dismissed as involving moot questions (St. 1925, p. 849, as amended; p. 892, § 42).

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In Bank.

Appeals from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Actions by William Crangle against the City Council of the City of Crescent City and others, in which W. J. Harvey intervened. Judgments for defendants, and plaintiff appeals.

Appeals dismissed.

Mathew Weber, of San Francisco, for appellant.

H. A. Postlethwaite, of San Francisco, for respondents.

Samuel W. Gardiner, of San Francisco, for intervener and respondents.

CURTIS, Justice.

This proceeding was instituted in the superior court of the city and county of San Francisco, by an alleged property owner of real property situated in Crescent City, Del Norte county, to cancel and set aside a resolution of the city council of the city of Crescent City, adopted on the 25th day of September, 1929, awarding to the Pacific States Construction Company a contract for the doing of certain work and improvement under the "Acquisition and improvement act of 1925." St. 1925, p. 849, as amended. No injunction was issued nor applied for to restrain said city or said company from proceeding under said resolution and award to perform said work and improvement. It appears that the contract for said work and improvement was under said resolution awarded to the Pacific States Construction Company and under said contract said company performed and completed said work and improvement and the same has been accepted by said city through its city council and the contractor has been paid in full by the city for the work and labor performed by him under said contract, by the issuance by said city to said contractor of the bonds of said city in accordance with the terms of said Improvement Act. These bonds have been sold for a valuable consideration, and are now in the hands of innocent purchasers who are not parties to this proceeding.

After the filing of the complaint herein, the defendants appeared and filed their answer thereto. The plaintiff thereupon filed an amended complaint, to which the defendants filed an answer. On September 15, 1931, the defendants gave notice of a motion for judgment on the pleadings. This motion was denied by one of the judges of said superior court, but on its renewal before another member of said court, it was granted, and judgment accordingly was entered in favor of the defendants. From this judgment, the plaintiff has appealed to this court.

While said appeal was pending, the defendants moved to dismiss the same on the ground that the questions involved herein have become moot. This motion is supported by an affidavit of defendants' attorney setting forth the facts hereinbefore recited and which are not controverted. It, therefore, satisfactorily appears that since the filing of this proceeding in the superior court of the city and county of San Francisco, the city council has caused to be completed, under the contract awarded to the Pacific States Construction Company, the work and improvement under the resolution attacked in this proceeding; the contractor has been paid in full for said work and improvement by bonds issued to him by said city as provided by said Improvement Act; and said bonds are now in the hands of innocent purchasers who are not parties to this proceeding. Under section 42 of said act, it is provided: "All bonds issued in pursuance of the provisions of this act shall by their issuance be conclusive evidence of the regularity, validity and legal sufficiency of all proceedings, acts and determinations in any wise pertaining thereto, had or made under this act, and after the same are issued no tax levied or collected for the purpose of paying the principal or interest on said bonds shall be held to be invalid or illegal, or set aside or refunded, by reason of any error, informality, irregularity, omission or defect in any of the proceedings, acts or determinations in any wise pertaining to the issuance or payment of said bonds, nor shall any action or proceeding be thereafter commenced or maintained to cancel or set aside said bonds or to prevent the payment thereof or the levy or collection or enforcement of a tax for such payment."

Appellant does not question the validity and binding effect upon him and all property owners within the district comprising the territory of said city affected by said bond issue, of this section of said act. Under this state of facts, nothing can be gained by a decision of this case upon its merits, except possibly the settlement of certain academic questions, which would in no way affect the rights of the parties hereto. Should it be finally determined that the resolution awarding said contract was invalid and should be canceled and annulled, such an adjudication would not in any way wipe out the improvement already completed, nor would it invalidate the bonds issued in payment of said improvements. The bonds would continue to be a valid lien upon all property in said district, including that claimed by the plaintiff, and the owner thereof would be subject to assessment to pay his proportion of said bonded indebtedness. The appeal should be dismissed as all questions involved herein have become moot.

By dismissing the appeal for the above reason, it becomes unnecessary to decide the effect of the Validating Act of 1931 (St. 1931, p. 375). Nor is it necessary for us to go into the merits of the appeal. However, we have given some attention to the record on appeal and find that plaintiff has little or no ground of grievance. The fact that this proceeding was commenced in the superior court of the city and county of San Francisco instead of in one of the counties adjacent to the county in which Crescent City is situated; that plaintiff's title to the real property of which he claims to be the owner is of dubious validity; that the total assessment against said real property, required to meet all payments due on said bonded indebtedness is small, perhaps not exceeding in all the sum of $100; and that this sum was tendered the plaintiff on condition that he dismiss this action, lend some color to the accusation of the respondents that this proceeding had its inception in a desire to harass and annoy the officials of Crescent City in their efforts to improve the conditions of said city rather than to protect any legal rights of the plaintiff, and that the same purpose and motive that actuated the institution of this action have characterized the acts of plaintiff in prolonging these proceedings through the trial and appellate courts.

For the reason heretofore given, the appeal is hereby dismissed.

We concur: WASTE, C. J.; PRESTON, J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.

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134 Cal.App. 637

WEBB v. LOS ANGELES RY. CORPORATION et al. (two cases).

Civ. 7832.

District Court of Appeal, Second District, Division 2, California.

Oct. 16, 1933.

Rehearing Denied Nov. 15, 1933.

1. Street railroads ⚷117(35).

In action for injuries sustained in collision between street car and plaintiff's automobile stalled on tracks at intersection, evidence *held* for jury under last clear chance doctrine, rendering new trial grant erroneous.

2. New trial ⚷66.

Error in instructions does not make verdict "against law" within new trial statute (Code Civ. Proc. § 657, subd. 6).

3. New trial ⚷68.

Where there has been no error affecting determination of fact question, there is no ground for new trial.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Actions by Grvan W. Webb, and by Faith Webb, a minor, by Grvan W. Webb, her guardian ad litem, against the Los Angeles Railway Corporation and another. Verdicts for plaintiffs, and from an order granting defendants' motion for a new trial, plaintiffs appeal.

Reversed.

Jones, Stephenson, Palmer & Moore, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (Penn Cummings, of Los Angeles, of counsel), for respondents.

CRAIG, Acting Presiding Justice.

Separate actions commenced by one of the plaintiffs in his own behalf, and as guardian ad litem on behalf of a minor child, were consolidated for trial, and were submitted to a jury upon the evidence adduced by the plaintiffs, without the offer of evidence by the defendants. Verdicts in favor of the former were returned, a motion for a new trial was interposed by said defendants, which was granted, and the plaintiffs appealed from such ruling.

[1] At an intersection of thoroughfares in the city of Los Angeles, known and designated as Vermont avenue and Eighty-Fourth place, respectively running northerly and southerly and easterly and westerly, the appellants, while driving easterly in an automobile, were injured by the collision of a south-bound street car of the respondent corporation therewith. The car was first seen about 300 feet away, approaching at a speed of 30 to 35 miles per hour, as the automobile made a boulevard stop, proceeded to cross Vermont avenue, and was stalled on the car tracks. Attempts to start the same proving fruitless, the occupants waived their arms and shouted, but the street car continued on, struck the machine, and carried it some distance to and against a large pole. At the close of the plaintiffs' evidence, counsel for the defendants announced that "the defendant submits the case on the plaintiffs' own testimony." Following the verdicts and the motion for a new trial, the court in granting the same stated, in part: "The only question for consideration on this motion is whether or not the evidence would support a finding against the defendants under the doctrine of last clear chance. If the evidence

would not support such a finding then the court erred in instructing the jury upon that question. It would be only upon an application of the doctrine of the last clear chance that the plaintiff would be entitled to recover, if at all." It becomes necessary to examine here the evidence upon which the jury awarded damages and from which appellants contend that the trial court erroneously arrived at the foregoing conclusions. The plaintiffs testified that the avenue "to the north from which direction the street car came was level and straight 2,000 feet or more from the intersection"; that they were familiar with the crossing; that they drove thereto at about 7:30 in the morning, looked and saw nothing in the way, then proceeded to cross; but for some unknown reason the machine "came to an absolute stall and still position on the west track. The automobile did not move after it stalled until the collision." When the street car was first seen it was about 300 feet away, and when the automobile stopped the car was approximately 100 feet or more away, north of the intersection. The motorman began ringing his bell at a point nearly 200 feet from the point of impact. The appellant swore that his motor was still, that he was unable to get it started, but that he "shifted into low gear to get it off" the track, and that it "rolled back just a little." One witness testified that he "heard the gong on the car from the time the car was 150 feet to 200 feet away continuously until it hit the auto"; that "when the auto came to a final stop the electric car was 75 feet away"; that the "speed of the car did not lessen at all from the time I first saw it 150 to 200 feet north to the point of the collision. The collision was very heavy." Another testified that when he first saw the automobile he "saw the electric car coming south about 100 feet north and the auto was then on the track. * * * It kept the same speed up to the time of the collision." A third testified that the ringing of the gong attracted his attention when the car was 150 to 200 feet away, approaching at a speed of 30 to 35 miles per hour; that "the electric car did not change its speed during that time, until just as he hit, when I heard him put on his air." Another swore that he observed the car as it approached the point of collision; that "there was no apparent change in the speed of the car." A witness who had stood on the sidewalk was attracted "by the furious ringing of the bell" about 112 feet away; he did "not notice the motorman put on his brakes; the street car diminished its speed slightly." And another testified that the car "was coming rapidly and maintained the same speed until the collision." A fair brief résumé of the evidence discloses slight, if any, variation of the views of numerous eyewitnesses. It appeared that the distances were related by them from measurements; all agreed upon the speed of the car, ringing of the bell, a clear view down the tracks, failure to stop or to appreciably slacken its speed, and the unavoidable peril of the plaintiffs in an emergency.

Careful consideration of the decisions would seem to compel an application of the rule stated in Darling v. Pacific Electric R. Co., 197 Cal. 702, 242 P. 703, 706: "The elements of the doctrine of last clear chance, which must be present in any given case in order to warrant the invocation of that doctrine, are these: (1) That the plaintiff has been negligent; (2) that as a result thereof she was present in a situation of danger from which she could not escape by the exercise of ordinary care; (3) that the defendant was aware of her dangerous situation and realized, or ought to have realized, her inability to escape therefrom; (4) that the defendant then had a clear chance to avoid injuring her by the exercise of ordinary care; (5) that the defendant failed to avoid the accident by the use of ordinary care. It is not required of the plaintiff to show that her inability to escape from the threatened danger was a physical impossibility. The doctrine applies equally if she be wholly unaware of her danger and for that reason unable to escape it. Whenever she becomes aware of the danger, however, she must thereafter exercise ordinary care for her protection. * * * There are, then, upon this phase of the case, two questions, viz.: (1) Whether or not there was any evidence showing or tending to show that the plaintiff was in such a situation, after she became aware of the threatened danger, from which she could not by the exercise of ordinary care have extricated herself; (2) whether or not there was any evidence showing or tending to show that the motorman had actual knowledge of her situation and could by the exercise of ordinary care have avoided the accident but negligently failed to do so. It is not disputed that both of these queries were, admittedly, in view of the situation revealed by the evidence adduced on the entire case, questions of fact for the determination of the jury. * * *" When the plaintiff herein realized that his automobile was on the track in the danger zone, he "screamed and threw up his left hand." When he did so the car was at least 100 feet away, and the motorman was looking directly down the track toward the plaintiffs, but "did not seem to slacken speed." "There is substantial, uncontradicted evidence, however, that the motorman had a clear view of the track for a considerable distance ahead. Between the car and the plaintiff there was nothing on the track to distract him. His vigorous ringing of the car bell, in connection with those circumstances, is a clear indication that he was attempting to warn the plaintiff of the approach of the car. Any other inference would be clearly unwarranted by the evidence." Darling v. Pacific Electric R. Co., supra. It has been said by our Supreme Court that in such a case an ordinarily prudent man would "upon seeing an automobile moving upon the track in the erratic manner described, have realized the danger of a collision and reduced his speed until he could ascertain whether the automobile would be able to get clear. * * * Certainly it cannot be said that every reasonable man would be bound to conclude, on the facts shown, that the collision was not caused by excessive speed of the car, or by the failure of the motorman to slow down as soon as he should have. If this be so, the plaintiff was entitled to have the question of negligence submitted to the jury." Burr v. United Railroads, 163 Cal. 663, 126 P. 873, 874.

[2, 3] The respondents are not aided by authorities cited upon facts clearly tending to show that upon the undisputed evidence the unavoidable inference must be that the plaintiff approaching a railroad track did not look or listen, or that when fully aware of the approach of a car he closed his eyes to the danger and blindly drove into its path. Stress is placed upon the fact that when the appellants approached the respondent company's tracks the car was 300 feet distant, and that the former were "driving slowly," when it was but 100 feet away; that the witnesses were nearly unanimous in their testimony that "the electric car was approximately 300 feet away when the plaintiff Webb drove upon the southbound track." Assuming, as apparently did the trial court, that the appellant Webb could have known of the approach of the car 300 feet away, it appears that he looked and saw no car, drove onto the track when his machine was responding, suddenly stopped in "an absolute stall" for no known reason or as "a car acts when it is out of gas," with but six seconds, according to the respondents' computations, in which to ascertain the difficulty and proceed. If error was committed in giving instructions upon the last clear chance theory, such instructions were so given at the instance of the defendants, and had the verdicts been permitted to stand would have furnished no ground for reversal of the judgments. Bognuda v. Pearson, 71 Cal. App. 105, 234 P. 857; Finkelstein v. Cosgrove, 83 Cal. App. 201, 256 P. 608; Murray v. Kunde, 91 Cal. App. 440, 267 P. 158. And error in giving instructions, if shown to exist, does not result in making the verdicts "against law," requiring a new trial (see Code Civ. Proc. § 657, subd. 6) O'Malley v. Carrick, 60 Cal. App. 48, 212 P. 45. The sufficiency of the evidence to sustain the verdicts was ample, since the jury may well have concluded that the respondents' car could have been brought to a stop after the motorman must be presumed to have seen the impending peril of the appellants; and that the latter were within the time allowed them unable to extricate themselves from such danger. Where there has been no error in determining an issue of fact or affecting the determination of any question of fact, there is no ground for a new trial. Such grounds all refer to the foregoing errors only. It is established that the motion for a new trial refers to a situation furnishing a reason for reexamination of an issue of fact. Estate of Keating, 162 Cal. 406, 122 P. 1079. It cannot be said that upon the same evidence a different conclusion might be reached, nor that evidence explanatory thereof was excluded to the prejudice of the respondents. Bone v. Hayes, 154 Cal. 759, 99 P. 172. Since the grounds upon which a new trial was granted are rendered by the foregoing unsubstantial, it must be held error in granting the same.

The order granting the motion for a new trial is reversed.

I concur: STEPHENS, J.

GRAF v. MONTECITO COUNTY WATER DIST.*

PAYTON v. SAME.

SANDELL v. SAME.

PADILLA v. SAME.

Civ. No. 7918.

District Court of Appeal, Second District, Division 2, California.

Oct. 13, 1933.

Hearing Granted by Supreme Court Dec. 11, 1933.

Master and servant ⚷375(1).

Employees of water district injured on conveyance furnished by employer while on pleasure trip *held* not subject to Compensation Act (St. 1917, p. 831, as amended).

Facts disclosed that employees were neither going to nor returning from work at time of accident, but that they lived at camp site and had been to their abode, changed their clothes, and boarded train for excursion of pleasure wholly aside from duty.

Appeals from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Actions for damages for personal injuries by George Graf, Curtis Payton, Edward W. Sandell, and Bacilio Padilla against the Montecito County Water District. From judgments of nonsuit, plaintiffs appeal.

Reversed.

See, also, 126 Cal. App. 178, 14 P.(2d) 336.

Butcher & Haines, Robertson & Crawford, and Maxwell Nichols, all of Santa Barbara, for appellants.

Heaney, Price & Postel and Marjorie D. Champion, all of Santa Barbara, for respondent.

STEPHENS, Justice.

This is an appeal from a judgment of nonsuit. The appellants have consolidated their cases on appeal. Substantially the facts are as follows: On June 14, 1930, appellants were injured while riding on a railroad owned and operated by the respondent upon respondent's premises; they brought suits for damages for personal injuries, and upon conclusion of their cases in chief respondent upon motion therefor was granted a nonsuit upon the ground that the superior court did not have jurisdiction of the subject-matter of the actions because appellants, at the time they incurred their injuries, were employees of the respondent, and that both appellants and respondent were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831 as amended), and that the Industrial Accident Commission of the state of California has sole and exclusive jurisdiction of the claims of appellants. The record shows that appellants as employees of respondent resided at a camp maintained by the respondent near the site of Juncal dam in Santa Barbara county; that said dam was being constructed by respondent at the time of the accident, and appellants' work was in connection with the construction thereof. On the day of the accident, at the customary hour of 4:30 o'clock in the afternoon, appellants ceased work, returned to their homes in the camp, changed their clothing, and made other preparation to go to the city of Santa Barbara over respondent's railroad. They boarded the train, which was called the "Saturday Special," and at 4:50 o'clock in the afternoon the train left the camp with appellants on board. The train had been in operation for approximately a year prior to the accident, its rolling stock consisting of flat cars about three feet wide, and the record shows that, while its primary purpose was to aid in the construction work, it was in operation for one trip every Saturday evening for the purpose of accommodating the employees of the district, their families and invitees, without cost to them, to ride from the camp site to the south portal of what is known as the Doulton tunnel, some four or five miles from the camp, at which place other means of transportation was procured by the passengers to take them on to Santa Barbara. While some of the employees testified that sometimes during the week they walked through the tunnel, the evidence shows that the tunnel was dark, the floor uneven and wet. The appellants testified that some of the trips they made to Santa Barbara were for the purpose of recreation and to secure supplies for their use at the camp, but on the day of the accident they were going to Santa Barbara for the sole purpose of visiting friends and relatives, or to attend a theater.

The issue on this appeal is whether the transportation furnished appellants by respondent was so connected with the employment that injury received by appellants while riding on the train arose out of or was incidental to their employment. Respondent contends that the transportation was furnished appellants as a matter of right, and was an implied term of their contract of employment. The record does not disclose what the exact terms of their employment were; there was no testimony that such transportation was promised the employees as a part of their contract.

Respondent cites many cases in support of its contention that an injury received while going to or coming from work by means of a conveyance furnished by the employer as an incident of the employment and in pursuance

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 34 P.2d 138.

of the contract of hire arises out of and in the course of the employment, and is compensable under the Workmen's Compensation, Insurance and Safety Act. But we think the facts of the instant case remove it from any influence of such cases. The injured employees were neither going to nor returning from their work, they lived at the camp site, and had been to their abodes, changed their clothes, and boarded the train for an excursion of pleasure wholly aside from their duties as employees. We cite the following two cases which cover the situation of the instant case and which are clearly and correctly reasoned to a like conclusion with ours: California C. I. Exchange v. Industrial Accident Com., 190 Cal. 433, 213 P. 257, and Hamaa Hama Logging Co. v. Department of Labor and Industries, 157 Wash. 96, 288 P. 655.

Other contentions made by respondent are inapplicable to the facts of this case.

Judgment reversed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

ROSS et al. v. REAL ESTATE INV. CO. et al.*

Civ. 8064.

District Court of Appeal, Second District, Division 2, California.

Oct. 16, 1933.

Rehearing Granted Nov. 13, 1933.

1. Appeal and error 🔑1008(1).

Whether purchaser, seeking rescission of contract for misrepresentation of location of lots, decided to buy specific lots at his office or on tract, and whether he knew numbers of lots he actually bought, *held* for trial court.

2. Vendor and purchaser 🔑44.

Evidence supported finding that sales agent did not misrepresent location of lots to purchaser, seeking to rescind contract and recover money paid thereunder (Code Civ. Proc. § 1963, subd. 19).

3. Vendor and purchaser 🔑341(3).

Evidence supported finding that purchaser was guilty of laches for failure to discover alleged misrepresentation of sales agent as to location of lots until more than two years after execution of contract, sought to be rescinded and money paid thereunder recovered.

4. Appeal and error 🔑1011(1).

Presumption that private transaction has been fair and regular was "evidence" creating conflict with evidence that vendor falsely represented that contract was let for immediate construction of houses in vicinity of lots purchased, precluding reversal of trial court's finding thereon (Code Civ. Proc. § 1963, subd. 19).

[Ed. Note.—For other definitions of "Evidence," see Words & Phrases.]

5. Vendor and purchaser 🔑303.

Tender of deed by vendor, not required by contract to tender performance before exercising right to accelerate deferred payments on default in payment of any installment, *held* not condition precedent to suit for deferred payments after purchaser defaulted.

6. Vendor and purchaser 🔑77.

Purchaser who gave notice of rescission, thereafter defaulting in monthly payments, and sued for amount paid on contract for fraud of vendor, whom court found not guilty, *held* in default for which vendor could accelerate deferred payments as provided in contract.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by K. F. Ross and another against the Real Estate Investment Company and the Security-First National Bank of Los Angeles, an association, which filed a cross-complaint. From a judgment for cross-complainant, plaintiffs appeal.

Affirmed.

George Acret, of Los Angeles, for appellants.

C. E. McDowell, of Los Angeles, for respondent Real Estate Inv. Co.

Howard F. Shepherd, of Los Angeles, for respondent Security-First Nat. Bank of Los Angeles.

ARCHBALD, Justice pro tem.

September 30, 1929, plaintiffs filed their second amended complaint against defendants, alleging in substance that on February 8, 1927, the latter represented to plaintiff Ross that two certain lots in tract 9761, in Los Angeles county, belonging to them, were located at the corner of Avon street and Burbank boulevard, and that, believing such representation to be true, he agreed to purchase them; that on February 28, 1927, Ross executed a writing agreeing so to do, "believing and intending that the same covered and described" the two lots referred to; that he paid $4,594.80 on the agreed purchase price before discovering that said lots were not so located, but were in fact located at the corner of Lima street and Burbank boulevard; that such discovery was made on or about May 15, 1929, and that on June 14, 1929, he

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*For subsequent opinion see 28 P.2d 52.

rescinded said agreement; that on March 12, 1929, he assigned such agreement to his daughter, the plaintiff Matilda E. Bach, as security for a loan. An amendment was filed to such amended complaint setting up as a second cause of action, not only the alleged representation relative to the location of said lots, but also alleged representations of defendants to the effect that contracts had been let for the immediate construction of one hundred homes in the vicinity thereof; that said houses were going to be constructed immediately; that a schoolhouse was to be built within a year a few blocks from said lots and would be ready for the following fall term, and other representations; that such representations were believed and the property purchased by said plaintiff in reliance upon them. The statements were alleged to have been false and to have been recklessly made, and allegedly known to defendants to have been false and untrue and recklessly made at the time they were made. The prayer of the amended complaint was for the return of the money alleged to have been paid on such purchase price. Both defendants filed answers denying the making of such representations, as well as denying the other material allegations of the complaint not admitted. The answer of defendant Security-First National Bank of Los Angeles also set up as a separate defense that plaintiffs were guilty of laches, and that of defendant Real Estate Investment Company that both causes of action were barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. Said Security-First National Bank also filed its cross-complaint against both plaintiffs for the balance due on said contract. The court made findings and entered judgment that plaintiffs take nothing by their complaint, and that the cross-complainant Security-First National Bank recover of and from cross-defendants the sum of $4,511.30. Plaintiffs and cross-defendants have appealed from such judgment.

Appellants contend that the court erred in making certain findings claimed to be not supported by the evidence, and in awarding a money judgment against them.

Respondent Real Estate Investment Company in 1926 and for several years thereafter was engaged in selling, among other properties, the lots in said tract 9761. Respondent Security-First National Bank held the legal title to said tract in trust for the various interested parties. One R. H. Strosnider was an agent employed by the Investment company to sell the lots. The latter met appellant Ross in December of 1926 at Ross' office, and endeavored to interest him in buying lots in the tract. It is Ross' contention that he looked at the lots at the southeast corner of Avon street and Burbank boulevard; that he did not know anything about their legal description; that he became interested because they were only one block from an important thoroughfare; and that he finally agreed to buy them. The lots said appellant claims to have agreed to purchase are numbered 107 and 108, the first being on the southeast corner of Avon street facing Burbank boulevard and the second just east and alongside of it. To the east of lot 108 and parallel therewith are six lots each 25 feet in width, and parallel with and adjoining these to the east are lots 115 and 116, being on the opposite corner of the block from 107 and 108. Lots 115 and 116 are the ones described in the purchase agreement signed by Ross. On January 17, 1927, Ross and Strosnider executed a combination receipt and agreement to purchase lots 104 and 105 of tract 9761. It does not appear that the parties ever discussed such lots. The so-called receipt fixes the price of the lots at $8,100, but the blanks providing for payments to be made are not filled in. Written in one of them, however, is the acknowledgment of the receipt of two pieces of jewelry which Strosnider was to try to sell. The sale price, if satisfactory, was apparently to be applied as the first payment. Strosnider's explanation is that it was a temporary receipt for the jewelry rather than an agreement, and it is not satisfactorily explained by any one how or why lot numbers were inserted therein.

On February 8, 1927, a receipt was executed by Ross and Strosnider acknowledging the deposit of $1.00 by Ross and "accepting one diamond ring and one diamond and opal *penant* [sic] in lavalier as the full down payment of $2025.00." The total purchase price agreed to be paid by appellant Ross was $8,100, and the balance was to be paid in monthly instalments of $105, with interest on deferred payments at 7 per cent. per annum. The agreement was conditioned on acceptance by the owner. Lots 115 and 116 were described therein. The evidence shows that the jewelry was not sold but was finally pledged by Ross and $700 in cash obtained, which was paid to Strosnider, and that Ross gave his note for $800, which he paid on May 28, 1927. The court found that $1,575 was paid in cash, and that the agent waived $450 of his commission, which made the first payment of $2,025. February 28, 1927, Ross entered into a contract for the purchase of said lots 115 and 116, with the Security Trust & Savings Bank, respondent bank's predecessor. On November 10, 1927, the trust department of the Security Trust & Savings Bank sent a notice to Ross reading in part as follows: "Payment will be due Nov. 15 on your contract—Note covering Lots 115 & 116, Tract 9761, as follows: Taxes for fiscal year 1927–1928, amounting to $48.63." This notice was stamped, "Received Payment Nov. 21, 1927," and was signed by the bank. It was introduced in evidence by plaintiffs as Exhibit 11. Plaintiffs also introduced in evidence a receipt signed by appellant Ross dated July 14, 1927, reading as follows: "Received of Guaranty Office, Security Trust & Savings Bank, contract for Lots 115 & 116, Tract 9761."

The court found in effect that defendants did not represent that the lots which Ross agreed to purchase were located at the corner of Avon street and Burbank boulevard, but did represent that such lots were located at the corner of Lima street and said boulevard, "at which point said lots were in fact actually located."

[1, 2] Appellants urge that there is no evidence conflicting with that of Ross to the effect that he picked out and agreed to buy the lots at the corner of Avon street and Burbank boulevard, and that he knew nothing about the numbers of such lots until more than two years after he had agreed in writing to buy the two lots actually located at the corner of Lima street. The evidence does not show any inadvertent insertion of lots 115 and 116 in such contract, and is only consistent with the fraudulent insertion of such numbered lots in the contract after respondent's agents discovered that the lots agreed to be bought by Ross had in fact been sold to some one else before the deal with Ross reached the closing stage. That was plaintiffs' theory at the trial, and is the only theory consistent with the evidence, if appellants' position is correct. Opposed to the evidence of appellants as to the manner in which the lots were selected and Ross' lack of knowledge as to the lot numbers are the writings signed by the latter and which were in his possession during the period of two years and more, as well as the presumption that private transactions have been fair and regular (section 1963, subd. 19, Code Civ. Proc.), which presumption is itself evidence, and which the court had a right to find was not dispelled by the evidence in this case. In addition is the evidence of agent Strosnider to the effect that the school site was "directly" across the street from the lots selected by Dr. Ross, and the evidence that it is directly across from lots 115 and 116, and not so from the Avon corner lots; his denial that he stood with Dr. Ross on the corner of Avon and Burbank, and told the latter "that was the corner"; that "all of the lot numbers indicated on these receipts [with the exception of the first one] were dealt with in his [appellant Ross'] office and on the tract," and that he "left a map, to the best of my knowledge, with him * * * the first time I talked to him," which showed the "lots and blocks." That Strosnider actually had such map at the time of his visit to the office is clear from appellant Ross' testimony. During the latter's examination, the following occurred:

"Q. You mean to say that he [Strosnider] brought a map in and you wouldn't look at it because you were too busy? A. Absolutely.

* * *

"Q. He had a map that showed the tract, but you were too busy to look at the lots he was selling? A. Why should I bother with a map? I didn't know whether I wanted to buy the property unless I saw it."

The question of the weight to be given to the testimony of the various witnesses was for the trial court, as was the question whether or not appellant Ross arrived at the decision to buy specific lots at his office or on the tract, and whether or not he knew the numbers of the lots he actually bought; and in view of the record we cannot say that there is no substantial evidence to support the finding made.

[3] The first writing, relative to the actual purchase of specific lots, was dated February 8, 1927; the final agreement was dated February 28, 1927. The date Ross claims to have first discovered the real location of the lots described in his contract is the latter part of May, 1929, the notice of rescission is dated June 14, 1929, and the original complaint herein was filed July 15, 1929. Over twenty-seven months intervened between the date of the contract and the attempted rescission, and over twenty-eight months before complaint was filed. The evidence shows without conflict that appellant Ross made frequent trips past the tract during such time, and he must have known that no buildings, or no school buildings, were built or construction thereon started, either immediately or at all, complying with the alleged misrepresentation; and, as we have said, in our opinion the evidence supports the finding that no misrepresentation was made as to location of the lots purchased. The receipts and contracts executed were at all times kept in Dr. Ross' desk in his office, and the court might well conclude that he had a map of the tract. No allegations are contained in the complaint in any way attempting to excuse the failure to discover the alleged fraud before said late date. Under such evidence the court found that appellants were guilty of laches, and we think the evidence amply supports such finding.

[4] "It is well settled that where a party has knowledge of facts of a character which would reasonably put him upon inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud or other ground for rescission, he will be charged with having discovered the fraud or other ground as of the time he should have discovered it; that is, as of the time when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so." Bancroft v. Woodward, 183 Cal. 99, 108, 190 P. 445, 449. This conclusion makes it unnecessary to review appellants' contention that the finding that respondents did not represent that a contract was let for the immediate construction of one hundred houses in the

vicinity of said lots, and that said houses were going to be constructed immediately, is not supported by the evidence. In our opinion, however, the presumption of fair dealing (section 1963, subd. 19, Code Civ. Proc.) was evidence creating a conflict with that to the effect that such representations were made, which would place such question beyond our power to review, even in the absence of other contrary evidence. Nor do we believe, in view of the conclusions we have reached, that the other objections made to the court's findings would have any effect thereon.

[5] Appellant Bach, at the time of the assignment of the contract to her, in writing agreed "to fully perform said agreement according to its terms." Under and by virtue of such written promise the court gave judgment for the unpaid balance of said contract against both appellants. No tender of a deed was necessary before bringing suit for such unpaid installments, under an express term of the agreement itself which provides "that no tender or offer of performance by said seller shall be necessary as a condition precedent to its right to exercise any privilege, option or right hereunder, and that the same may be exercised upon any default of the buyer without such or any tender or offer of performance and without notice of any kind to said buyer." One of such rights is to accelerate the deferred payment in default of payment of any installment. The evidence shows that at the time the cross-complaint was filed appellants had defaulted on two monthly payments, viz., those of June 15 and July 15, 1929, and the court found that the respondent bank elected to and did declare the unpaid purchase price immediately due and payable, which was its right under said agreement.

[6] Appellants urge that they were not in default, having rescinded and brought an action to recover the amount paid on the contract, and cite the case of Roome v. Real Estate Inv. Co. (Cal. App.) 21 P.(2d) 599. We fail to see that such case is in point here. In that case it was contended by defendants that plaintiffs had waived their right to damages by reason of their failure to make payments under the contracts, which provided that time of such payments was of their essence, and that the vendors had elected to declare the principal due and payable. This court there said [page 600 of 21 P.(2d)]: "Under a claim of fraud in such a case the buyer will be permitted to withhold payment of the purchase price pending a suit for alleged damage, but must be willing and able to pay if and when liable therefor." In other words, there was no waiver of their right to claim damages by reason of such failure to pay pending suit, and, if the plaintiffs were successful and fraud were established, defendant was not in a position to claim forfeiture, and plaintiff was justified, if fraud existed, "in withholding the payments to recoup the damages she would be entitled to recover." Pembrook v. Houston, 41 Cal. App. 54, 181 P. 828, 829. The same is true here. If the court had found respondents guilty of fraud, then no right of acceleration or any rights under the contract would have existed; but, a contrary finding having been made, appellants became liable to pay the amount which the court determined to be due under the contract.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

134 Cal.App. 652

LYNCH v. KUPFER.

Civ. 681.

District Court of Appeal, Fourth District, California.

Oct. 17, 1933.

1. Estoppel 🔑**3(3).**

Affirmative defense in answer was not binding on defendant in another action, where such answer was signed only by attorney and was not verified.

2. Judgment 🔑**576(1).**

Judgment, even though erroneous, was binding, in absence of direct attack.

3. Judgment 🔑**704.**

Judgment in former action was not res judicata and did not create estoppel in subsequent action to quiet title, where parties to subsequent action were not adverse in former action, and former judgment made no adjudication between them.

> Former judgment referred to fact that plaintiff in second action claimed some interest in property as against defendant and awarded property to defendant subject to such right, particularly stating that no adjudication was made in regard thereto.

4. Navigable waters 🔑**46(2).**

Whether title to accreted land passes when upland to which it is attached is conveyed depends on intention of parties.

5. Navigable waters 🔑**46(2).**

Where nothing indicates contrary intention, conveyance of upland to which accreted land is attached carried title to adjoining alluvion, but only slight evidence is required to show intent to separate the two (Civ. Code, § 830).

6. Appeal and error ⚷842(8).

In action to quiet title, whether defendant's deed conveying land to plaintiff indicated intention not to convey adjoining land claimed to be alluvion *held* fact question for trial court.

7. Appeal and error ⚷1010(1).

Trial court's determination of fact question supported by evidence cannot be disturbed.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action to quiet title by E. A. Lynch, as trustee in bankruptcy in estate of A. M. Kupfer, against Brookie May Kupfer. From an adverse judgment, plaintiff appeals.

Affirmed.

McFadden & Holden and S. F. Gallagher, all of Anaheim, and John E. Dalton, of Los Angeles, for appellant.

Combs & Combs, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

On August 11, 1928, the defendant conveyed to the plaintiff certain lots in Newport Beach, according to the recorded map or plat thereof. Thereafter the plaintiff brought this action to quiet title to a tract of land lying between the lots as described in the deed and the line of ordinary high tide of the Pacific Ocean in Newport Bay. In her answer the defendant alleged that she was the owner of this additional land and asked that her title thereto be quieted. The court found in favor of the defendant, and from a judgment quieting her title the plaintiff has appealed.

The appellant introduced no oral testimony, and relies entirely upon two exhibits received in evidence as establishing title in himself. The first of these is the above-mentioned deed executed by the respondent purporting to convey to the appellant certain lots as designated on the map. The other exhibit is the judgment roll in a former action in which the city of Newport Beach was plaintiff and in which the parties to the present action, with others, were the defendants. In that action the court fixed the line of ordinary high tide of the Pacific Ocean in Newport Bay, and adjudged and decreed that this respondent was the owner of the land in controversy, describing the same by metes and bounds, the description running from the lines of the lots and block as shown on the map or plat referred to and extending to and along the line of ordinary high tide. This judgment was entered on July 2, 1928, a few weeks before the deed above referred to was executed and delivered.

It is appellant's contention that this second exhibit establishes that the land here in question, lying between the lots as described in the deed and the ocean, was and is alluvion (Civ. Code, § 1014); that as such it was and is a part of the upland lots which were conveyed to the appellant by the respondent; and that, under section 830 of the Civil Code, the deed conveying the described lots also conveyed title to the additional land. The respondent concedes the general rules of law relied upon by the appellant, to the effect that alluvion or accreted land becomes a part of the upland and passes with a conveyance of the latter, in the absence of facts showing an intent to separate the same, but contends that the appellant failed to meet the burden of proof resting upon him to prove that the land in question was and is alluvion, and that the evidence discloses such an intent to separate the two parcels as will prevent the passing of title to the additional land under the deed conveying the specific lots.

[1, 2] The complaint in this action describes the land claimed exactly as the same was described in the judgment in the former action. In that action the court fixed the line of ordinary high tide, found that certain of the defendants were entitled to certain lands, and adjudged that this respondent was the owner of this particular land. No finding was made that this land was or is alluvion or accretion, and neither the findings nor judgment make any reference thereto. As proof that this land is alluvion, the appellant here relies upon a statement in an affirmative defense included in the answer filed for all of the defendants in the former action, which reads as follows: "That there is attached to the respective parcels of land above described as alluvion and accretion thereto, formed from natural causes by imperceptible degrees, other lands, which, by virtue of said accretion belong to said defendants and which said lands extend over, beyond and bayward of the said line described in said complaint." It is argued that, while the court made no finding with reference to that special defense, it was "necessary for the court to find that the land here in controversy was alluvion in order to warrant the judgment made in said action." The statement referred to is not binding upon this respondent, since the answer in which it appears was signed only by the attorneys for the defendants in that action, and the same was not verified, verification being waived. McDermott v. Mitchell, 47 Cal. 249. So far as appears from the judgment roll in that case, the findings and judgment were based upon the issues raised by the complaint and the answer, without regard to the affirmative defense. While the appellant argues that it was "necessary for the court to find that the land here in controversy was alluvion in order to warrant the judgment made in said action," this fact does not appear from the judgment roll, and the judgment, even

though it may have been erroneous, is binding in the absence of a direct attack. Strand Improvement Co. v. Long Beach, 173 Cal. 765, 161 P. 975. Nothing appearing in the judgment roll in that action establishes that the land here in question was formed through natural causes by imperceptible degrees. The respondent states that the land in controversy is approximately 262 feet long by 50 feet in width and that its area is considerably in excess of that of the lots conveyed by description to the appellant. While it appears from the description used that the land in controversy is 50 feet in width, its length or the distance between the described lots and the ocean nowhere appears in the record.

[3] The appellant argues that, by the doctrine of res adjudicata or estoppel, or both, the judgment in the former action establishes that this particular land is alluvion and a part of the lots formerly owned by the respondent. Not only were the parties hereto not adverse in the former action, but the judgment therein referred to the fact that this appellant claimed some interest in this property as against this respondent, and awarded the property to this respondent, subject to such rights, if any, particularly stating that no adjudication was made in regard thereto.

[4-7] The question of whether title to accreted land passes when the upland, to which it is attached, is conveyed, is purely one of the intention of the parties. Freeman v. Bellegarde, 108 Cal. 179, 41 P. 289, 49 Am. St. Rep. 76; Fowler v. Wood, 73 Kan. 511, 85 P. 763, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534; Orendorff v. Steele, 2 Barb. [N. Y.] 126. But slight evidence is required to show an intention to separate the two. Tyler on Boundaries, 230. Under the authorities and under Civil Code, § 830, where there is nothing to indicate a contrary intent, a conveyance of the original tract carries title to adjoining alluvion. Where the grant under which the land is held indicates a different intent, the contrary is true. So far as a record title is concerned, the respondent held the land here in question under the judgment in the former action, which itself was a muniment of title. While the size of this particular tract does not here appear, it does appear that it was of sufficient area and importance to be made the subject of litigation, and, in awarding it to this respondent, the court gave it a definite description, setting it apart from other lands awarded to other defendants in that action. In that action it was treated as separate and apart from the lots described by reference to the plat on file, and the description attached to it by the court began at these lot lines and ran to the ocean. Almost immediately thereafter, and closely following this litigation, which thus resulted in a separate description being given to this land, this respondent deeded the lots, of which she was the owner, to the appellant without including therein this parcel of land, the title of which had recently been awarded to her in a judgment. It cannot be said, as a matter of law, that respondent's deed does not indicate an intention not to convey the property here in controversy. The question of intent was one of fact for the trial court, and we think the evidence is sufficient to sustain the implied finding that there was no intent to convey this particular land. Under these circumstances, the trial court's decision on this question of fact cannot be disturbed.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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134 Cal.App. 643

TAYLOR et al. v. WILLIAMS.

Civ. 8000.

District Court of Appeal, Second District, Division 2, California.

Oct. 16, 1933.

Hearing Denied by Supreme Court Dec. 14, 1933.

1. Appeal and error ⟹930(1), 933(1).

Reviewing court must resolve all intendments in favor of conclusions of jury and trial court.

2. Appeal and error ⟹1002.

Appellate tribunal is not concerned with possible conflicts in evidence where it was sufficient to support judgment.

3. New trial ⟹99.

In action for injuries in automobile collision, denial of new trial for newly discovered evidence *held* not abuse of discretion under facts.

> It was contended that four days preceding trial defendant learned that certain witness saw accident, but not until after trial did defendant discover that she had removed from former residence and had resumed maiden name. According to such witness' affidavit, she was riding with parties who testified, and saw third car approach, hit that in which she sat, after which it struck machine driven by plaintiff, and disappeared.

4. New trial ⟹99.

Courts look with distrust and disfavor on motions for new trial for newly discovered evidence.

5. New trial ⟹108(1).

New trial for newly discovered evidence should not be granted, unless it is reasonably probable that new evidence would change result.

6. New trial 🔑150(4).

Party seeking new trial for newly discovered evidence must state in affidavit facts showing he exercised diligence to discover evidence before first trial.

7. New trial 🔑99.

Granting new trial for newly discovered evidence rests within sound discretion of trial court.

8. Appeal and error 🔑981.

Court's discretion in granting or refusing new trial for newly discovered evidence will not be reversed on appeal, unless clearly abused.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Annie E. Taylor and others against F. Williams to recover damages for personal injuries sustained in an automobile accident. From an adverse judgment, defendant appeals.

Affirmed.

Paul Nourse and Harold Jones, both of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for appellant.

Nadia Williams, of Glendale, and E. B. Drake, of Los Angeles, for respondents.

CRAIG, Acting Presiding Justice.

In consequence of a conceded collision of automobiles of the parties, a jury returned its verdict in favor of the plaintiffs and against the defendant for damages alleged to have been sustained by the former from resultant injuries. The defendant appealed from the judgment entered accordingly.

[1, 2] The sole question in controversy before the jury, which was further argued upon a motion for a new trial, and is strenuously contested upon appeal, consists of the existence or nonexistence of an intervening cause of the collision. From the testimony of eyewitnesses it appeared that, while the plaintiffs were proceeding southerly upon a congested thoroughfare, the defendant rapidly appeared from the same direction, suddenly turned, and negligently drove so as to collide with the plaintiffs' car. A witness designated by the defendant as the only disinterested person testifying averred that as he was following the defendant's machine a dark sedan swung around the latter which it "clipped," causing the same to turn and strike that of the plaintiffs. Two other witnesses swore positively that they observed the car of the defendant approach and immediately crash into the automobile occupied by the plaintiffs. Witnesses for the respective parties whose testimony conflicted with previous statements shown to them while on the stand, and physical facts which the defendant construes adversely to the verdict and judgment are the basis of his conclusion that "defendant's story is more within the realms of probability." However, we are compelled to resolve all intendments in favor of the conclusions of the jury and of the trial court, which foreclose a contrary finding of fact in the face of positive evidence. Since its sufficiency is admittedly ample, an appellate tribunal is not concerned with its possible conflicts. Beatty v. McQuirk, 113 Cal. App. 530, 298 P. 510.

[3-8] Upon the motion for a new trial, affidavits were filed by each side, principally upon the question as to whether or not sufficient diligence was shown as to previous effort to locate a witness capable of furnishing newly discovered evidence. It is contended that four days preceding the date of trial defendant learned that this witness saw the accident, but that not until after the trial did the defendant discover that she had removed from a former residence and resumed her maiden name. Reversal is sought upon the authority of Spear v. United Railroads, 16 Cal. App. 637, 117 P. 956, wherein the motorman of a street car, which had collided with an express wagon, was not discovered until after the trial had concluded. In contrast with the case last cited, the trial court in the instant one may well have concluded that the new witness was not of such vital importance that her evidence "although cumulative, is nevertheless of so overwhelming a character as to render a different result probable, not so much because of the testimony itself, but because it would be the testimony of the actor, and therefore of infinitely greater probative value." According to the affidavit of the witness proposed by the appellant, she was riding with parties who testified, and she swore that she also saw a third car approach, hit that in which she sat, after which it struck the machine driven by the respondents, and disappeared. The importance of such testimony is said to arise from the fact that the affiant was the only person who saw the third car after the accident, but it is not contended that she saw or knew more of the cause of the collision than those who had appeared and testified. "The decision of the appeal is controlled by the well-established rules that the courts look with distrust and disfavor upon motions for new trials based on the ground of newly discovered evidence; that such motions should not be granted by trial courts unless the new evidence is such as to make it reasonably probable that it would change the result upon another trial; that the moving party must state in his affidavits facts

which show that he exercised reasonable diligence from the beginning in endeavoring to discover the evidence before the first trial; that the decision of these questions rests in the sound discretion of the trial court; and that its decision will not be reversed on appeal unless an abuse of that discretion clearly appears." Estate of Emerson, 170 Cal. 81, 148 P. 523. As to the degree of reasonable diligence in such cases, we need but cite Bennington v. National Packing Co., 122 Cal. App. 313, 9 P.(2d) 857. It does not seem to have been made to appear that there was an exercise of judicial discretion in contravention of the foregoing rules.

The judgment is affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

SMITH v. FALL RIVER JOINT UNION HIGH SCHOOL DIST. et al.*

SMITH et al. v. PRATT.

Civ. 4856.

District Court of Appeal, Third District, California.

Oct. 13, 1933.

Hearing Granted by Supreme Court Dec. 11, 1933.

1. Judgment ⚷894.

Where surety on bond to stay judgment paid personal injury judgment affirmed on appeal, and took satisfaction and assignment of judgment, bond by which surety indemnified defendants against liability for personal injuries *held* not admissible on motion to compel entry of satisfaction of judgment, where moving party was not party to indemnity bond and surety paid judgment under stay bond (Code Civ. Proc. §§ 675, 942).

2. Subrogation ⚷7(9).

Surety on stay bond paying judgment affirmed on appeal became subrogated to plaintiff's rights and could enforce judgment against any one of defendants, hence trial court's entry of satisfaction of judgment was error (Code Civ. Proc. §§ 675, 942, 1059).

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by California Smith, by and through her guardian ad litem, Walter B. Aldridge, against the Fall River Joint Union High School District and others, and by California Smith, by and through her guardian ad litem, Walter B. Aldridge, plaintiff, and the Independence Indemnity Company, defendant, against M. D. Pratt. From an order granting a motion to compel entry of satisfaction of judgment, plaintiff and the Independence Indemnity Company appeal.

Order reversed.

John Ralph Wilson, of San Francisco, for appellants.

Oliver J. Northup, of Redding, for respondent.

PULLEN, Presiding Justice.

California Smith, a minor, by her guardian ad litem, commenced an action against Fall River joint union high school district, M. D. Pratt, and Dave Fitzwater upon a cause of action arising out of personal injuries suffered by plaintiff. The defendants answered, and in due time the cause was tried and a judgment entered against all of the defendants. An appeal was taken and judgment was affirmed. 118 Cal. App. 673, 5 P.(2d) 930.

Upon the taking of the appeal, the defendants Fall River joint union high school district and Dave Fitzwater gave an undertaking on appeal, as provided in section 942, Code of Civil Procedure, staying the judgment pending the determination of the appeal. The defendant Pratt appealed, but gave no undertaking to stay the judgment.

Upon affirmance, the judgment was entered against appellant Independence Indemnity Company for the full amount thereof, the surety upon the bond executed by the school district and Fitzwater. An execution was issued against the surety, and thereafter the surety paid the amount of the judgment in full. Upon the payment of the judgment by the surety company, plaintiff executed and delivered to the surety a satisfaction of judgment, and also an assignment thereof. The satisfaction was never filed, and in due time Pratt moved the court to compel the entry of the satisfaction of the judgment, as provided by section 675, Code of Civil Procedure. The motion to compel satisfaction was submitted, and thereafter the court granted the motion and ordered that satisfaction be entered of record. From this order, plaintiff and Independence Indemnity Company have appealed.

There are two questions submitted for determination: (1) As to the correctness of the order directing the filing of the satisfaction of judgment; and (2) as to the propriety of receiving in evidence an indemnity bond entered into between Independence Indemnity Company and the high school district and Fitzwater.

[1] The indemnity bond was entered into long prior to the injury to plaintiff here complained of, and was for the purpose of indemnifying Fitzwater and the high school district against loss from any liability imposed by law for damages against them on account

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 34 P.2d 994.

of bodily injuries or death as a result of the operation or use of a certain school bus.

Disposing of the latter question first, it is evident that the indemnity contract to protect the school district and Fitzwater from injuries to pupils using the school equipment had no bearing upon the issues here presented. Pratt was not a party to the indemnity bond, and any contract as to it was a matter solely between the parties thereto, for whose protection it was entered into. The indemnity company did not pay under the indemnity bond but under the stay bond given pursuant to the provisions of section 942, Code of Civil Procedure. The trial court, therefore, erred in receiving evidence in regard thereto.

[2] In support of its position upholding the filing of the satisfaction, respondent relies upon the case of Adams v. White Bus Line, 184 Cal. 710, 195 P. 389, as authority for its position, but an analysis of that case and the instant case does not support his contentions. In the cited case, Adams recovered a judgment in tort against White Bus Company and Stiles jointly for personal injuries. The bus company carried indemnity insurance against such liability with the Western Indemnity Company. This company paid the amount of the judgment to plaintiff, and at the request of the bus company, the insurance company, instead of causing satisfaction of judgment to be entered, assigned the judgment to the manager of the bus company. Stiles moved for an order directing the entry of the satisfaction of judgment, which was granted; the court saying: "In considering this appeal the Western Indemnity company may as well be eliminated as a factor in the case. There was no privity or relation between it and the plaintiff or the defendant Stiles, and its payment to the plaintiff was no more than the act of the insured, the White Bus Line."

Here we have a situation where the appellant surety company paid the judgment in full to plaintiff, and executed the assignment now under consideration, and is now attempting only to hold respondent for reimbursement for any money for which plaintiff could have held Pratt, if the surety had not paid the judgment she held against the defendants. In the Adams Case, an actual tort-feasor was attempting by the assignment of plaintiff's judgment to its own agent to compel contribution from the other tort-feasors; whereas, in the case at bar, appellant surety, which is no tort-feasor at all, is attempting merely to enforce its rights of subrogation derived from the assignment to it by plaintiff, and from its actual payment of the judgment under section 942, Code of Civil Procedure.

Respondent relies upon the case of Holmes v. Hughes, 125 Cal. App. 290, 14 P.(2d) 149, but that case may also be distinguished. There a judgment had been recovered against defendant Hughes, who was protected by a surety company, obligated to pay any judgment against him. After a judgment had been recovered against him, he did not appeal. His surety company, in its own name, and without his knowledge or consent, took an appeal, and gave another surety company as his surety upon his appeal bond. Upon appeal, the judgment was affirmed, and the surety upon the appeal bond paid the judgment, then proceeded to execute against its alleged principal Hughes to recover the amount of the judgment. He defended by setting up the fact that he was the real principal, which contention was upheld by the court.

Section 1059, Code of Civil Procedure, provides that: "Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment * * * he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment, in all respects as if he had recovered the same."

If, therefore, plaintiff had the right to recover from Pratt all or any part of the judgment, then, by virtue of the foregoing section, the surety was subrogated to the same rights; in common language, the surety company stood in the shoes of Smith, and by the assignment acquired all of the plaintiff's right, title, and interest in the judgment, together with all rights and remedies arising therefrom.

"The principle upon which the right of subrogation is founded applies in all cases in which one person, not a volunteer, pays a debt for which another is primarily answerable, and which in equity and good conscience, should have been discharged by the latter." 23 Cal. Jur. 919.

Pratt, together with the school district and Fitzwater, was primarily answerable for the debt, and was obligated in equity and good conscience to discharge the same.

Appellant cites and relies upon the cases of LaFleur v. Burns Lumber Co., 188 Cal. 321, 205 P. 102; Kolb v. National Surety Co., 176 N. Y. 233, 68 N. E. 247, and Maryland Casualty Co. v. Repass (C. C. A.) 253 F. 328, as authority for the principles for which he contends, and, while respondent undertakes to distinguish these cases from the case at bar, we are of the opinion they hold as contended by appellant.

It appearing to us that the trial court erred in directing the filing of the satisfaction of judgment, the order is hereby reversed.

We concur: **PLUMMER, J.**; **R. L. THOMPSON, J.**

134 Cal.App. 657

GRABAN v. GONZALES et al.

Civ. 1211.

District Court of Appeal, Fourth District, California.

Oct. 17, 1933.

Rehearing Denied Nov. 16, 1933.

1. Appeal and error ⚷1068(5).

Refusal to give alleged correct instruction on law governing liability, if accident was caused solely by latent defects in automobile, *held* not prejudicial error, where driver of truck causing accident was negligent, independent of any latent defects.

2. Automobiles ⚷147.

Permitting truck to coast down mountain highway in violation of statute *held* negligence per se (St. 1923, p. 562, § 139).

3. Automobiles ⚷244(36).

In action for injuries from collision on mountain highway, evidence *held* to show that truck driver's failure to stop truck upon discovering something was wrong with transmission and permitting truck to coast in neutral was proximate cause of accident (St. 1923, p. 562, § 139).

> Facts disclosed that truck had good brakes, and, in addition to standard transmission which had four speeds, there was installed compound transmission which gave additional speeds ahead, and additional braking power in descending grade by compressing the engine; that, when the truck driver first attempted to shift to compound transmission, he was unsuccessful and allowed truck to coast for about 600 feet, and, after a motor officer whom he passed had told him to get his truck in gear, truck driver again attempted to shift, but again was unsuccessful, and he made third unsuccessful attempt before colliding with automobile in which plaintiff was riding.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Frances E. Graban against Juan Gonzales and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Borton & Petrini, of Bakersfield, and Wakefield & Hansen, of Fresno, for appellants.

Osborn & Burum, of Bakersfield, for respondent.

MARKS, Justice.

This is an action for damages suffered by respondent in a motor vehicle accident on highway No. 99 in Kern county, near the Grapevine creek bridge in the mountains between Lebec and the Grapevine station. The accident occurred on June 27, 1931, between three and four o'clock in the afternoon. The day was dry and clear. Respondent recovered judgment, from which this appeal is taken.

[1] In the oral argument before this court, counsel for appellants expressly waived reliance upon any of their specifications of error except the failure of the trial court to give one of their requested instructions. This instruction concerned the law governing their liability if the accident and injury to respondent was caused solely by a latent defect in devices and appliances attached to a motor vehicle which had been purchased from reputable manufacturers, and which latent defect could not be discovered by the ordinary inspections usually made. From the view we take of the case we may assume that the proposed instruction properly stated the law and should have been given by the trial judge, and still we conclude that under the evidence before us the refusal to give it was not prejudicial error requiring a reversal of the judgment. We are satisfied that the record discloses such carelessness and negligence on the part of Angel Bracamonte, the driver of the truck, entirely independent of any latent defect, if any, in the machinery under his control, so that the failure to give the instruction had little, if any, bearing upon the verdict returned.

The truck was owned by Juan Gonzales and was being operated by Bracamonte, his employee, who was acting in the scope of his employment and upon the business of his employer. The truck was a three-ton GMC, about 8½ months old, and up to the occasion in question had given no trouble in its operation. Its brakes were in good repair. In addition to the standard transmission which had four speeds ahead, there was installed a compound transmission which gave additional speeds ahead, and, in descending a grade, additional braking power through the compression of the engine. The compound transmission was operated by a lever separate from the regular gear shift lever. The compound transmission lever descended through the floor boards of the truck and was attached to two arms in the form of an inverted "Y," which operated the gears through connecting rods. These arms were grooved to receive the lower end of the lever and were attached to it by a bolt which was secured by a lock nut.

Bracamonte was making the trip northerly from Los Angeles to Bakersfield with a load of about one ton on the truck. After descending the grade north of Lebec for some distance he shifted his standard transmission from fourth speed to third speed and attempted to shift his compound trans mission from direct drive to a gear in order to get added engine compression to brake his truck in descending the grades ahead of him. The exact speed at which he was traveling at that time is not clear from his testimony. He either reduced his speed eight miles an hour to twenty-two miles an hour, or eight miles an hour from a speed of twenty-two miles an hour. It was necessary to have the revolutions of the engine correspond to the revolutions of the gears in order to engage the gears of the compound transmission. He was unsuccessful in his efforts to engage the gears of this transmission and found his truck proceeding forward in neutral. He allowed it to coast for about 600 feet, and, after a motor officer whom he passed had told him to get his truck in gear, he again attempted to shift while the truck was traveling at a speed of thirty or more miles per hour. He was unsuccessful in his second attempt and continued to coast down the grade around what is known as "Dead Man's Curve" until his truck reached a speed of fifty or more miles an hour. He then made a third and last unsuccessful attempt to engage his gears. The truck rapidly gained speed in proceeding down the grade for about two miles, and when at a speed of between seventy and eighty-five miles an hour it crashed into an automobile in which respondent was riding.

There is evidence in the record which would indicate that the lock nut which attached the compound transmission gear shift lever to the "Y" arms under the floor boards had become loose, and that there was some wear showing. Appellants maintain that these two conditions created a latent defect which prevented Bracamonte from engaging his gears and proceeding down the grade safely under the resistance from the compression of the engine.

[2] Section 139 of the California Vehicle Act (St. 1923, p. 562), in effect at the time of the accident, provided in part that a driver of a motor vehicle on a mountain highway should not permit his vehicle to coast. Of course, a violation of a statutory enactment by a driver is negligence per se.

Appellants produced as witnesses a number of truck drivers familiar with the part of the highway in question here who all testified that it was unsafe to permit a truck to proceed down the grade north of Lebec without having its gears engaged. They all agreed that a truck driver should shift from direct drive to the gears of his truck at about the place where Bracamonte first attempted to make the shift and go into lower gears as the grade became steeper northerly from that point. One of these witnesses testified that four-wheel brakes, such as were part of the equipment of the truck in question, would burn out within 150 feet if used solely to control the truck without the use of the braking power of the engine. Bracamonte testified that he always shifted his gears at about the place where he first tried to change them on the day of the accident, and that it was dangerous to proceed northerly with the truck either in direct drive or neutral. The brakes on the truck were in good condition at the point where Bracamonte attempted to make his first shift. It is clear from his testimony that, had he desired to stop at that time, by using his brakes he could have done so.

[3] Under the facts which we have briefly outlined we have reached the conclusion that the proximate cause of the accident was Bracamonte's failure to stop his truck when he found that something was wrong with his compound transmission, and that the truck was coasting in neutral. It was his negligence in proceeding, contrary to law, with his truck out of gear, coasting down a mountain grade, upon which the right of recovery of the respondent should be predicated, and not upon any possible or supposed latent defect in the compound transmission which might have prevented Bracamonte from engaging the gears. According to his own testimony it was dangerous to coast down the grade ahead of him with his truck in neutral. He took the chance of being able to shift his gears at some point ahead rather than to stop his truck with his brakes while he could. He should have stopped and either himself made repairs in the compound transmission so that the gears would engage, or, if he could not have done this, he should have delayed his journey until the necessary repairs could have been made by others so that he could have proceeded in safety and without endangering the lives of those ahead of him.

Under these circumstances there is ample evidence in the record to sustain the verdict and judgment independent of any question of a latent defect in the compound transmission of the truck, if any existed.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

ARCHER v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 8892.

District Court of Appeal, First District, Division 1, California.

Oct. 19, 1933.

Rehearing Denied Nov. 18, 1933.

Hearing Granted by Supreme Court Dec. 18, 1933.

1. Evidence 🔑568(1).

In engineer's proceeding to compel San Francisco civil service commission to replace his name on eligible lists, his affirmative answers to leading questions which contained legal conclusion that he acquired legal residence in city *held* of no evidentiary value, in view of his detailed statements as to his intention and occupancy of abode.

2. Appeal and error 🔑842(1).

Where material facts were not conflicting, question of residence of engineer seeking replacement of his name on eligible civil service lists *held* one of law.

3. Domicile 🔑4(1).

Physical occupancy and intention with which premises are occupied are to be considered in determining residence, and both must occur to establish domicile of choice (Pol. Code, § 52, subd. 7, and § 1239, subd. 10).

4. Domicile 🔑10.

Entries in directories and telephone books of San Francisco and Piedmont *held* not determinative of domicile, entries not having been shown as emanating from person claiming residence in San Francisco.

5. Domicile 🔑10.

Father's registration of son's automobile in Piedmont *held* not determinative of son's claim of domicile in San Francisco.

6. Domicile 🔑10.

Claim of veteran's exemption in Piedmont *held* not determinative of domicile in San Francisco, where claim did not contain declaration as to residence.

7. Domicile 🔑10.

Engineer's declarations of intention as to past acts given during narration of those acts at trial to replace his name on eligible civil service lists *held* not determinative of his domicile.

8. Domicile 🔑10.

Registration and voting in San Francisco *held* prima facie evidence only of intention to establish residence there.

9. Municipal corporations 🔑218(2).

Facts *held* not to sustain finding that engineer was resident of San Francisco so as to justify replacement of his name on eligible civil service lists (Pol. Code, § 52, subd. 1, and § 1239, subds. 8, 9).

> Facts showed that engineer claimed certain place in San Francisco to be his home, but that he never lived there except that he kept suit of clothes there, and he and his wife lived in Piedmont and intended to move to San Francisco.

10. Municipal corporations 🔑218(2).

Word "positions" and phrase "shall be continued" in new San Francisco charter providing that positions exempt from civil service under old charter shall be continued without examination, and that positions in municipal airport shall be continued at pleasure of manager of utilities, *held* to mean same thing and to except airport employees from prior provision (Pol. Code, § 52, subd. 1, and § 1239, subds. 8, 9).

[Ed. Note.—For other definitions of "Position," see Words & Phrases.]

11. Municipal corporations 🔑218(2).

Specific provision of new San Francisco charter that airport positions shall be continued at pleasure of manager of utilities *held* to prevail over general provision that positions exempt from civil service examination under old charter shall be continued without examination (Code Civ. Proc. § 1859).

12. Municipal corporations 🔑218(2).

In determining whether engineer held airport position under old San Francisco charter, authorizing his discharge under new charter at pleasure of manager of utilities, manner of hiring, its purpose, duties which he was hired to and did perform, and source of compensation must be considered.

13. Municipal corporations 🔑218(2).

Consideration by city authorities that engineer was airport employee under old charter, and that he acquiesced in such construction, *held* entitled to great weight in determining whether engineer was airport employee.

14. Municipal corporations 🔑218(2).

Facts *held* not to sustain finding that engineer was blanketed into position of civil engineering designer under new San Francisco charter without civil service examination by his holding of such position under old charter.

> Facts showed that engineer had been employed exclusively on airport and was paid solely from airport funds; that on day before effective date of new charter, which permitted dismissal of airport employees at pleasure of manager of utilities, engineer was transferred to Public Utilities Commission and continued with it until March, 1932, when he was transferred to city engineer's department.

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*For subsequent opinion see 34 P.2d 1023.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Petition by Lawrence J. Archer for a writ of mandate against the Civil Service Commission of the City and County of San Francisco, and the individual members thereof. From a judgment ordering the issuance of a peremptory writ of mandate, defendants appeal.

Reversed.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for appellants.

Leo A. Cunningham, of San Francisco, for respondent.

GRAY, Justice pro tem.

The civil service commission of the city and county of San Francisco appeals from a judgment ordering the issuance of a peremptory writ of mandate commanding it (1) to replace respondent's name on the eligible lists, respectively, of civil engineering designer, in second place, and, of structural engineering designer, in third place; (2) to so place his name on its rolls as to show that he was blanketed into the position of civil engineering designer of the engineering department as of the effective date of the new San Francisco charter, and that, by reason of section 142 thereof, he be accorded all civil service rights and be restored to employment in such position, irrespective of any eligible list; and (3) to approve his claim for the salary of such position, since May 26, 1932. Each of parts 1 and 2 rests upon a separate cause of action. But one finding, as to each cause, is attacked for lack of evidentiary support. Each such finding is an essential support to its respective part of the judgment, without which such part must fall. The third portion, while not assailed specifically, stands or falls with the second part.

As to the first count, the court found that, on December 1, 1930, respondent filed his sworn application to take the examinations for above positions; that, in such application, as required by the commission's rules, he stated his residence to be 472 Belvedere street, San Francisco; that after such examinations, held on June 14, 1931, his name was placed on the eligible lists, as specified in the judgment; and that, after a hearing, the appellants, in disregard of the evidence, adduced thereat, on May 25, 1932, ordered his name stricken from such lists, upon the ground that he had not been a resident of said city and county for more than a year prior to such examination. The court, further, found that he was such resident for the requisite time. Appellants' challenge of this finding raises for determination the question whether the evidence supports it.

[1] The only evidence on this issue of residence consists of stipulations as to his registration and voting in San Francisco county and his own testimony, which is hereafter summarized. His affirmative answers to leading questions, which contained the legal conclusion that he had acquired a legal residence in San Francisco have no evidentiary value in view of his detailed statements as to his intention and his occupancy of an abode. Estate of Harkness, 176 Cal. 537, 169 P. 78. In October, 1928, he left the home of his parents in Oakland and took up his residence at 472 Belvedere street, San Francisco. He had an understanding with the lady, who with her husband possessed the premises, to pay $3 every night he occupied a room there. He never paid any rent or slept in or otherwise occupied any room at this address, although he did keep there a suit of clothes. He registered as a voter from this address on June 16, 1929, June 16, 1930, and March 7, 1932, and voted, under such registrations, in 1930, 1931, and 1932. His name was listed either at such address or at his office (which he did not know) in the San Francisco directories in 1929, 1930, and 1931. He gave such address as his residence to various associations to which he belonged. In June, 1929, he purchased a house at 111 Wildwood avenue, Piedmont, county of Alameda, and later in the same month married. He and his wife, thereupon, moved into this house and lived there until July 1, 1932. The most part or major portion of his time after working hours, including his meals and sleeping, were spent at the Piedmont house. His wife's health prevented her earlier removal to San Francisco. Prior to July 1, 1932, he and his wife had planned to move to San Francisco, and, in furtherance of that plan, had attempted to dispose of the Piedmont house. They actually moved to San Francisco on July 1, 1932, and have resided there ever since. He considered 472 Belvedere street as his permanent and 111 Wildwood avenue as his temporary residence. He never intended to acquire a residence in Piedmont and never abandoned his San Francisco residence. During 1930, his name was listed, in the local directory and telephone book, as residing at 111 Wildwood avenue, Piedmont. Upon his father's application, the latter's automobile was registered, in 1931 and 1932, in respondent's name at the Piedmont address. Respondent in 1930, filed with the assessor of Alameda county a claim for a veteran's exemption upon a vacant lot. From February 21, 1927, he was employed by said city and county and worked either there or in San Mateo county.

[2, 3] If the evidence, as to respondent's residence, were conflicting, the questioned finding thereon could not be disturbed on appeal. Bradley v. Davis, 156 Cal. 267, 104 P. 302; Huston v. Anderson, 145 Cal. 320, 78 P. 626; Smith v. Thomas, 121 Cal. 533, 54 P. 71; Estate of Weed, 120 Cal. 634, 53 P. 30; Quinn

v. Nevills, 7 Cal. App. 231, 93 P. 1055. But there being no controversy as to any material fact, the question of respondent's residence is purely a matter of law (Estate of Wickes, 128 Cal. 270, 60 P. 867, 49 L. R. A. 138), and an erroneous conclusion of the trial court will be reversed on appeal (Sherman v. Reynolds, 83 Cal. App. 403, 256 P. 846). The physical fact of occupancy and the intention with which the premises are occupied are both elements to be considered in determining actual residence. Lakas v. Archambault, 38 Cal. App. 365, 176 P. 180. "Domicile of choice is entirely a question of residence and intention, or, as it is usually put, of factum and animus. Both must concur in order that the domicile may be deemed established. Therefore, as soon as a point of time is reached, when residence and intent concur, the domicile is obtained. * * * Residence at the place in question must be shown to have existed in order that the party's domicile may be deemed to have been established there." 19 C. J. 401. "The first requisite of domicile is a habitation, place of abode or dwelling place." 9 R. C. L. 540. "Residence can be changed only by the union of act and intent." Pol. Code, § 52, subd. 7. "The mere intention to acquire a new residence, without the fact of removal, avails nothing, neither does the fact of removal, without the intention." Pol. Code, § 1239, subd. 10. See, also, Sheehan v. Scott, 145 Cal. 684, 79 P. 350; Smilie v. Smilie, 24 Cal. App. 420, 141 P. 829; Sherman v. Reynolds, supra, to the effect that act and intent must unite to acquire residence.

[4-9] Entries in the directories and telephone book of San Francisco and Piedmont, not having been shown as emanating from respondent, are entitled to no weight as evidence. Estate of Brady, 177 Cal. 537, 171 P. 303. This is also true as to the father's registration of his automobile. The claim of a veteran's exemption is also immaterial, for it is not shown to have contained any declaration as to residence. Respondent's declarations of his intention as to past acts given in the course of his narration of those acts at the trial are entitled to little, if any, consideration. Sheehan v. Scott, supra. His registration and voting in San Francisco is prima facie, but not conclusive, evidence of his intention to establish a residence there. Estate of Brady, supra; Chambers v. Hathaway, 187 Cal. 104, 200 P. 931; Quinn v. Nevills, supra; Bradley v. Davis, supra; Estate of Spencer, 198 Cal. 329, 245 P. 176. Therefore the evidence supports one element—that is intention—included within the finding as to residence. His testimony not only fails to show that he ever occupied a room at 472 Belvedere street, but it affirmatively shows that the place where he remained when not called elsewhere for labor and to which he returned in seasons of repose (Pol. Code, § 52, subd. 1), and the place where his family resided (Pol. Code, § 1239, subds. 8 and 9), was 111 Wildwood avenue. The evidence, therefore, utterly fails to support the other element—that is, occupancy or abode—included within the finding. The finding as to residence is contrary to the evidence, and the first part of the judgment must be reversed.

As to the second count, the court found the following facts, which are admittedly supported by the evidence. For more than five years San Francisco had been continuously engaged outside its boundaries in the construction, operation, and maintenance of the San Francisco airport. Until January 8, 1932 (the effective date of its new charter), all engineering, drafting, and inspection work on this airport was prosecuted under the direction and control of the bureau of engineering of the board of public works. The airport is still being maintained and operated by the city and county. By the terms of the new charter, the jurisdiction, operation, and control of the airport was transferred entirely to the public utilities commission. On February 21, 1927, respondent was employed by said bureau as an engineering draftsman and was assigned to the duty of drafting and preparation of surveys, plans, and specifications and similar work on the airport project. A large portion of his time in such work required his presence at the airport. This employment continued from February 21, 1927, until March 1, 1932. His compensation was paid each month from the municipal airport general funds. From February 14, 1929, to and including March 1, 1932, respondent held the position of civil engineering designer. For more than one year immediately preceding the effective date of the new charter, he was continuously employed on the airport project. Under article XIII, section 11, subdivision A, of the old charter, city and county employees employed on public works outside of the city and county were not subject to the civil service provisions. Section 142 of the new charter provides: "Where existing positions that have heretofore been exempt from civil service examinations are now made subject to examination by this charter, the incumbents of such positions who have held such positions for a period of one year continuously next preceding the time that this charter shall go into effect, shall be continued in their positions as if appointed thereto after examination and certification from a list of eligibles and shall be governed thereafter by the provisions of this charter." Respondent has for more than one year last past and immediately preceding the effective date of the new charter held the position of civil engineering designer employed exclusively on the airport project located wholly without the limits of San Francisco.

[10-14] The court further found that respondent was blanketed into his said position by said section 142 the same as if he had been appointed thereto after examination and certification from the list of eligibles for such position. Appellants assail this finding as unsupported by the evidence. There is no question but that respondent held a position exempted from civil service by the old charter for the time required by section 142, and that the public work upon which he was employed was located outside of the city and county. The fact that his work was performed partially within the city and county is immaterial. Were these all of the facts, he would clearly be continued in this position with civil service status. Cutting v. McKinley (Cal. App.) 19 P.(2d) 507. However, section 125 of the new charter provides: "Positions and employments in the municipal airport, which airport by this charter is placed under the jurisdiction of the public utilities commission, shall be continued and the employees thereof shall, subject to the approval of the commission, be appointed by and hold office at the pleasure of the manager of utilities." The word "positions" and the phrase "shall be continued," used in each section, have the same meaning in both instances. McCarthy v. Board of Fire Com'rs, 37 Cal. App. 495, 174 P. 402. In construing these sections so as to give effect to each and harmonize their meaning, the special provision of section 125 must be considered as an exception to the general provisions of section 142. Marshall v. Williams, 85 Cal. App. 507, 259 P. 970. "In construing these two sections of the charter, the principle of statutory interpretation applicable is that specific provisions shall prevail over general ones. Code Civ. Proc. § 1859; 23 Cal. Jur. p. 732, and cases cited." Gualco v. City of Bakersfield, 86 Cal. App. 167, 260 P. 308, 309. In determining whether respondent held a position or employment in the airport, under the old charter, consideration must be given to the manner of his hiring, its purpose, the duties which he was hired to and did perform, and the source of his compensation. See Maxwell v. Civil Service Commission, 169 Cal. 336, 146 P. 869; Craighan v. O'Brien, 199 Cal. 652, 250 P. 653. The court found that he was employed by the bureau of engineering of the department of public works and immediately assigned to engineering work on the airport, which work was under its direction and control. Obviously his hiring was for a specific job. It also found that he was employed exclusively on the airport and was paid solely from airport funds. The city and county was still his employer, although the bureau was its agent in his employment. The city and county employed him to perform the limited duties of a specific task. This is not a case where one already employed is transferred or assigned from his regular duties to perform work for another department. Respondent testified that, on the day before the effective date of the new charter, he was transferred to the public utilities commission and continued with it until March, 1932, when he was transferred to the city engineer. This transfer shows that the city authorities considered he was an employee of the airport and that he acquiesced in such construction. In case of any doubt, such contemporaneous construction and acquiescence is entitled to great respect and deference. Ahearn v. Davis, 184 Cal. 579, 194 P. 1008. The finding that respondent was blanketed into his position of civil engineering designer in the bureau by section 142 is contrary to the evidence. The last two sections of the judgment, therefore, must be reversed.

Judgment reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

134 Cal.App. 661

SALES v. STEWART.

Civ. 9200.

District Court of Appeal, First District, Division 1, California.

Oct. 18, 1933.

Hearing Denied by Supreme Court Dec. 14, 1933.

1. **Statutes** ⚿217.

History of enactment may be considered in determining whether act permits motion for judgment notwithstanding verdict after entry of judgment on verdict, since wording of act creates doubt as to legislative intention thereon (Code Civ. Proc. § 629).

2. **Judgment** ⚿199(6).

Motion for judgment notwithstanding verdict made after entry of judgment on verdict *held* timely (Code Civ. Proc. §§ 629, 963).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Dudley D. Sales against A. O. Stewart. Verdict and judgment in favor of plaintiff. From an order denying a motion for judgment notwithstanding the verdict, defendant appeals and plaintiff files a motion to dismiss the appeal.

Motion denied.

McCutchen, Olney, Mannon & Greene, of San Francisco, for appellant.

Harry I. Stafford and Keyes & Erskine, all of San Francisco, for respondent.

PER CURIAM.

A motion to dismiss an appeal from an order denying a motion for judgment notwithstanding the verdict.

The verdict was against the defendant, following which judgment was entered in due course. Previous to the submission of the cause to the jury, defendant moved the court for a directed verdict, which was denied. With his motion for a new trial defendant asked for judgment notwithstanding the verdict. A new trial was granted, but the motion for judgment was denied. From the latter order the appeal was taken.

No motion for judgment notwithstanding the verdict was made before the entry of the judgment on the verdict. Plaintiff contends that, under the provisions of section 629 of the Code of Civil Procedure, this was necessary, and that such a motion made thereafter came too late.

The section reads as follows:

"When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict.

"A motion for judgment notwithstanding such verdict may also be made in the alternative form, asking therefor and reserving, if that be denied, the right to apply for a new trial. If the motion for a directed verdict or for judgment notwithstanding the verdict be denied, the trial court on motion for new trial or the appellate court on appeal from the judgment may order judgment to be so entered when it appears from the whole evidence that a verdict should have been so directed at the trial; and when the motion is made in the alternative form, the court may also so order on appeal from the other [order] denying such motion for judgment notwithstanding the verdict, whether a new trial was granted or denied."

The provisions of this section have been considered in several cases. In Estate of Caldwell, 216 Cal. 694, 16 P.(2d) 139, following the rendition of a verdict, but before the entry of judgment thereon, a motion for judgment notwithstanding the verdict was granted and judgment entered accordingly. However, no motion for a directed verdict was made, and it was held that, in the absence of such a motion, the court was not authorized under the statute to grant the motion for judgment.

Cushman v. Cliff House, 79 Cal. App. 572, 250 P. 575, principally relied upon by plaintiff, was an appeal from a judgment and from an order denying a motion for judgment notwithstanding the verdict. No motion for a directed verdict was made; but after the entry of judgment thereon there was a motion for judgment notwithstanding the verdict. It was held that under the section a motion for a directed verdict was in all cases a condition precedent to an order granting a motion for judgment notwithstanding the verdict, and that the latter motion must be made before the entry of judgment on the verdict.

After further consideration of the question we are satisfied for the reasons hereinafter set forth that the statement in the opinion that the latter motion must in all cases precede the entry of judgment on the verdict is not supported by the language of the section, nor do the cases from other jurisdictions therein cited go farther than to declare the rule followed in the Caldwell Case.

The case of Bolar v. Maxwell Hardware Co., 205 Cal. 396, 271 P. 97, 60 A. L. R. 429, also throws doubt on the correctness of the conclusion that a motion for a directed verdict must precede a motion for judgment made in the alternative form as provided by the section. However, that question is not involved here, as a motion for a directed verdict was duly made.

It has been said that the purpose of requiring a motion for a directed verdict as a condition to a motion for judgment is to give the opposite party an opportunity to introduce further proof to meet objections made to the sufficiency of his case (Estate of Fleming, 199 Cal. 750, 251 P. 637; Estate of Easton, 118 Cal. App. 659, 5 P.(2d) 635); and the justice of this requirement seems clear whether the motion be made before or after the entry of judgment on the verdict.

Defendant contends that it was the legislative intention to permit such a motion both before and after the entry of judgment, and that consequently his motion was timely.

[1, 2] The wording of the act might reasonably create a doubt in this respect; and where such is the case the history of the enactment may be considered. Monk v. Ehret, 192 Cal. 186, 193, 219 P. 452; Crowe v. Boyle, 184 Cal. 117, 193 P. 111. The section, which was enacted in 1923, was proposed and its passage urged by the California Bar Association. It was drafted by the legislative committee of that body, and its provisions were discussed at the annual meeting of the association in 1922. These discussions indicate that the object of its proposers was to permit a motion for judgment to be made both before and after the entry of judgment on the verdict, the motion subsequent to such entry to be made in the alternative form, reserving the right to move for a new trial should the motion be denied. In addition, the provision therein for a motion before judgment, and, in case of a denial, that the trial court on a motion for a new trial, or the appellate court on appeal from the judgment, may order judgment to be so entered when it appears that

a verdict should have been directed, considered with the last clause of the section, which provides that "when the motion is made in the alternative form, the court may also so order on appeal from the other [order] denying such motion for judgment notwithstanding the verdict, whether a new trial was granted or denied," shows beyond reasonable question that two motions for judgment non obstante were intended, an appeal from the order denying the motion if made after judgment being provided for by section 963 of the Code of Civil Procedure.

It is clear, we think, that defendant's motion was proper in the circumstances, and that the motion to dismiss the appeal should be denied.

The motion is denied.

219 Cal. 314

TRACY v. SCHMITZ.

S. F. 14849.

Supreme Court of California.
Oct. 31, 1933.

Deeds 🔑211(4).

In action to establish plaintiff's title to realty on ground it was acquired by undue influence of defendant's intestate, evidence sustained finding for defendant.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by William A. Tracy against Frank J. Schmitz, as administrator of the Estate of Amerilla Schmitz, also known as Emma Schmitz, and Frank J. Schmitz, as an individual, to establish title. Judgment for defendant, and plaintiff appeals.

Affirmed.

A. J. Stebenne, D. E. Sullivan, Larrouy & Macdonald, George P. Larrouy, and Jerome F. Macdonald, all of Redwood City, for appellant.

Kincaid & Fitzpatrick, of Redwood City, for respondent.

PER CURIAM.

This is an action, the general purpose of which is to establish the title of plaintiff in certain real property, on the ground that it was acquired by defendant's intestate by means of undue influence.

Said intestate, Mrs. Emma Schmitz, came to live with plaintiff in San Francisco, in 1917, acting as his housekeper. In 1920, they went into the business of chicken raising, at Sebastopol, and later at Redwood City. The Redwood City place was purchased under a contract signed by both parties. The deed from the grantors was executed to plaintiff and Mrs. Schmitz as grantees. In 1929, plaintiff made an agreement to sell the property to Mrs. Schmitz for $2,000, and in August, 1930, made a deed to her. She died July 6, 1931. Some months afterwards this action was brought. From a judgment for defendant, plaintiff appeals.

The appeal is grounded upon the insufficiency of the evidence to sustain the findings and plaintiff, relying chiefly upon his own testimony, charges that Mrs. Schmitz exercised a dominating influence, and made continual demands upon him, to convey the property to her, which finally resulted in his yielding. He further testified that all of the money that went into the purchase of the property was his. Plaintiff's children and son-in-law also testified that Mrs. Schmitz would not permit them to be alone with their father.

On the other hand, the undisputed facts show that Mrs. Schmitz left plaintiff at Sebastopol, and that for a year and a half he corresponded with her, requesting her to return and take an equal share in the business, which she finally agreed to do. Smith, the real estate agent who sold them the place, testified that plaintiff was anxious that Mrs. Schmitz's name should be on the deed, because they were buying it jointly, and plaintiff admits that this was a free and voluntary act on his part. There is evidence of substantial payments made on the contract by Mrs. Schmitz. It is also established by many witnesses that Mrs. Schmitz did all of the housework, and labored on the ranch and garden as well. She spent a good deal of her own money making improvements on the ranch property. Several witnesses testified to the cordial relations existing between the two.

The record lends no support whatever to appellant. The judgment is affirmed.

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219 Cal. 331

WATSON v. CITY OF ALAMEDA et al.

S. F. 14885.

Supreme Court of California.
Oct. 31, 1933.

1. Municipal corporations 🔑788(1).

Proof that municipality had knowledge or notice but failed to exercise opportunity to remedy defective condition of street is necessary to recovery by one injured, because of defective condition (St. 1923, p. 675, § 2).

2. Municipal corporations 🔑788(1).

Pedestrian injured by slipping on wet paint laid at intersection to define pedestrians' lanes *held* not entitled to recover from city, where city had no notice or knowledge of defective condition, since painting was not inherently wrong and dangerous (St. 1923, p. 675, § 2).

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Iris D. Watson against the City of Alameda and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Prior opinion, 19 P.(2d) 270.

Breed, Burpee & Robinson, and Bestor Robinson, all of Oakland, for appellants.

Ford & Johnson and Elliott Johnson, all of San Francisco (Fletcher A. Cutler, of San Francisco, of counsel), for respondent.

H. A. Postlethwaite, of San Francisco (Samuel W. Gardiner, of San Francisco, of counsel), for respondent, amicus curiæ.

LANGDON, Justice.

This is an action for damages for personal injuries. Employees of defendant city of Alameda, acting under orders of the chief of police, were engaged in marking pedestrian crossing lanes at the intersection of Park street and Santa Clara avenue, in the business district of said city. Eight-inch lines were painted in bright orange, establishing lanes nine feet wide. Having finished one side, the workmen proceeded to the other, leaving the wet, painted lanes without barricade or warning sign. Plaintiff, while crossing the street, stepped on the wet paint, slipped and fell, sustaining serious injuries. The jury brought in a verdict in her favor for $9,000, and defendant city appeals from the resulting judgment.

Liability on the part of the city is sought to be imposed under the act of 1923 (Stats. 1923, p. 675; Deering's Gen. Laws 1931, Act 5619). As far as is relevant here, this statute (section 2) makes the city liable for injuries to person or property resulting from the dangerous or defective condition of public streets, where the "board, officer or person having authority to remedy such condition, had knowledge or notice" thereof, and "failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice," to remedy such condition or to take steps reasonably necessary to protect the public.

We accept as conclusive the verdict of the jury on the negligence of the street workers, and the absence of contributory negligence on the part of plaintiff. The question is whether plaintiff has proved a case within the terms of the statute.

Since the accident happened shortly after the work was done, there was, of course, no opportunity for the chief of police, superintendent of streets, or any other responsible officer of defendant to obtain knowledge or notice of any dangerous condition; and, indeed, the condition itself could last but a few hours, during which the paint would dry. Nor does the record contain any suggestion that the absence of warning signs or barricades was actually made known to any of these officers. This case is therefore distinguishable from most of the decisions under the act of 1923 in which the plaintiffs prevailed, where there was shown either actual knowledge or obvious and long-continued neglect sufficient to constitute notice. See, e. g., Dawson v. Tulare Union High School, 98 Cal. App. 138, 276 P. 424; Boyce v. San Diego High School District, 215 Cal. 293, 10 P.(2d) 62; see, also, Benton v. City of Santa Monica, 106 Cal. App. 339, 289 P. 203; Hook v. City of Sacramento, 118 Cal. App. 547, 5 P.(2d) 643.

[1, 2] In view of these holdings, plaintiff has sought to establish a distinction between dangerous conditions resulting from disrepair or neglect of public property, and their actual construction and improvement. Where a properly constructed street, e. g., falls into disrepair, knowledge or notice of its defective condition is conceded to be essential to fix liability. But, it is argued, where the affirmative act of responsible officers is directly carried out, as in new construction or improvement, this fact itself gives rise to liability for any dangerous condition, notice being unnecessary. The effect of this distinction would be that the municipality would, in all governmental work on public streets, buildings, grounds, etc., be liable for the negligence of its employees, in the same manner as if the work were done in its proprietary capacity, that is to say, in the same manner in which a private corporation would be liable. But any such modification of the rule of nonliability for acts performed in a governmental capacity must come from the Legislature, and the Legislature has, in the act of 1923, set forth the extent of its departure from the former rule. The municipality is not, under this statute, liable in the same manner as a private corporation, for negligence of its employees; nor is it enough to show a dangerous condition of property. The municipality must have had notice and have failed to exercise its opportunity to remedy the condition. The theory of the act seems to be that liability is imposed not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof. The elements of knowledge or notice are logically essential to show culpability in failure to remedy the condition, and proof of one or the other is necessary to recovery. See Benton v. City of Santa Monica, supra; Crone v. City of El Cajon (Cal. App.) 24 P.(2d) 846. Reference is made by plaintiff to the special doctrine that notice is unnecessary where the planned improvement is inherently wrong and dangerous [see Perkins v. Blauth, 163 Cal. 782, 127 P. 50; Kaufman v. Tomich, 208 Cal. 19, 280 P. 130; Black v. Southern Pacific Co., 124 Cal. App. 321, 12 P.(2d) 981], but it can have no application to the instant case, where the work planned and the directions given involved no danger to the public, and the defective condition arose solely through the negligence of those doing the work. The case of Mulder v. City of Los Angeles, 110 Cal. App. 663, 294 P. 485, where street work was ordered with the knowledge of the board of works that no provision was to be made for

protection of property against damage which reasonably might have been expected to result therefrom, is likewise distinguishable.

It follows that plaintiff's contention, in conflict with the express language of the statute and the rule of numerous cases, cannot prevail, and we are forced to conclude that she has failed to establish the liability of defendant city under the act of 1923.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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219 Cal. 334

MARTIN v. HALL.

L. A. 12868.

Supreme Court of California.

Oct. 31, 1933.

1. Quieting title ⚷39.

In quiet title action directed at all claims made by defendant under written instrument, cross-complaint for damages *held* authorized, since relating to "transaction" upon which action was brought (Code Civ. Proc. § 442).

[Ed. Note.—For other definitions of "Transaction," see Words & Phrases.]

2. Quieting title ⚷39.

That complaint in quiet title action alleges only plaintiff's title and right to possession and sets forth no "transaction" is not conclusive of defendant's right to file cross-complaint for damages under statute permitting cross-complaint relating to "transaction" upon which action is brought (Code Civ. Proc. § 442).

3. Set-off and counterclaim ⚷29(1).

Facts surrounding cause of action, and not form of complaint, determine "transaction" within statute permitting cross-complaint relating to transaction upon which action is brought (Code Civ. Proc. § 442).

4. Pleading ⚷147.

Cross-complaint may be filed though relief demanded is distinct from relief demanded by plaintiff (Code Civ. Proc. § 442).

5. Quieting title ⚷35(1).

In quiet title action, general allegations or denials of ownership and possession are sufficient.

6. Quieting title ⚷38.

In quiet title action, defendant abandoned interest in land, thereby conceding plaintiff's right to judgment, by claiming damages and alleging that state destroyed value of gas and oil lease by curtailing production.

7. Pleading ⚷35.

Where party pleads his title specially and generally, special allegations may be treated as surplusage if insufficient or incomplete; but where special allegations affirmatively reveal weakness of title, they nullify general allegations.

8. Quieting title ⚷39.

In action to quiet title, cross-complaint *held* not to state cause of action for damages for breach of agreement for oil and gas lease, where alleged agreement was too uncertain and incomplete to be enforceable.

9. Quieting title ⚷39.

In action to quiet title, cross-complaint demanding damages for breach of agreement for oil and gas lease, which was unenforceable for uncertainty *held* to state cause of action for recovery of sum paid to plaintiff in consideration of agreement.

10. Mines and minerals ⚷73.

Agreement for oil and gas lease *held* unenforceable for insufficiency and indefiniteness, where agreement failed to fix date for commencement of lease or term of duration, and specifically alleged that other provisions were to be mutually agreed on, indicating omission of essential terms.

11. Judgment ⚷252(5).

Defendant who in cross-complaint to quiet title action sought damages *held* entitled to return of sum paid to plaintiff for unenforceable lease, though not prayed for, where pleading prayed for general relief (Code Civ. Proc. §§ 442, 580).

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Frank Martin against J. E. Hall, wherein defendant filed cross-complaint. Judgment for plaintiff, and defendant appeals.

Affirmed in part, and reversed in part.

C. A. Lindeman, of Los Angeles, for appellant.

Harry F. Sewell and Harold Richardson, both of Whittier, for respondent.

SEAWELL, Justice.

Defendant, J. E. Hall, appeals from a judgment on the pleadings quieting the title of plaintiff Frank Martin to real property in the county of Los Angeles, and from an order denying his motion to vacate said judgment. By his original answer and cross-complaint defendant alleged that plaintiff had agreed to give him an oil and gas lease on said property, for which defendant had paid $5,000 and agreed to make further payments. He prayed for specific performance of said agreement for a lease. Thereafter he amended his answer and cross-complaint to pray for damages instead of for specific performance. He alleged that subsequent to issue joined upon the original pleadings the production of oil and gas in the vicinity of the lands in question had been so curtailed and limited, pursuant to legislation of the state of California effective since the joinder of issue, as to destroy the value of an oil and gas lease on the premises and make drilling of a well unprofitable and prohibitive. On August 8, 1928, when the contract for a lease was signed, defendant alleged that said lease would have had a cash value in excess of $17,500, the sum agreed to be paid therefor, and that he could have drilled and operated wells at a profit, wherefore he prayed for damages in the amount of $50,000.

When the case came on for trial, plaintiff orally moved for judgment on the pleadings, which was granted. Thereafter, upon defendant's motion to vacate, the court modified the judgment to provide that it should be "without prejudice to the rights of defendant to maintain a separate action as to matters set forth in the cross-complaint." It is apparent from the record that the court was of the view that a claim for monetary damages could not be made the subject of cross-complaint in an action to quiet title. Since the decision of the court below it has been determined that in the circumstances alleged herein damages may be recovered by cross-complaint. California Trust Co. v. Cohn, 214 Cal. 619, 7 P.(2d) 297, 299; Hanes v. Coffee, 212 Cal. 777, 300 P. 963.

[1-4] Where a quiet title action is directed at all claims made by defendant under a written instrument, and would not have been brought but for defendant's claims under said instrument, the claim of plaintiff to quiet title and the claim of defendant for damages for breach of said instrument are necessarily related to the same "transaction" within the meaning of section 442, Code of Civil Procedure. Although the complaint is in the usual brief form, alleging simply plaintiff's title and right to possession, and setting forth no "transaction," this is not conclusive. "The facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the transaction." California Trust Co. v. Cohn, supra. The effect of the two cited cases, taken together, is to disapprove of the reasoning advanced in Meyer v. Quiggle, 140 Cal. 495, 74 P. 40, and Yorba v. Ward, 109 Cal. 107, 38 P. 48, 41 P. 793, so far as they dealt with the "transaction" clause of the cross-complaint statute. California Trust Co. v. Cohn, 214 Cal. 619, at page 625, 7 P.(2d) 297. The relief sought on cross-complaint need not diminish or defeat the plaintiff's recovery, but may be distinct from the relief demanded by the plaintiff. Hanes v. Coffee, supra.

[5-7] Appellant contends that irrespective of the propriety of a cross-complaint for monetary damages in an action to quiet title, or the sufficiency of the facts alleged by him by way of cross-complaint to state a cause of action for damages, his general denials of plaintiff's ownership and right of possession are sufficient to state a defense to plaintiff's claim of title. In an action to quiet title general allegations or denials of ownership and possession are sufficient. Smart v. Peek, 213 Cal. 452, 2 P.(2d) 380. But in the case herein appellant, by his claim for damages and his allegation that the state of California had curtailed the production of oil and gas in the vicinity and thereby "destroyed the value" of a lease, has abandoned his claim to an interest in the property. By accepting a lease appellant would assume burdensome obligations, including payment of $12,500. He is unwilling to accept a lease which would be without value, and in legal effect has so stated in his answer. It is the law that where a party undertakes to plead his title specially, as well as generally, the special allegations may be treated as surplusage if insufficient or incomplete. Smart v. Peek, supra. But where the special allegations affirmatively reveal the weakness of his title, their effect is to nullify the general allegations. Hamman v. Milne, 179 Cal. 634, 178 P. 523; Sierra Land & Water Co. v. Cain Irrig. Co. (Cal. Sup.) 25 P.(2d) 223; Durst v. Jolly, 35 Cal. App. 184, 169 P. 449. The same effect must be attributed to allegations whereby a party renounces all interest in the property. Appellant by his pleading has conceded the right of plaintiff to a judgment quieting title. Furthermore, it affirmatively appears from the special allegations of appellant's pleading that the alleged agreement was too uncertain and incomplete to vest in him any interest in or claim to said property, as will appear hereafter.

[8, 9] It follows from the fact that the alleged agreement as described by appellant is too uncertain and incomplete to constitute a valid agreement for a lease, that his cross-complaint fails to state a cause of action for damages for breach of said agreement in the sum of $50,000, as prayed for. However, by virtue of the fact that the alleged agreement is unenforceable appellant has stated a cause of action for recovery of the sum of $5,000, which he alleges he paid respondent for a lease and which respondent still retains.

[10] Appellant alleges execution of a written agreement for a lease on August 8, 1928.

The written agreement is not set forth haec verba in the answer and cross-complaint. As described by appellant it is uncertain, indefinite, and incomplete, particularly in that it fails to fix a date for commencement of the lease or to fix any term of duration. Rohan v. Proctor, 61 Cal. App. 447, 214 P. 986, Enlow v. Irwin, 80 Cal. App. 98, 251 P. 658. It is specifically alleged that other provisions were to be mutually agreed on, which indicates that essential terms were left for after consideration and agreement. Howard v. Burrow, 77 Cal. App. 4, 245 P. 808; Durst v. Jolly, supra; Enlow v. Irwin, supra; Los Angeles Soda Works v. Aquazone Co., 103 Cal. App. 105, 284 P. 253. The subsequent allegation as to negotiations had between appellant's attorney and respondent's attorney are insufficient to remove the uncertainty or to establish that the minds of the parties had met in final agreement.

[11] Although appellant does not ask for return of the $5,000 in the event he is not entitled to damages as prayed for, his pleading contains a prayer for general relief. "It is not essential that a complaint state a cause of action for the relief which plaintiff seeks, provided the facts stated show some right of recovery, and a party cannot be thrown out of court merely because he may have misconceived the form of relief to which he is entitled." Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84, 87. See, also, Brown v. Anderson-Cottonwood Irr. Dist., 183 Cal. 186, 190 P. 797; Harris & Hull v. McCarty, etc., Corp., 102 Cal. App. 461, 283 P. 111; Von Schrader v. Milton, 96 Cal. App. 192, 273 P. 1074; Gregg v. Carey, 4 Cal. App. 354, 88 P. 282. The court may grant any relief consistent with the case made by the complaint and embraced within the issues. Section 580, Code Civ. Proc. In Harris & Hull v. McCarty, etc., Corp., supra, a contract for the sale of lots, which plaintiff sought to enforce by specific performance, appeared from the complaint to be void by reason of the description of the lots by reference to an unrecorded map. In sustaining the right of plaintiff to recover the sum of $1,960.12 paid on the contract the appellate court said: "It appears from the face of the complaint that the alleged contract is void and the answer expressly so alleges. Since the complaint shows that the contract is void, it does not state a cause of action for specific performance, but it does state sufficient facts to constitute a cause of action for the recovery of the purchase money paid to the defendants."

In Zellner v. Wassman, 184 Cal. 80, 193 P. 84, the plaintiff sued the administrator and heirs of a decedent to recover on an oral promise of decedent to leave him $5,000 by will in consideration of his caring for decedent. The plaintiff was not entitled to recover on the contract by virtue of the statute of frauds, but the court held that his pleadings stated a cause of action for recovery of the reasonable value of his services.

Upon the pleadings herein, plaintiff was entitled to a judgment quieting his title to the lands described in the complaint. But the cross-complaint stated a case for recovery of the sum of $5,000, which the court should have heard.

The judgment and order appealed from are therefore affirmed in so far as they quiet plaintiff's title, but in so far as they determine that defendant take nothing on his cross-complaint they are reversed for further proceedings on said cross-complaint.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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219 Cal. 243

BOX et al. v. YOUNG et al.

L. A. 14267.

Supreme Court of California.

Oct. 23, 1933.

1. Waters and water courses 🔑227.

Filing with secretary of irrigation district of original and duplicate sections of recall petition, made petition public document in files of district, and stealing of portion of petition did not divest secretary of authority to make certificate, nor divest board of jurisdiction to call election.

2. Evidence 🔑178(2).

Secondary evidence of contents of recall petition filed with secretary of irrigation district could be received and acted on by board of directors of district where major portion of petition was stolen after filing (Code Civ. Proc. § 1855).

3. Waters and water courses 🔑227.

When board of directors of irrigation district examines secretary's certificate and hears evidence of loss or destruction of recall petition, and concludes that a sufficient petition was filed and properly certified, petition is "submitted" to board as required by Irrigation District Act (St. 1897, p. 254, § 28½, as added by St. 1911 [Ex. Sess.] p. 135).

[Ed. Note.—For other definitions of "Submitted," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Imperial County; L. N. Turrentine, Judge.

Suit by Maril L. Box and another for an injunction against William E. Young, Evan T. Hewes, Mark Rose, Ira Aten, and Burleigh E. Adams, Directors of Imperial Irrigation District, and F. H. McIver, Secretary of the Board of Directors of the Imperial Irrigation District. From a judgment granting a permanent injunction, the last four named defendants appeal.

Reversed.

Charles L. Childers and D. B. Roberts, both of El Centro, for appellants F. H. McIver, Secretary, Mark Rose, Ira Aten, and Burleigh E. Adams, Directors of Imperial Irr. Dist.

S. P. Williams, of El Centro, for respondents William E. Young and Evan T. Hewes, Directors of Imperial Irr. Dist.

Ernest R. Utley, of El Centro, for respondents Maril L. Box and Herman Huth.

PRESTON, Justice.

Appeal from judgment on the pleadings in favor of plaintiffs. The question involved is correctly stated by the appellants in the following language: "When a recall petition, sufficient in all respects, has been filed with the secretary of the board of directors of an irrigation district, and after the secretary has made complete examination, but before his certificate is made or said certificate and petition presented to the board of directors, the major portion of said petition is stolen and lost, does such loss divest the secretary of authority to make his certificate and divest the board of jurisdiction to call the election?"

On the 21st day of February, 1933, a petition was filed with the secretary of the board of directors of Imperial Irrigation District for the recall of one Burleigh E. Adams, a director from the fourth division of said district. The original petition consisted of one section with only 16 names on it. The minimum number of names required to effect a recall election for director of said division of said district was 540. The first petition was certified by said secretary to be insufficient and within ten days thereafter a supplemental petition was filed with said secretary in thirteen sections, containing over 800 names. The secretary made his examination as required by law and also made a duplicate list of all the signers on said petition, and places of their residence. However, before he had actually made his certificate, as required by law, based upon the original and supplemental papers, eleven of the sections of said supplemental papers were stolen from his office, which said sections contained some 647 names. Inquiry was made, but said papers were never found or recovered. The secretary nevertheless proceeded to make his certificate based upon his said examination of the original and supplemental papers, prior to their loss, and from such examination, he determined that a sufficient number of names of qualified electors were contained therein. He attached to said certificate the three sections remaining in his possession and satisfactorily accounted for the loss of the remaining portions.

At this point plaintiffs, as taxpayers, instituted this action to enjoin said secretary, as well as the board of directors of said district, from taking any further steps toward calling a special election for the recall of said director Adams until the whole of the petition had been found or the lost portions thereof restored by a proper decree of court. The allegation was made that the directors would, unless restrained, call the election for the purpose indicated.

Three of the members of the board, one of whom was said director Adams, resisted this application for an injunction. The other two members of the board, by their answer, joined with the plaintiffs in requesting the injunction. The secretary answered, denying that he was unable to make the certificate required by law and alleging that he had already performed that duty, also setting up the foregoing facts as to the loss of said documents.

Under these pleadings, plaintiffs and the two directors who joined them, moved for judgment on the pleadings in their favor. The motion was granted and judgment was thereupon entered in favor of plaintiffs granting a permanent injunction against the calling of said election until the lost documents were recovered or their loss established by a decree of court. From such judgment, said three director defendants, and said secretary, appealed.

[1, 2] We can find no justification for the judgment for plaintiffs. The irrigation district is a public corporation. Yolo v. Modesto Irr. Dist., 216 Cal. 274, 13 P.(2d) 908. The filing with the secretary of said original and duplicate sections of the recall petition made the petition a public document in the files of said district. An order of the court restoring the lost portions of the petition was not necessary to give it validity. The loss or destruction of such public records did not affect their validity or effectiveness. Estate of Heywood, 154 Cal. 312, 315, 97 P. 825. Secondary evidence of the contents of said petition could be received and acted upon by the board of directors of said district. Section 1855, Code Civ. Proc.; Hibernia Savings, etc., v. Boyd, 155 Cal. 193, 100 P. 239.

[3] Respondents rest their contention for the propriety of said judgment upon the provisions of section 28½ of the Irrigation District Act, as added by St. 1911 (Ex. Sess.) p. 135, which provides that the secretary shall examine the petition "and he shall attach to said petition his certificate showing the result of said examination"; also "if the peti-

tion shall be found to be sufficient, the secretary shall submit the same to the board of directors without delay, whereupon the board shall forthwith cause a special election to be held. * * *" We think that the construction contended for is entirely too technical. When the board examines the certificate of the secretary and hears the evidence of the loss or destruction of the petition or any material portion thereof, and concludes therefrom that a sufficient petition was filed and properly certified, the same may be said to be in law "submitted" to said board.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; IRA F. THOMPSON, J.

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219 Cal. 246

MORROW v. BOARD OF DIRECTORS OF IMPERIAL IRR. DIST. et al.

L. A. 14435.

Supreme Court of California.
Oct. 23, 1933.

As Amended Nov. 2, 1933.

1. **Waters and water courses** ⚷227.

That valid recall petition, part of which was stolen, was on file with secretary of irrigation district did not warrant refusal of directors to act on second petition as former petition would then have no further force.

2. **Mandamus** ⚷74(2).

Requiring board of directors of irrigation district to act on second recall petition filed within six months of first petition, when portion of first petition was stolen, *held* not to infringe statute forbidding filing of petition within six months of prior recall election (Gen. Laws 1931, Act 3854, § 28½).

In Bank.

Mandamus by Charles H. Morrow against the Board of Directors of the Imperial Irrigation District to compel them to meet and call a special election.

Peremptory writ issued.

Prior opinion, 23 P.(2d) 789.

S. P. Williams, of El Centro, and Gray, Cary, Ames & Driscoll, of San Diego, for petitioner.

Charles L. Childers and D. B. Roberts, both of El Centro, for respondents.

PRESTON, Justice.

This is an original proceeding seeking a peremptory writ of mandate requiring respondents, as the full Board of Directors of the Imperial Irrigation District, to forthwith meet as such board and call a special election to determine whether Burleigh E. Adams should be recalled as a director from the fourth division of said district, and his successor elected. Directors Hewes and Young have not appeared. The other three members of the board have answered. However, respondents do not question the sufficiency of the petition nor of the certificate of the secretary of the board nor the fact that the board has failed to act, nor that they will not act without an order of court directing them so to do. The answer sets up the proceeding this day determined. Box v. Young (Cal. Sup.) 26 P.(2d) 290.

From the situation as therein set forth, it is urged that the second petition, the one here involved, should not be entertained or acted upon until the first petition, the one involved in said Box Case, has been disposed of by proper action of the board. It is unnecessary to give a detailed account of these proceedings. It suffices to say that prior to the filing of the present petition a petition for the identical purpose was filed with the secretary of the district, was examined by him and determined to be sufficient, but before the completion of his certificate thereon eleven sections of the petition, containing some 647 names, were purloined from the files of the district. The secretary, nevertheless, proceeded to make his certificate setting forth the loss or destruction of the documents and filed same with the board of directors. At this point the above-mentioned proceeding was commenced (Box v. Young, supra) to permanently restrain the calling of a special election until the lost documents were restored to the files or the loss accounted for by a decree of court. Judgment was granted therein as asked. An appeal was taken and said judgment has, as aforesaid, been this day reversed. Box v. Young, supra.

[1] The petition and certificate involved in the instant proceeding are sufficient and hence no justification can be found for the failure of the board to act thereon and proceed to call the special election. The fact that two valid petitions may be on file at the same time does not warrant a refusal to act if either of them is sufficiently certified. When the election is called under one petition, any other petition for the same purpose then on file or in existence becomes functus officio.

[2] The provision of section 28½ of the Irrigation District Act (Stats. 1897, p. 254, as amended; Deering's Gen. Laws 1931, vol. 2, Act 3854, p. 1968), which forbids the filing of

a petition for a recall election at any time before the expiration of six months from the date of a prior recall election, is not infringed in any manner by this holding.

Let the peremptory writ of mandate as prayed issue forthwith.

Petitioner to have his costs.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; IRA F. THOMPSON, J.

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219 Cal. 249

SYMONDS v. SHERMAN (two cases).

L. A. 14193.

Supreme Court of California.

Oct. 23, 1933.

Rehearing Denied Nov. 20, 1933.

1. Contracts 🔑164.

Several papers relating to same subject-matter and executed as part of substantially one transaction must be construed together (Civ. Code, § 1642).

2. Bills and notes 🔑134.

Document in payee's handwriting of same date as and attached to note, to effect that note should be returned to maker on payee's death, should be construed with note as one contract (Civ. Code, § 1642).

3. Bills and notes 🔑527(1).

Evidence warranted court's finding that payee had agreed for ample consideration that note should be canceled on payee's death.

4. Wills 🔑715.

Testator's intention to discharge debt due from legatee must be ascertained from language of will exclusive of other declarations, unless will on its face is uncertain or ambiguous.

5. Wills 🔑488.

Will bequeathing sum to testatrix' debtor as legatee, and directing that it be paid before any other bequests *held* not to contain latent ambiguity which would permit introduction of extrinsic evidence showing testatrix intended cancellation of notes given her by legatee.

> Will provided that in recognition of services shown testatrix by care and attention which she had received from legatee, testatrix bequeathed to legatee sum of $3,000, to be paid to her before any of bequests thereinafter named had been paid. Legatee had executed notes to testatrix, for $5,000 and $400, and after testatrix' death there was found a memorandum written and signed by her to effect that any notes held by her against legatee at death should be canceled, but there was nothing to show when memorandum was written, or the circumstances, or that there was any consideration therefor.

6. Wills 🔑715.

$3,000 bequest to maker of $5,000 and $400 notes due testatrix *held* not to discharge notes, though bequest was given priority, where will failed to mention indebtedness.

In Bank.

Appeals from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Two actions by H. C. Symonds, as executor of the last will and testament of Jerusha W. Garrison, deceased, against Nettie N. Childs, in which Grace C. Sherman, as administratrix of the estate of Nettie N. Childs, deceased, was substituted as defendant after defendant's death. The two actions were consolidated, and from a judgment for defendant, plaintiff appeals.

Affirmed in part, and reversed in part.

Prior opinion, 18 P.(2d) 732.

Kirkbride, Wilson & Brooks, of San Mateo, and H. C. Symonds, (John D. Willard, of San Francisco, of counsel), for appellant.

U. F. Lewis, of Redlands, and Fred A. Wilson, of San Bernardino, for respondent.

IRA F. THOMPSON, Justice.

These consolidated causes were transferred to this court after decision by the District Court of Appeal, Mr. Presiding Justice Barnard of the Fourth District being the author of the opinion, because we were in doubt as to the correctness of the conclusion of that court with respect to two notes, in the sums of $5,000 and $400 respectively. A further consideration has convinced us that the District Court of Appeal correctly determined the matter, and we adopt the major portion of the opinion therein rendered, as follows:

On January 3, 1929, an action was begun by H. C. Symonds, as executor of the will of Jerusha W. Garrison, against Nettie N. Childs, seeking to recover on a promissory note for $5,000, dated May 15, 1925, with a second cause of action based on a note for $400 dated June 1, 1926. On May 23, 1929, another action was filed upon a note for $2,500, dated August 12, 1924. All of these notes were signed by Mrs. Childs and payable to Mrs. Garrison. Subsequently Mrs. Childs died and her administratrix has been substituted as defendant in both cases. The two actions were consolidated for trial, and one set of findings and one judgment was entered in favor of the defendant, from which judgment the plaintiff has appealed.

Mrs. Garrison was an invalid, quite elderly, and for many years she and Mrs. Childs had been very close friends. About the time the $2,500 note was executed, Mrs. Childs took Mrs. Garrison into her home and, in order to make this possible and to provide comforts and conveniences for her, remodeled her house, making rather extensive alterations for the purpose. From that time until the death of Mrs. Garrison, Mrs. Childs not only furnished her board and lodging at an agreed price which was paid, but rendered to her unusual services which she required as she became more feeble, giving her almost constant care and attention, day and night, during most of that period. The rendering of these additional services is not disputed and the trial court has found that they were of a value very considerably in excess of the monthly amounts paid to Mrs. Childs. On March 27, 1927, Mrs. Garrison died, leaving a will executed on January 21, 1927, which contained the following: "Item 2. In recognition of the kindness shown me by care and attention which I have received from Mrs. Nettie N. Childs, of Redlands, California, I will devise and bequeath unto her, the said Nettie N. Childs the sum of three thousand dollars to be paid to her before any of the bequests hereinafter named have been paid."

This is followed by "Item 3," making several specific bequests totaling $3,980, and by "Item 4," giving the residue of her estate to her nephew H. C. Symonds, who is also appointed executor.

The controversy here is as to whether or not Mrs. Childs was entitled to a cancellation of the three notes sued on, in addition to the bequest of $3,000 provided in the will.

[1-3] We will consider first the $2,500 note involved in the second action filed. In her answer, in addition to a general denial, Mrs. Childs alleged as a separate defense that in the year 1924 she entered into an agreement with Mrs. Garrison by the terms of which Mrs. Garrison agreed to furnish to her the sum of $2,500, and she agreed to make such changes and alterations in her dwelling house as Mrs. Garrison desired for her own accommodation and comfort; that the money was furnished and the alterations made; that it was further agreed that she should execute a note for $2,500 and pay interest thereon as long as Mrs. Garrison lived and that at her death the note should be canceled; and that concurrently with the execution of the said note Mrs. Garrison executed an instrument in writing in which she agreed that the note should be canceled upon her death. The court found in accordance with the allegations of this separate defense, also finding that Mrs. Childs would not have made the changes and alterations in her home for the accommodation of Mrs. Garrison had not this agreement been made.

We think these findings are supported by the evidence. After the death of Mrs. Garrison the $2,500 note was found and pinned to it, and folded therewith was found another document of the same date, entirely in Mrs. Garrison's handwriting, reading as follows:

"August 12, 1924.

"To whom it may concern:

"This note of Nettie N. Childs is to be given back to her at the time of my death as compensation for kindness shown to me.

"Mrs. J. W. Garrison.

"Redlands, California.

"This is my own handwriting."

The deposition of Mrs. Childs was admitted in evidence at the suggestion of the appellant, with no objection made thereto, and in fact the appellant relies upon considerable portions thereof in the arguments here made. In this deposition Mrs. Childs testified that before she took Mrs. Garrison into her home it was agreed between them that this amount was to be advanced to her; that she was to take Mrs. Garrison, look after her, and see that she was not put in an institution; that the $2,500 was not to be repaid, but that she should pay interest thereon during the lifetime of Mrs. Garrison; and that the obligation was to be canceled upon her death. She also testified that she spent a large share of the money in remodeling her home for the accommodation of Mrs. Garrison, and that thereafter until her death she took care of her, waiting upon her both day and night, and giving details of a most exacting and arduous attention required of her by Mrs. Garrison. A letter from Mrs. Childs to Mr. Symonds, the executor appellant, dated May 5, 1924, was received in evidence. In this letter Mrs. Childs explained that she proposed to take Mrs. Garrison and look after her for a named amount per month, with an additional $2,500, that she was to pay interest on this amount during her lifetime so that her income would not be reduced, and that this note was to be canceled upon the death of Mrs. Garrison, "whether it be this year or several years hence"; and closing by asking Symonds' approval of the plan. Another letter from Mrs. Childs to Mr. Symonds, received by him in September, 1924, was introduced, in which she told of the reorganization of her household and the taking of Mrs. Garrison into her home, that "she has loaned me and has my note for $2,500 which I spoke to you about," and said, "I trust this will meet with your approval, otherwise I will have to give it up." The appellant now claims that the two letters last referred to were not admissible in evidence. Not only is no sufficient reason pointed out why these letters were not admissible upon the issues raised as to the agreement in connection with this note, but the record shows that at the time these letters were offered and received in evidence, no objection thereto was made, and the letter of May 5, 1924, was read into evidence by the appellant in response to a question asked by his own attorney.

It is a general rule that several papers relating to the same subject-matter, and executed as parts of substantially one transaction, are to be construed together as one contract. 6 Cal. Jur. 298; 19 Cal. Jur. 832; Civ. Code, § 1642; Goodwin v. Nickerson, 51 Cal. 166. We think this rule applies under the circumstances here shown, and that these findings and judgment, in so far as this particular note is concerned, are supported by the evidence, which shows an agreement, on ample consideration and evidenced by a written memorandum, that the principal sum of the note is not to be paid.

A different situation appears with respect to the first action filed, involving the other two notes. There is neither evidence of any agreement entered into contemporaneously therewith nor of any other agreement for the cancellation of these notes. After the death of Mrs. Garrison, a memorandum written and signed by her was found, reading as follows:

"For value received.

"This is to certify that any notes held by me against Nettie N. Childs at my death shall be cancelled.

"Jerusha W. Garrison."

It does not appear when this was written or under what circumstances, nor does it appear that there was any consideration therefor. As is conceded by the respondent, the problem of whether or not these two notes are to be considered as canceled resolves itself into the question as to whether or not a testamentary discharge thereof was effected by Mrs. Garrison's last will.

[4-6] The respondent contends that a bequest to a debtor, coupled with evidence establishing an intent on the part of the creditor to release the debt, effects a testamentary discharge thereof, citing in support thereof such cases as Ziegler v. Eckert, 6 Pa. 13, 47 Am. Dec. 428; Sharp v. Wightman, 205 Pa. 285, 54 A. 888, 889; Daugherty v. Rogers, 119 Ind. 254, 20 N. E. 779, 3 L. R. A. 847. It is then contended not only that a latent ambiguity appears in this will justifying the admission of other evidence tending to show such an intent on the part of the testatrix, but that such an intention conclusively appears from the language used in the will. It is argued that an intention to release these notes appears upon the face of the will since the will fails to recognize the existence of the indebtedness, since uniform language is used in referring to Mrs. Childs and other devisees, since $3,000 is to be "paid" to Mrs. Childs, and, finally, since the bequest to Mrs. Childs is given priority over the other specific bequests amounting to $3,980. It is argued that this priority provision was useless if the notes be not considered as canceled, since the amount of the notes, irrespective of other portions of the estate, is larger than the total amount of all specific bequests. This argument is not conclusive since it could well be that Mrs. Garrison, having made the contract with reference to the $2,500 note, did not consider that a part of her estate and, with that note eliminated, the amount of the remaining notes was not sufficient to cover the $3,000 bequest to Mrs. Childs and the other specific bequests made. In addition, it appears that Mrs. Garrison's estate, aside from these notes, consisted of only about $500 at the time the will was drawn. In view of her condition, the amount required to care for her, and the uncertainty as to the length of her life, she could well have anticipated and provided for a situation in which all of her specific bequests could not be paid. The fact that the bequest of $3,000 to Mrs. Childs was prefaced by the statement that it was made "in recognition" of the kindness and care she had received from Mrs. Childs, indicates that she intended no further or additional testamentary provision for her, in recognition of those attentions.

In Sharp v. Wightman, supra, cited by the respondent, it is said: "A legacy by a testator to his debtor does not operate as a release or extinguishment of his debt, unless it clearly appears that it was the intention of testator that it should so operate."

In the last-cited case, however, the language of the will was such as to indicate a general release. The testatrix there devised the residue of her estate to trustees with authority "to invest and keep the same invested in such manner as they shall deem best, and to pay the net interest, income and profits thereof into the hands of my said son John Gerry Wightman, M. D., from time to time so long as he shall live free from his present or future debts, contracts and engagements." In Daugherty v. Rogers, supra, the will contained the following clause: "I will, devise, and bequeath to Philo Rogers, the young man I raised, in addition to what I have already given him, the further sum of five hundred dollars." In an action upon notes aggregating $6,000, evidence of the relations of the parties was admitted to show what was meant by the expression "in addition to what I have already given him." In Ziegler v. Eckert, supra, in speaking of the admissibility of the parol evidence, the court said: "It is not adduced to control the will, but to rebut a presumption from matter extrinsic to it; and its competency to so do is established." While the language of some of the authorities cited by the respondent indicates that in some jurisdictions an intention to discharge a debt may be proven by matters dehors the will, yet the above references to the authorities relied upon and those in our own jurisdiction convince us that ordinarily the testator's intention is to be ascertained from the words of the will exclusive of his other declarations, and that evidence of his declarations cannot be received in the absence of uncertainty or ambiguity appearing upon the face of the will. This is so, not only for the purpose of preserving the sanctity of the written declarations, but it is also founded upon the reason that the testator's lips have been sealed. While we would not deny to the readers of an instrument the same light that the writer employed, yet it must be borne in mind that he has endeavored to express his intention in the instrument, and that he who is charged with the interpretation thereof should be careful not to substitute another in its stead.

The Estate of Tompkins, 132 Cal. 173, 64 P. 268, 269, illustrates our meaning and closely approaches the present case. In that case the testatrix had released two of her sons from obligations, and declared that they were canceled. Six years later she directed by her will that the amounts of the obligations should be deducted from their interests, and the court said: "The instrument of release was executed in 1886, and, whatever motive may have then prompted her to give it, she was not thereby precluded from making in 1892 such testamentary disposition of her property as she desired; and if she deemed it just or proper, for the purpose of bestowing upon each of her children an equal portion of her property, that the amounts received by these sons should be deducted from their shares, she was at liberty to express such purpose in her will, and, if so expressed, it is the duty of the court to carry it into effect. Whether such was her intention must be determined from the terms of the will itself. The will must be interpreted by the language which she has used therein, and cannot be affected by an instrument made by her several years previous, and to which she makes no reference. The circumstances under which the will is made are to be taken into view only when there is an uncertainty 'arising upon the face of the will,' and only for the purpose of ascertaining 'from the words of the will' the intention of the testator. Civ. Code, § 1318. Even if it could be shown that her execution of the document of 1886 had escaped her memory, it would merely result that the purpose or motive for directing the deduction was produced by a mistake or oversight, and would constitute no reason for disregarding the language of her will." While related to somewhat different subjects, the Estate of Franck, 190 Cal. 28, 210 P. 417, and Estate of Donnellan, 164 Cal. 14, 127 P. 166, generally support the rule.

The language of the will in the present case is clear, unequivocal, and free from any ambiguity. The bequest was made in appreciation of the kindness and attention shown to the testatrix by Mrs. Childs. No situation has been shown to exist which would permit the introduction of extrinsic evidence to show that a cancellation of the notes was intended.

A number of other points are raised by appellant which need not be considered in view of the conclusion reached upon the point just discussed.

The portion of the judgment denying recovery to appellant on the first action filed, involving the notes for $5,000 and $400 respectively, is reversed. That portion of the judgment involving the second action filed, denying recovery of the $2,500 note, is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

219 Cal. 322

HAMILTON v. OAKLAND SCHOOL DIST. OF ALAMEDA COUNTY et al.

S. F. 14589.

Supreme Court of California.

Oct. 31, 1933.

Rehearing Denied Nov. 27, 1933.

1. Schools and school districts 🔑79.

Compromise by board of education with contractor who disputed board's claim for liquidated damages for delay in constructing schoolhouse, on ground that extension of time was unjustifiably refused and that part of delay was due to board's agents *held* valid regardless of board's motives (St. 1911, p. 1647, art. 23, § 187 et seq.).

2. Schools and school districts 🔑79.

Board of education possessed power to compromise claims against it (St. 1911, p. 1647, art. 23, § 187 et seq.).

3. Contracts 🔑75(1).

Promise to do that which one is legally bound to do cannot constitute consideration for promise.

4. Compromise and settlement 🔑2.

Policy of law favors compromises of doubtful rights and controversies made in or out of court.

5. Compromise and settlement 🔑6(4).

Compromise of claim asserted in good faith is valid though later claim proves not well founded.

6. Schools and school districts 🔑82(1).

School building contractor's failure to apply prior to July 1st for extension of time within which to complete building *held* not to show lack of good faith so as to invalidate compromise of claim that delays occurring after July 31st were due partly to board of education and to other circumstances beyond his control.

7. Contracts 🔑1.

Where valid consideration for contract exists, motive inspiring acceptance of offer is immaterial.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by John Hamilton, individually and as the Hamilton Construction Company against Oakland School District of Alameda County and others. From the judgment, plaintiff appeals.

Reversed.

Prior opinion, 20 P.(2d) 766.

Robert L. McWilliams and Shelton, Gray & McWilliams, all of San Francisco, for appellant.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakley, Deputy Dist. Atty., all of Oakland, for respondents.

PER CURIAM.

Plaintiff brought this action for the purpose of enforcing a compromise alleged to have been entered into by plaintiff with defendant school district. The trial court found the compromise was unsupported by consideration and therefore unenforceable against defendants. From the judgment based on this finding, this appeal has been taken.

The facts giving rise to the controversy are not substantially in dispute, and are as follows:

In November, 1928, plaintiff, as general contractor, and defendants, by and through the board of education of the city of Oakland, entered into a contract for the construction of a school building to be known as the Allendale-Fruitvale school in said city. The contract provided that the building should be completed on or before July 31, 1929, and time was expressly made of the essence of this provision. The contract further provided:

"Should the contractor fail to complete his contract and the works provided for herein within the time fixed for such completion as stated above, due allowance being made for unavoidable delays, he shall become liable to the Board in the amount of Fifty ($50.00) Dollars per calendar day for each day said work remains uncompleted beyond the term for completion. * * * If it appears to any contractor that he will not complete the work provided in his contract in the time agreed, he shall make written application of the Board at least thirty (30) calendar days prior to the expiration of the time for completion, stating the reasons why and the amount of extension which he believes should be granted. The Board may then in its discretion grant or deny such extension."

The building was not completed until December 3, 1929, 124 days after the time specified in the contract for its completion. The amount still due and owing plaintiff at that time was about $48,000. After the building had been formally accepted by defendants, the board directed the auditor to draw a warrant in favor of the plaintiff for the remainder of the contract price less the sum of $6,200, that amount being claimed by the board as liquidated damages for the full 124 days at $50 per day as provided in the contract. In the meantime subcontractors and materialmen of the plaintiff had filed stop notices against the amount still owing to plaintiff. The evidence shows that if the full $6,200 claimed by defendants were withheld, there would not then have been a sufficient sum remaining owing to plaintiff to pay all the subcontractors and materialmen. The plaintiff objected to the deduction of the full $6,200. To adjust the matter hearings were had before the board on February 25 and March 4, 1930. At these hearings the plaintiff was present with his then counsel, Mr. Beardsley, and the matter was discussed at some length. Mr. Beardsley finally offered to compromise the $6,200 disputed claim of the board for $2,000. At the conclusion of the hearings the board accepted the offer and adopted the following resolution:

"Upon motion of Director Sturgis, seconded by Director Kornhaus, the following report and recommendation of the committee of the whole was approved. * * *

"That the amount of liquidated damages to be exacted of the Hamilton Construction Co. on account of the delay in the completion of the Bret-Harte (Allendale-Fruitvale) school as stated in the minutes of December 5, 1929, be changed from $6,200 to $2,000.

"This action was taken after a conference with Mr. Charles A. Beardsley, attorney representing the Hamilton Construction Co., the contractor agreeing that if the board reduced the amount of liquidated damages to $2,000, he would secure releases of withhold notices filed against his contract, and file with the Board of Education bonds in the amount of 125 per cent of the withholds for all disputed claims, in order that the balance due on the contract may be released for distribution to the subcontractors."

Before a warrant drawn pursuant to the foregoing resolution was delivered to the plaintiff, the board was advised by the district attorney that in his opinion, the liquidated damage clause of the contract was valid and could not be waived by the board; that "if an actual dispute exists between your board and the contractor as to the number of days in which the latter was in default, your board may compromise such dispute, and may adjust its claim for such damages upon that basis only." The district attorney further advised the board that the provision on the part of the contractor to pay the subcontractors and other claimants and to bond against certain claims referred to in the resolution could not form the basis of a valid compromise, for the reason that the contractor was already bound to perform these acts in any event.

Following the receipt of this advice the board immediately by resolution rescinded its action of March 4th approving the offer of compromise. A warrant for the balance of the contract price less $6,200, the full amount claimed, was issued to and accepted by plaintiff, subject to his right to prosecute his claim for the additional $4,200, according to the terms of the compromise. A claim for this amount was presented to the board and rejected, whereupon this action was brought, resulting in a judgment for the defendants.

In reference to the compromise the trial court found that plaintiff, before the date of the alleged compromise, disputed the right of defendants to retain $6,200, and claimed that out of the 124-day delay, 23 days of delay were due to causes beyond plaintiff's control; that plaintiff requested an extension of time for the 23 days, which request was denied; that thereupon plaintiff "offered to compromise all differences between the parties arising out of the contract upon payment to him of $4,200 of the total amount of $6,200 withheld by defendants as aforesaid and urged his inability to pay his subcontractors and materialmen as the chief reason for reaching an agreement"; that defendants agreed to the compromise "solely by reason of a desire upon their part that said subcontractors and materialmen be paid"; that it is not true that the resolution of March 4th accepting the compromise "was predicated upon the respective claims and contentions made by the parties at the board meeting of March 4, 1930, and in order to avoid litigation, but it is true that defendants entered into said compromise agreement in the belief that they were thereby making funds available to plaintiff to pay said subcontractors and materialmen, and that their action as taken would result in such payment; that defendants expressly rejected all other reasons advanced for reaching said compromise agreement, and that there was no other consideration therefor; that said compromise, by reason of the facts herein determined, was wholly without consideration and beyond the power of said defendants to consummate, and therefore was invalid and of no force or effect and did not constitute a valid obligation."

From this finding the trial court concluded that there was no valid basis for the compromise, and that the agreement to compromise was not a binding obligation of the board.

[1] We are of the opinion that the judgment should be reversed for the reason that the uncontradicted evidence shows that plaintiff prior to March 4th was disputing the validity of defendants' claim; that prior to the completion date plaintiff asked for a 23-day extension for delays caused by adverse weather conditions, and that a portion of that claim was good; that plaintiff also claimed that a large portion of the delay prior and subsequent to the completion date was caused by the agents of defendants in failing to cooperate and give requested instructions. It is our opinion that the compromise of such a claim, whatever might have been the motives or reasons of the board in agreeing to it, constitutes a valid compromise enforceable against the board.

[2] In support of the judgment defendants first contend that the board was entirely without power to compromise any claim against the district. This point is without merit. The broad powers conferred on the board by article 23 of the city charter (St. 1911, p. 1647) places that board in the category of those public bodies invested with the necessarily implied power to compromise claims against it. That such a board has, under the general law, such implied power was decided in Smith v. Cloud, 28 Cal. App. 453, 152 P. 950, and, so far as we are advised, the rule there laid down has not been successfully challenged. See, also, 5 Cal. Jur. 394, § 9.

[3] The main contention of defendants is that since the evidence shows that the main reason the board agreed to the compromise was to secure a promise from plaintiff that he would then pay all subcontractors, and since the contractor was already legally bound to pay these subcontractors, plaintiff has supplied no consideration for the agreement. There can be no doubt, of course, that, if the consideration for the compromise agreement was solely the promise of the contractor to pay his subcontractors and materialmen, the agreement would be lacking in consideration, for the reason that plaintiff was liable in any event to pay those claims and the district was in no way bound to pay them. In other words, if the sole consideration furnished by the contractor was his promise to pay the subcontractors, he would only be promising to do that which he was already legally bound to do, and that never can constitute consideration for a promise. But the uncontradicted evidence shows that this promise was not the only consideration furnished by the contractor. The plaintiff testi-

fied, and his testimony is uncontradicted, that he disputed the number of days' delay chargeable to him; that at the meeting of March 4th, Mr. Beardsley went into some detail in explaining to the board the rather hopeless situation as far as ever agreeing as to the number of days; that plaintiff contended that many of the delays were caused by reasons beyond his control; that a large portion of the delay was caused by the board itself in not giving him instructions or orders. Mr. Beardsley testified, and his testimony is not contradicted, that he had several conversations with members of the board prior to the meetings of February 25th, and March 4th, regarding the $6,200 claim; that he told the board at the meeting that he did not dispute the validity of the liquidated damage clause in the contract; that he had been authorized to offer to settle the claim for $2,000; that he told the board that "my basis for suggesting that compromise was that there was a dispute existing between the contractor and the board in reference to that particular sum of money, not as to the rate per day, but as to the responsibility of the contractor for the 124 days delay. I stated that * * * Mr. Hamilton claimed that that delay was due in part to weather conditions and in part to the fault of the owner, as represented primarily by the Building Inspector, and we [had] made certain complaints to him in reference to rulings and actions of the Building Inspector that we did not desire, unless it was necessary to have thrashed out in court, and because of that dispute, and for the purpose particularly of securing the payment of these large number of claimants [subcontractors] * * * we were willing to compromise. * * * There was a considerable discussion, we were in session approximately two hours on the second occasion and a little less on the first occasion." From the incomplete minutes of the meetings, it clearly appears that several members of the board were well aware that plaintiff had had several disputes with representatives of the board. Moreover, the answer of defendants alleges that "plaintiff was actually in default for 124 days and the only dispute between said parties was as to whether plaintiff was responsible for all of said days." As to the attitude of the board, at the meeting on March 4th, one member of the board stated: "It is my idea to take the compromise; otherwise these people will go into court. I think that is the businesslike thing to do, regardless of the fact that we had more actual damages." Another member of the board stated: "I do not see how it will help this board to go into court. I think the best thing to do is to settle it now. * * * Why keep this thing up for six months or more? If we do we will have a lawsuit on our hands." Another member of the board stated that he would be willing to compromise for $4,000. One member's concluding view of the question was expressed by him as follows: "I would vote for $2,000. If we can stand our ground, deducting $6,000 this thing will never be settled."

[4-6] No useful purpose would be served in further reviewing the facts. It may be admitted that when the board finally accepted the offer of compromise they did so with the desire of securing the payment of the subcontractors. The situation presented therefore is one where the plaintiff was disputing the validity of a claim against him on many grounds and threatening suit. The defendants then accepted an offer of compromise, their reason for doing so being a desire to assist subcontractors. Does this constitute a valid compromise? We think it does. It must be remembered that it is the policy of the law to discourage litigation and to favor compromises of doubtful rights and controversies, made either in or out of court. Armstrong v. Sacramento Valley Realty Co., 179 Cal. 648, 178 P. 516; Union Collection Co. v. Buckman, 150 Cal. 159, 88 P. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609. It is not essential to a valid compromise that the claim in dispute be determined to be a valid one. As long as the claimant is asserting the claim in good faith, a compromise thereof is valid even though it later develops that the claim was not well founded. As was said in Union Collection Co. v. Buckman, supra, at page 163 of 150 Cal., 88 P. 708, 710:

"* * * The compromise of a doubtful claim, asserted and maintained in good faith, constitutes a sufficient consideration for a new promise, even though it may ultimately be proved that the claimant could not have prevailed. This is true whether the claim be in suit or not. * * *" See, also, Bennett v. Bennett (Cal. Sup.) 25 P.(2d) 426; First Nat. Bank v. Thompson, 212 Cal. 388, 405, 298 P. 808; 5 Cal. Jur. 391; 6 Cal. Jur. 176. The good faith of plaintiff challenging the amount of the claim was not attacked. The contention that the contract provided the exclusive method of securing an extension, and that therefore lack of good faith on plaintiff's part is shown in urging reasons for delay not set forth in the manner provided by the contract, is not sustainable. The contract provision only applied to delays prior to completion. The plaintiff was not foreclosed by failure properly to apply for an extension prior to July 1st, from contending that delays occurring subsequent to July 31st were due at least in part to defendants and to other circumstances beyond his control.

[7] It is therefore our opinion that there was a valid consideration for the compromise. The mere fact that the motive of the board in agreeing to the compromise was a desire to

see that the subcontractors were paid is immaterial. Motive and consideration are not the same thing. Where a valid consideration for a contract exists the motive that inspires the acceptance of the offer is of no importance. 1 Williston on Contracts, § 111, p. 230. The fact is that plaintiff was threatening suit on the claim and contending that he was not responsible for the delay. Under such circumstances the board saw fit to settle the dispute. What reasons the members of the board may have had, or what they may have said on the subject is of no consequence. Agnew v. Brall, 124 Ill. 312, 16 N. E. 230, 232.

The judgment appealed from is reversed.

219 Cal. 316

KECK v. KECK.

S. F. 14747.

Supreme Court of California.
Oct. 31, 1933.

1. Motions 🔑14.

Motion in trial court may be made orally, and written notice of motion may be waived.

2. Divorce 🔑286.

On appeal from order modifying previous order for alimony, where record on appeal did not show proceedings had in trial court, presumption arises that entire matter of alimony was submitted and that motion for modification was made orally and notice thereof waived.

3. Divorce 🔑258.

Where interlocutory decree, requiring husband to pay alimony pendente lite to wife in divorce action, is silent on question of wife's indebtedness to husband, husband may not as matter of right offset alimony obligation against wife's indebtedness.

> Husband may not as matter of right offset obligation to pay monthly alimony against wife's debt to him, since wife may be entirely without means to pay debt to husband or to support herself, and marital duty of husband to support wife is not suspended during continuance of marriage because wife may be indebted to him, and since obligation of husband to pay alimony is founded on his duty to support his wife.

4. Divorce 🔑258.

Where liberal allowance for support of wife, suitable to circumstances and financial condition of parties, is made in divorce action, court may, in proper case, authorize husband to withhold portion of monthly allowance in payment of wife's indebtedness to him.

5. Divorce 🔑245(1).

Decree for alimony in divorce action may be modified as to future installments to become due, but as to accrued installments, it is final.

6. Divorce 🔑245(1).

Subsequent order relieving husband from accrued alimony, and discharging alimony by offsetting it against indebtedness of wife to husband, existing at time of entry of divorce decree, constitutes improper modification as to past due installments.

7. Divorce 🔑245(1).

Order requiring wife to accept in full settlement of accrued alimony less than full amount due constitutes improper modification as to past due installments.

8. Divorce 🔑245(3).

Modification as to future installments of alimony may be made as of date when modification is applied for, and need not be made as of date of hearing.

9. Divorce 🔑245(1).

Court, if justice requires, may relieve husband from liability for portion of alimony which accrued subsequent to date when matter of modification was addressed to court.

10. Divorce 🔑269(9).

Husband cannot be punished for contempt as to delinquent installments on alimony beyond his ability to pay.

11. Divorce 🔑228.

Order directing husband to pay stipulated amount to wife's attorney in full settlement of attorney's fees in divorce action *held* void on its face, where attorney was not party to action.

In Bank.

Appeal from Superior Court, San Francisco County; Thomas F. Graham, Judge.

Suit by Arthur W. Keck against Lizzie B. Keck wherein the defendant filed a cross-complaint. From an order modifying a previous order for payment of alimony as to accrued installments, the defendant appeals.

Order reversed.

See, also, 18 P.(2d) 338.

Waldo F. Postel, of San Francisco, for appellant.

William P. Hubbard, of San Francisco, for respondent.

SEAWELL, Justice.

On September 3, 1930, Arthur W. Keck was cited by the superior court of the city and county of San Francisco to show cause why he should not be punished for contempt in failing to make monthly payments due Lizzie B. Keck under an order for alimony pendente lite. The hearing on this order to show cause was not held until May 11, 1932. In the meantime an interlocutory decree of divorce had been entered on March 16, 1931, in favor of Lizzie B. Keck on her cross-complaint for extreme cruelty and willful desertion, by which she was awarded $100 a month for her support, with the provision that cross-defendant might pay her $10,000 within six months, and thereby be released from all future payments. Arthur W. Keck had been awarded custody of the three children of the marriage in a separate proceeding. The hearing of May 11, 1932, resulted in the order from which Lizzie B. Keck prosecutes this appeal.

Said order provided that Arthur W. Keck pay to Lizzie B. Keck the sum of $1,000 "in full settlement, satisfaction and discharge of all claims and demands whatever, and particularly of all claims and demands referred to and decreed and ordered and directed to be paid by said plaintiff-cross-defendant Arthur W. Keck to defendant-cross-complainant Lizzie B. Keck in said interlocutory decree." The court further ordered Mr. Keck to pay $750 to the attorney for Lizzie B. Keck in full settlement of attorney's fees.

It is conceded that $1,387.50 was due for alimony pendente lite, and that $1,200 was due under the interlocutory decree, making a total of $2,587.50 due on May 11, 1932. It is the contention of appellant, Lizzie B. Keck, that no motion for modification of the decrees for alimony had been made, or notice thereof served on her. She further contends that the effect of the order appealed from is to modify the alimony as to accrued installments, in which she had a vested right, contrary to the rule that alimony decrees can be modified only as to future installments.

[1, 2] The record on appeal contains no written motion for modification, or written notice of motion therefor. But motions may be made orally and written notice of motion may be waived. Morel v. Morel, 203 Cal. 417, 264 P. 760; Hammond Lumber Co. v. Bloodgood, 101 Cal. App. 561, 281 P. 1101; Walberg v. Underwood, 39 Cal. App. 748, 180 P. 55; 18 Cal. Jur. 649, 652. In his several affidavits, respondent set forth his present and prospective inability to make the payments ordered. The proceedings upon the hearing of May 11, 1932, and upon the occasions when continuances were had between September 26, 1930, and May 11, 1932, are not set forth in the record on appeal herein either by reporter's transcript or bill of exceptions. In this situation it must be presumed that in connection with the order to show cause the parties submitted to the court the entire matter of alimony, accrued and to accrue, and that a motion for modification was made orally and notice thereof waived. Both parties were personally before the court on May 11, 1932. It cannot be presumed that the court acted without right in the absence of a clear showing to that effect.

Respondent, Arthur W. Keck, contends that the order directing him to pay $1,000 in full settlement did not relieve him from paying accrued alimony for the reason that his former wife was indebted to him in the sum of $1,896.26, and that the court offset said indebtedness against the accrued alimony in the sum of $2,587.50, leaving a balance of $691.24 due for accrued alimony. This balance is less than the amount of $1,000 which he is ordered to pay. He averred in the several affidavits filed by him prior to the hearing of May 11, 1932, that he had been adjudged incompetent several years prior to the divorce action, and that Lizzie B. Keck had been appointed his guardian; that in April, 1926, he was restored to capacity; and that the court below found $1,896.26 to be due him upon final settlement of the guardianship accounts of Lizzie B. Keck on March 27, 1930, which sum she has never paid to him. Lizzie B. Keck filed no counter-affidavits.

[3] The interlocutory decree awarding appellant, Lizzie B. Keck, a monthly allowance of $100 was rendered on March 16, 1931, a year after settlement of her guardianship accounts. It cannot be doubted that the court may order a husband to make monthly provision for his wife upon entry of a decree for divorce notwithstanding she is indebted to him. The wife may be entirely without means to pay her debt to her husband, or to support herself. In the findings which support the interlocutory decree herein the court found that Lizzie B. Keck was without any means for her support and maintenance, and that Arthur W. Keck was worth $50,000. The marital duty of a husband to support his wife is not suspended during the continuance of the marriage because the wife may be indebted to him. The obligation to pay alimony is founded on this duty, and is not an ordinary debt. Where the interlocutory decree is silent, as in the case herein, as to an indebtedness of the wife to the husband, he may not as a matter of right offset his obligation to pay monthly alimony against the wife's debt to him, and thus relieve himself from making provision for her support. The two demands do not by operation of law compensate and discharge each other (23 Cal. Jur. 254) under section 440, Code of Civil Procedure. The husband may not, in the manner of an ordinary judgment debtor, as a matter of right, and by motion (15 Cal. Jur. 275), have a judgment against him for ali-

mony offset against a judgment in his favor against his wife.

It is the general rule that alimony ordered to be paid in a divorce action cannot be garnished or appropriated to payment of the wife's debts contracted prior to the decree granting the alimony, either where her creditor is a third party, or her divorced husband. Bensel v. Hall, 177 Minn. 178, 225 N. W. 104; Tappe v. Battelle, 140 Misc. 49, 249 N. Y. S. 589; Maurice Baskin & Co. v. Howe, 225 App. Div. 553, 233 N. Y. S. 648; Wright v. Wright, 93 Conn. 296, 105 A. 684; note, 55 A. L. R. 361.

[4, 5] We are inclined to the view that where a liberal support allowance suitable to the circumstances and financial condition of the parties is made, the court should have the right in a proper case to provide as a part of the decree that the husband may withhold a portion of the allowance each month in payment of his wife's indebtedness to him. But in the case herein the interlocutory decree contains no such provision, and hence its legal effect is to order Arthur W. Keck to pay $100 a month to his divorced wife in cash. The order appealed from is a subsequent order in the nature of a modification of the original decree. It is settled that a decree for alimony may be modified as to installments to become due in the future. As to accrued installments, it is final. Sistare v. Sistare, 218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061; Parker v. Parker, 203 Cal. 787, 266 P. 283; Rinkenberger v. Rinkenberger, 99 Cal. App. 45, 277 P. 1096; Cummings v. Cummings, 97 Cal. App. 144, 275 P. 245; Bruton v. Tearle, 117 Cal. App. 696, 4 P.(2d) 623; Caples v. Caples (C. C. A.) 47 F.(2d) 225; Bolton v. Bolton, 86 N. J. Law, 622, 92 A. 389, Ann. Cas. 1916E, page 938; Alexander v. Alexander, 164 S. C. 466, 162 S. E. 437, 82 A. L. R. 719; notes, 41 A. L. R. 1419; 57 A. L. R. 1113; 1 R. C. L. 957–960.

[6, 7] A subsequent order which relieves the husband from paying accrued alimony in cash as ordered, and discharges said alimony by offsetting it against an indebtedness of the wife to the husband existing at the time of entry of the divorce decree, is a modification as to past due installments, just as is an order requiring the wife to accept in full settlement of accrued alimony less than the full amount due.

It is by virtue of the finality of alimony decrees as to past due installments that the Supreme Court of the United States has held that an alimony decree of one state is within the full faith and credit clause, and must be recognized in the courts of another state. Sistare v. Sistare, supra. If under the laws of the state where the decree is rendered it is subject to modification retroactively as well as prospectively, it is not within the full faith and credit clause. Lynde v. Lynde, 181 U. S. 183, 21 S. Ct. 555, 45 L. Ed. 810. To hold that alimony decrees may be modified retroactively in the manner contended for herein would be contrary to the rule of finality as to past due installments, with the result that where the wife is indebted to the husband decrees of this state would not be within the protection of the full faith and credit clause even as to past due installments under the doctrine of Sistare v. Sistare, supra.

[8, 9] Upon the record before us it must be held that the court below attempted to modify the alimony orders as to accrued installments, contrary to law. We have heretofore held that in the absence of a reporter's transcript or bill of exceptions it must be presumed in disposing of this appeal that a motion for modification was made. In the state of the record it cannot be ascertained at what date such a motion was made, if in fact it was made. A modification as to future installments may be made as of the date when modification is applied for, and is not required to be made as of the date of hearing. In the case herein the entire matter of alimony and motion for modification may have been submitted to the court before the hearing of May 11, 1932, upon one of the occasions when continuances were had. In that event, the court below, if the justice of the case requires it, may, upon further proceedings, relieve respondent from liability for that portion of the sum of $2,587.50 which accrued subsequent to the date when the matter of modification was addressed to the court.

[10] Of course, respondent cannot be punished for contempt as to delinquent installments beyond his ability to pay. 1 Cal. Jur. 986, and 5 Cal. Jur. 948, and cases there cited. But it does not follow that the court can make a general order modifying a decree as to past due installments, and thereby affect the liability for alimony, as well as the remedy to enforce payment by contempt proceedings. The order herein purports to be a general order of modification.

[11] That portion of the order of May 11, 1932, which directs respondent to pay $750 to the attorney for Lizzie B. Keck is null and void on its face. Stevens v. Stevens, 215 Cal. 702, 12 P.(2d) 432; Pennell v. Sup. Ct., 87 Cal. App. 375, 262 P. 48. Said attorney was not a party to the action. Lizzie B. Keck has appealed from the whole of the order of May 11, 1932. Said order is, therefore, reversed in its entirety.

We concur: WASTE, C. J.; Ira F. THOMPSON, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

219 Cal. 257

PACIFIC PALISADES ASS'N v. MENNINGER.

L. A. 12666, 12771.

Supreme Court of California.
Oct. 23, 1933.
Rehearing Denied Nov. 20, 1933.

1. Set-off and counterclaim 🔑34(1).

In action to foreclose purchaser's rights under contract to purchase leases, cross-complaint seeking declaration that lessor held in trust larger area, of which lots in question constituted part, and seeking receivership and accounting, *held* properly stricken out as not "relating to or depending on contract sued on" or "affecting property to which action relates" (Code Civ. Proc. § 442).

2. Appeal and error 🔑595.

That party appealing from both interlocutory and final judgments ordered and filed complete transcript only on appeal from interlocutory judgment *held* not ground for dismissing appeal from final judgment, even if interlocutory judgment was nonappealable.

3. Landlord and tenant 🔑149.

Duty to pay taxes rests on landlord, where lease contains no provision as to who shall pay taxes.

4. Landlord and tenant 🔑22(4).

Vendor of leases suing to foreclose interest of purchaser thereunder for nonpayment of taxes, following purchaser's refusal to execute leases tendered, had burden to prove leases tendered conformed to contract.

5. Appeal and error 🔑1012(1).

Reviewing court may set aside trial court's finding, where unsupported by evidence or directly contrary thereto.

6. Landlord and tenant 🔑22(4).

Evidence in action by vendor of leases to foreclose purchaser's interest thereunder for nonpayment of taxes *held* insufficient to sustain finding that leases tendered by vendor, calling for purchaser's payment of taxes, complied with contract.

Contract for sale of renewable 99-year leases covering six lots provided that the leases should be in substantially the form contained in the Founder's handbook of the plaintiff association. While two handbooks were introduced in evidence, testimony showed that the only handbook sent to the purchaser was one containing no requirement for payment of taxes by purchaser of leases.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by the Pacific Palisades Association against Bertha Deglow Menninger, in which defendant filed a cross-complaint. From an adverse interlocutory judgment, and from an adverse final judgment, defendant appeals.

Motions to dismiss appeals denied, and judgments reversed.

Prior opinion, 16 P.(2d) 313.

D. A. Knapp, of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondent.

Stearns, Luce & Forward, of San Diego, amici curiæ, for respondent.

PER CURIAM.

Plaintiff brought this action for the purpose of securing a judgment compelling defendant to pay the taxes on six lots located in a subdivision known as Pacific Palisades near Los Angeles, or, in the alternative, if defendant failed to pay the taxes, for a judgment foreclosing defendant's rights in the lots and quieting plaintiff's title thereto. The complaint is in six counts; each differing from the others only as to the lot described. Plaintiff alleges that in March, 1923, plaintiff agreed to sell to defendant, and defendant agreed to buy from plaintiff, renewable 99-year leases on the lots in question. The sales agreement signed by the parties and dated March 26, 1923, is attached as an exhibit to the complaint. It provides that, upon defendant completing all payments called for by the agreement, plaintiff "agrees to deliver * * * a renewable ninety-nine year lease, in substantially the form contained in the Founders' Hand Book of said Pacific Palisades Association. * * *" The complaint further alleges that defendant has paid the full purchase price of the six leases (totaling over $7,000); that such payments, together with interest, were completed in April, 1926; that plaintiff thereupon tendered to defendant leases in the form agreed upon; that defendant refused to execute the leases; that defendant has not paid the taxes levied against the property for the period 1925 to 1929; that plaintiff has paid or will be compelled to pay the taxes. The prayer of the complaint requested that the amount of the taxes be ascertained; that defendant be ordered to pay the same within 30 days after judgment; that, if defendant fail to pay the taxes within that period, her interest in the lots be foreclosed and plaintiff's title thereto be quieted. The form of the lease alleged to have been tendered by plaintiff to defendant is attached to the complaint as an exhibit. That lease, in paragraph 2 of the covenants on the part of the tenant, expressly provides that the tenant shall pay all state, county, or city taxes on assessments levied on the lots.

The answer of defendant alleges that the leases tendered and pleaded are not the leases agreed upon; that under the agreement between the parties she was entitled to leases which did not impose the burden of paying the taxes on her. Defendant also set forth in great detail and at some length an affirmative defense and a cross-complaint. It is therein alleged that plaintiff holds title to the 1,100 acres of land known as Pacific Palisades, of which the six lots are a part, in trust for defendant and others known as "Founders"; that the terms of this trust were that a local church, under the authority of a religious corporation, should cause the plaintiff to be incorporated; should collect from certain individuals, to be known as "Founders," a sufficient sum to buy the area under contract, and that plaintiff was to improve and operate the land as an educational, cultural, recreational, and religious center; that plaintiff was to lease the lots therein to the "Founders" for residential purposes; that the consideration for this trust agreement has failed because of certain alleged violations of the trust by plaintiff. The cross-complaint, in addition, alleges that plaintiff has failed to carry out the proposed development, and in violation of the trust has mortgaged the lands, purchased additional acreage, and deeded away portions thereof; that plaintiff has dissipated the trust assets and violated its charter; that the religious corporation has ignored its agreement with the "Founders" to supervise plaintiff's execution of the trust; that the trust is now impossible of fulfillment. The prayer of defendant's answer is that plaintiff be not granted the relief prayed for by it; that a decree be entered to the effect that plaintiff holds title to all the property in trust for the "Founders"; that the trust be terminated and all of the lessees be given fee-simple titles; that receivers be appointed to liquidate the trust; that a referee be appointed for the purpose of an accounting; that the receivers shall be ordered to request the attorney general to proceed against plaintiff to forfeit its charter.

[1] On motion of the plaintiff, the cross-complaint was stricken out on the ground that the matters pleaded therein did not constitute a cross-complaint within the meaning of section 442 of the Code of Civil Procedure. Defendant assigns this as error. We are of the opinion that the trial court correctly decided that the matters alleged in the pleading in question did not constitute a proper cross-complaint. Section 442 of the Code of Civil Procedure, so far as pertinent here, provides: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, * * * upon which the action is brought, or affecting the property to which the action relates, he may * * * file * * * a cross-complaint."

The alleged trust set forth in the cross-complaint does not refer to, or depend upon, the contract of sale pleaded in the complaint (Interstate Lumber Co. v. Loop Building Co., 97 Cal. App. 64, 275 P. 262), nor do the matters therein pleaded affect the property to which the action relates within the meaning of section 442 of the Code of Civil Procedure. As was said in Mahan v. Millar, 56 Cal. App. 280, 288, 205 P. 67, 71: "We cannot believe that the Legislature, in enacting section 442 intended that the right to file a cross-complaint should extend so far. It cannot be that in a legal sense, speaking in the terms of the section, a cross-complaint affects the property to which an action relates when it seeks affirmative relief concerning a single and indivisible parcel of land which includes within its boundaries a lesser tract, which lesser tract is the subject of the action as shown by the allegations of the complaint."

[2] The cross-complaint was therefore properly stricken out.

After a trial on the merits, the trial court entered a judgment, which it called "interlocutory," which will hereafter be referred to as the first judgment, and which provided that, unless defendant paid certain taxes on the lots within thirty days, then, without further proof, her interest in the lots should be foreclosed, and plaintiff's title thereto should be quieted. Upon the expiration of the specified period, defendant not having paid the taxes, the trial court entered a second and final judgment foreclosing defendant's rights and quieting plaintiff's title. Defendant appealed from both the first and second judgments. Defendant properly ordered and filed a complete transcript in the appeal from the first judgment, but on the appeal from the second judgment she had prepared and filed simply a supplementary transcript containing all proceedings subsequent to the rendering of the first judgment. Upon affidavit and stipulation this court consolidated the two appeals. Plaintiff has moved to dismiss the appeal from the first judgment on the ground that that judgment is interlocutory in nature, and therefore not appealable. Plaintiff has also moved to dismiss the appeal from the second and final judgment, if its first motion is granted, on the ground that, if the first appeal is dismissed, there will then not be a complete transcript on the second appeal. These motions to dismiss the appeals are denied. No useful purpose would be served in determining whether the first judgment was appealable or not. Assuming, but not deciding, that the first judgment was interlocutory, the motion to dismiss the second appeal is based on highly technical grounds, and is without merit. The parties to the two appeals are the same. There is now before this court a complete clerk's and reporter's transcript, so that the case may be decided on its substantial merits. The exact point has been decided adversely to the contention of plaintiff in the case of Bryant v. Kelly, 203 Cal. 721, 722, 265 P. 817, 818, where it was stated:

> "The appellant filed two separate and distinct notices of appeal, the first stating that he appealed from the two nonappealable orders above referred to; the second, that he appealed from the judgment there rendered. It appears, however, that appellant filed but one request for a transcript, that filed in connection with the attempted appeal from the nonappealable orders. Respondents urge, therefore, that there is no transcript properly before the court in connection with the appeal from the judgment. The cases relied on, Goyhinech v. Goyhinech, 80 Cal. 410, 22 P. 175, and Soule Co. v. Severtson, 68 Cal. App. 46, 228 P. 351, correctly state the rule when applied to the facts there involved, but are not applicable to this appeal. There is here but the one appealing party, and there is before the court a transcript of the proceedings had in the lower court which fully enables this court to pass upon the merits of the appeal from the judgment."

We turn now to a determination of the merits of the appeal. The sole question presented is whether plaintiff has tendered leases, in accordance with the provisions of the sales agreement, that are "in substantially the form contained in the Founders Hand Book of said Pacific Palisades Association." Defendant contends that the tendered leases provided that she should pay the taxes levied on the property, and that under the agreement of the parties she was entitled to leases which imposed this burden on the plaintiff as landlord. Plaintiff contends that the tendered leases containing the tax clause are in accordance with the agreement of the parties. The trial court found in favor of plaintiff on this issue. Defendant attacks these findings as being unsupported by the evidence.

The evidence shows that the project here involved was first promoted by the Huntington Beach Methodist Assembly, a corporation. This corporation purchased a large tract of land at Pacific Palisades, and the lots involved in this case are a part thereof. In order to raise the money to make the first payment on this land, the Huntington Beach Methodist Assembly solicited money from individuals to be known as founders. In return for money advanced, the founder was given a founders' certificate. Defendant was the holder of such a certificate dated August 31, 1921, in the sum of $1,000. The son of defendant, Elmore William Menninger, and defendant's business agent, was also the holder of such a certificate of the same date and amount. The rights under this last-mentioned certificate were subsequently assigned to defendant. The founders' certificate recited that defendant, as a founder, was entitled to a leasehold interest of the value of $1,000 in the property to be acquired by the Huntington Beach Methodist Assembly, which property was to be conveyed to a corporation organized for that purpose. This corporation referred to was subsequently organized and the land conveyed to it; it being the plaintiff in this action. The purpose of the project was stated to be to found on the land acquired a religious and educational center. The certificate specifically stated that it is understood that the land will be subdivided into lots which will be leased for renewable 99-year terms upon substantially uniform conditions, the form of the lease to be modeled after the leases issued at Lake Chautauqua, N. Y., and Ocean Grove, N. J. The New York lease referred to contained an express covenant the tenant should pay the taxes while, according to defendant, and not denied by plaintiff, the New Jersey lease contained no such provision. The founders' certificate also provided that, as soon as the land is platted and appraised, the corporation will appoint a day upon which the certificate holder may select a lot, this day to be known as founders' day; that, if the certificate holder does not select a lot within one year thereafter, such holder may surrender his or her certificate, and upon 90 days' notice shall be repaid the amount advanced at 6 per cent. interest. It is to be noted that under this contract the certificate holder was not obligated to accept a lease on any lot no matter what the provisions of the proposed lease might be, but could treat the certificate as a promissory note and recover the amount advanced with interest. It should also be emphasized that the certificate referred to founders' day, and informed the holder that she would be notified of its date and that on that date she could select her lot. Late in December, 1921, defendant received through the mails a letter dated December 24, 1921, in a Pacific Palisades Association envelope, the envelope being addressed to her, and the letter being addressed "To the Founders of the Pacific Palisades Association." This letter stated that January 14, 1922, had been selected as founders' day, and that on that date all those founders so desiring could select their lots. The letter continued: "We are preparing the material for the printer to furnish a Founders Hand Book, which will contain a copy of the plat, a price list, the form of the lease, and a considerable amount of helpful information for the guidance of the Founders in making their lot selections. These will be ready and mailed out from our office on or before January 7, so that you may have them for use during the week preceding Founders Day." This letter was signed by Chas. H. Scott, who was then president of plaintiff corporation. Plaintiff does not deny sending this letter to defendant on or about its date. On or about January 7, 1922, defendant received through the mails on stationery of the Pacific Palisades Association a letter dated January 7, 1922, likewise signed by Dr. Scott, in which it was stated: "We are today reading proof on the Founders Hand Book which we hoped to have in the mail to you tonight. The printer has promised to have them in our hands on Monday [January 9] and envelopes are already addressed so that they should reach you on Tuesday or Wednesday [January 10 or 11]." The letter then pointed out that the company intended to hold open house for the three days immediately preceding founders' day, January 14, and recommended that all founders, if possible, select their lots before January 14. The letter then continued: "We have said in a previous letter [obviously referring to the letter of December 24, 1921], that we expect to have a copy of the plat and the price list in the Founders Hand Book. It seems now that it may be necessary to send out the Hand Book containing all other information and to provide the Founders with the plat and prices at our tract office any time that they may visit the property after Wednesday, January 11th." Clearly, part of the "all other information" referred to was a copy of the proposed lease referred to in the letter of December 24, 1921. Plaintiff admits that the letter of January 7, 1922, was sent by it.

[3, 4] Dr. Scott, as a witness for plaintiff, positively and unequivocally testified that the founders' handbook referred to in the letters of December 24 and January 7, was sent to the founders prior to founders' day, January 14, 1922. Defendant produced a handbook which it was testified to was received by her January 11, 1922, which date was stamped thereon by her son when received, and which handbook contained a copy of the proposed lease as promised. The lease contained in this handbook was silent as to who should pay the taxes. It is clear, of course, that, if a lease is silent as to who shall pay the taxes on the real property, the obligation rests on the landlord. Miller v. Buck Creek Oil Co., 38 Wyo. 505, 269 P. 43, 73 A. L. R. 824. Defendant's son and the witness Smith, also founders, testified that they received handbooks from the Pacific Palisades Association on or about January 11, 1922, which handbooks were identical with the one received by defendant. Two copies of the handbook which contained the form lease which was silent as to taxes were introduced in evidence; defendant's copy being Exhibit F. Defendant and her son had lost or destroyed the envelope in which their respective handbooks had been delivered, but the witness Smith had preserved the envelope in which his handbook, identical with that of defendant, had been delivered. This envelope, introduced in evidence, is postmarked January 10, 1922, and has the return address of plaintiff printed thereon. The evidence is without conflict on the point that these handbooks were received by defendant, her son, and Smith prior to founders' day, January 14, 1922. On the trial plaintiff produced a handbook which Dr. Scott testified was "in use" by plaintiff during 1922 and 1923. This handbook was introduced in evidence and became Exhibit 3. Exhibit 3 contained a copy of a proposed lease which expressly provided the tenant must pay all state, city, and county taxes and assessments levied on the lot leased. Except that Exhibit 3 has no preliminary matter referring to founders' day and provides for taxes, it is identical with defendant's handbook, Exhibit F. It will be remembered that the sales agreements entered into by defendant in March, 1923, all expressly provided that, upon defendant completing her payments, plaintiff "agrees to deliver to Bertha Deglow Menninger * * * a renewable ninety-nine year lease in substantially the form contained in the Founders Hand Book of said Pacific Palisades Association." There can be no doubt that the burden rested on plaintiff to prove that the leases tendered were "in substantially the form contained in the Founders Hand Book," and that, if the leases tendered differed from the form lease in the handbook, plaintiff is not entitled to the relief sought in this action. It is conceded that, after defendant completed her payments on the leases (over $7,000), plaintiff tendered to her leases all of which contained the clause imposing liability for taxes on her as tenant, and it is also admitted that defendant refused to execute the leases solely on that ground. Plaintiff was well aware of the basis of defendant's claim before suit was filed, because before that time defendant at plaintiff's request sent to plaintiff a photostatic copy of her handbook, Exhibit F, which contained the form lease silent as to taxes. Before trial defendant's deposition was taken, and her handbook was introduced in evidence. These last-mentioned facts are recited solely for the purpose of demonstrating that before this action was filed, and certainly long before trial, plaintiff had full knowledge of the basis of defendant's claim for exemption from taxes. Plaintiff was not taken by surprise at the trial. Plaintiff knew defendant had in her possession the handbook in question. The trial court found that the tendered leases were in the form agreed upon by the parties; that plaintiff's handbook, Exhibit 3, was "current and in full force" at the date of the several sales agreements; and that the handbook referred to in the sales agreements contained the tax clause. Based upon these findings the trial court caused to be entered the two judgments already mentioned. The sole point involved on this appeal is the sufficiency of the evidence to sustain these findings.

[5, 6] After a careful reading and re-reading of the transcript in this case, we are of the opinion that the challenged findings are not supported by the evidence, and that there can be but one interpretation of the evidence, that is, that plaintiff sent to defendant Exhibit F, and that defendant was entitled to rely upon that handbook as the one referred to in the sales agreement. We are well aware of the rule that, where there is any substantial evidence to support a finding, an appellate court, whatever it may feel as to the weight of the evidence, is without power to disturb the challenged finding, but that salutary rule has no application when the finding in question is totally unsupported by the evidence, and when the evidence, read as a whole is directly contrary to the finding. That is the situation here presented. Dr. Scott, called by plaintiff, and plaintiff's president, testified that the handbook containing the tax clause, Exhibit 3, was the handbook "in use" by plaintiff during 1922, 1923; that it was the only handbook in use by the plaintiff during that period; that founders' day was January 14, 1922; that the firm of Tower & Lee did the printing for plaintiff during 1922; that he, Dr. Scott, prepared the founders' handbook; that his employees sent the handbook to the founders; that Exhibit 3, plaintiff's handbook, was printed "just prior to Founders Day"; that he did not think printers other than Tower & Lee were employed by plaintiff in 1922, although he might be mistaken; that the Sam B. Carlisle Printing Company did some printing for plaintiff, but he believed this was at a later date. This was substantially all of the evidence introduced by plaintiff on this issue, on the opening of its case. The crux of this testimony is that Exhibit 3 was printed prior to founders' day, and was the only handbook used by plaintiff in 1922. Defendant then put on her case. She testified that her son handled all of the negotiations for her in reference to the lots; that Exhibit F was the only handbook received by her from plaintiff; that she or her son have had the handbook in their possession since it was received through the mail; that she thinks she received Exhibit F prior to founders' day; that she is sure she received it prior to March, 1923; that she read it when it was received. Elmore W. Menninger testified that he carried on the business details of the transaction for his mother; that he lived with his mother in 1921 and ever since; that he first saw Exhibit F on January 11, 1922, which date he stamped on the book when it was received; that he always called for his mother's mail at the post office, where she has a box; that he personally secured the envelope containing the handbook from the post office; that the envelope was lost; that the envelope had printed thereon the return address of the Pacific Palisades Association: that no other handbook was ever received from plaintiff; that he personally was also a founder; that he received through the mails a founders' handbook identical with Exhibit F on January 11, 1922; that it was also in a Pacific Palisades Association envelope. Another witness, Alfred H. Smith, testified that he was a founder; that he received through the mail a handbook from plaintiff postmarked January 10, 1922; that his handbook which was introduced in evidence, was identical with Exhibit F, and contained no covenant that the tenant should pay the taxes; that this handbook was the only one received from plaintiff. This witness had preserved the envelope in which his handbook was delivered. This envelope is postmarked January 10, 1922, and has printed thereon the return address of plaintiff. The defendant then called Alphonso W. Tower of the printing firm of Tower & Lee, the firm that Dr. Scott had testified did plaintiff's printing in 1922. He testified that it was the usual custom for his firm to number each job; that his firm had printed Exhibit 3, the handbook presented by plaintiff; that the number of that job was 9874, which number was printed on the handbook itself. He then positively testified that from the records of Tower & Lee the order for the printing of Exhibit 3 was not delivered to Tower & Lee until January 24, 1922, a date ten days after founders' day. This testimony is very important, because it conclusively fixes the date when the order was given for the printing of Exhibit 3 as after founders' day. That this was the fact is clearly illustrated by an examination of the two handbooks. The handbook of defendant, Exhibit F, in its preliminary paragraphs, contains references to founders' day in such a way that it is obvious it was sent out to assist founders on that date. Exhibit 3, the handbook upon which plaintiff relies, contains no reference to founders' day, indicating it was printed at a date subsequent thereto.

After Mr. Tower had fixed January 24, 1922, as the date upon which the order for Exhibit 3 was first received by his firm, defendant's son was recalled as a witness. On cross examination he testified that he had read Exhibit F carefully, and particularly noted that in the form lease therein contained no reference was found as to taxes; that not until the time of trial had he seen a handbook containing a clause that the tenant should pay the taxes; that he noticed in the lease form in Exhibit F the covenants on the part of the tenant were numbered; that the paragraphs were numbered 1, 3, 4, etc., and that there was no paragraph numbered 2; that this made no particular impression on him. It should be mentioned that in the lease form contained in Exhibit 3, clause 2 is the clause imposing the burden of paying the taxes on the tenant. Dr. Scott was then called by plaintiff in rebuttal. He testified that Tower & Lee were to the best of his recollection the only printers hired by plaintiff in 1922; that he had no recollection of ever having seen a hand book with the tax clause omitted until it was introduced in connection with this case. The trial judge then asked Dr. Scott if, after observing the two handbooks and noting that Exhibit F obviously was prepared prior to founders' day, while Exhibit 3 was apparently prepared after that date, "does that refresh your recollection as to whether that book [Exhibit F] might have been printed and published prior to Founders Day and then after the necessity for that language [referring to Founders Day] had been eliminated by the holding of Founders Day, a reprint succeeded, which left that material out?" Dr. Scott answered: "It does not refresh my memory as to the time, but it creates a presumption in my mind that that is the case." He then stated that he had racked his memory, but had no recollection of Exhibit F. He then positively reaffirmed his former testimony that handbooks had been sent to founders prior to founders' day; that he was totally unable to reconcile that fact with the fact that the order for the printing of Exhibit 3 was not given until January 24, 1922, ten days after founders' day.

We have thus reviewed all of the testimony offered on this point. It seems quite clear to us that the evidence thus summarized does not sustain the finding that Exhibit 3 is the handbook referred to in the sales agreement. The positive testimony of Mr. Tower clearly fixes January 24, 1922, as the date when the order for the printing of Exhibit 3 was first given to the printer. Plaintiff's president positively and unequivocally testified that handbooks were sent to the founders prior to founders' day, January 14, 1922. The only handbook presented by plaintiff is therefore a handbook printed after founders' day. There is a total lack of evidence that this handbook was ever sent to the founders. Plaintiff has entirely failed to prove that the leases tendered were in conformance with the sales agreement of March 26, 1923. Although it is true that Exhibit 3 was *then* in use, the evidence shows that the only handbook sent to the founders was some handbook sent prior to founders' day. The only evidence of such a handbook is the evidence of defendant, and her handbook contained no tax clause. If, as appears, defendant received from plaintiff a handbook prior to founders' day which contained a lease form silent as to taxes, she was obviously entitled to rely on that form in executing the contracts of March 26, 1923. The circumstances upon which plaintiff relies to show that defendant should have known that the tax clause was omitted by mistake are not sufficient for that purpose. The lease as a whole and the comments in reference thereto contained in Exhibit F certainly did not inform her she must pay the taxes on her leasehold. The form lease found in both Exhibit 3 and Exhibit F contained an express clause that as rental the tenant must pay yearly to plaintiff 1 per cent. of the cost of the lease. This might well have indicated to the prospective tenant that this charge was in lieu of taxes. Although a copy of the lease used at Lake Chautauqua, N. Y., was also included in both handbooks, and although the New York lease contained the tax clause, it did not contain the rental clause. Moreover, the New York lease was materially different in many substantial particulars from the lease proposed by plaintiff. Obviously the New York lease was included for purposes of comparison only. The fact that in the lease contained in Exhibit F the covenants on the part of the lessee jumped from 1 to 3 would not of itself give the reader notice of an omission. There was no break in the continuity of the provisions, and the reader might well assume it was a typographical error.

No useful purpose would be served in further reviewing the contentions of the parties. As already stated, the motions to dismiss the appeals are denied. For the reasons stated above, the judgments appealed from are reversed.

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219 Cal. 310

OTEY v. CARMEL SANITARY DIST.

S. F. 14719.

Supreme Court of California.

Oct. 30, 1933.

Rehearing Denied Nov. 27, 1933.

1. Navigable waters ⚷44(2).

Evidence in action by riparian owner to quiet title as against grantee of tideland sustained finding that beach land in question was formed by accretion (Civ. Code, § 1014).

2. Navigable waters ⚷39(2).

Judgment quieting title in land above ordinary high-water mark *held* not rendered uncertain or erroneous by failure definitely to fix "ordinary high-water mark" (Civ. Code, §§ 670, 3538).

> The judgment was not rendered uncertain or erroneous by reason of failure definitely to fix "ordinary high-water mark," since "ordinary high-water mark" is the limit reached by the neap or twice-a-day tides, and is readily ascertainable at any given time, and since under Civ. Code, § 3538, that is certain which can be made certain.

[Ed. Note.—For other definitions of "Ordinary High-Water Mark," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Monterey County; Harry W. Falk, Judge.

Action by Emma Otey against the Carmel Sanitary District. Judgment for plaintiff, and defendant appeals.

Affirmed.

Argyll Campbell, of Monterey, and Wyckoff, Gardner & Parker, of Watsonville, for appellant.

Silas W. Mack and John Thompson, both of Monterey, for respondent.

WASTE, Chief Justice.

Defendant appeals from a judgment quieting plaintiff's title to certain beach lands at and near the mouth of the Carmel river in Monterey county. Plaintiff claims title by accession or accretion to the upland while the defendant claims through a legislative grant of tideland. The trial court found in favor of the plaintiff, and gave judgment accordingly.

The principal question on this appeal has to do with the sufficiency of the evidence to support the trial court's findings. Section 1014 of the Civil Code declares that: "Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank." Appellant contends that the record is destitute of evidence tending to show that the land here in dispute formed "from natural causes" and "by imperceptible degrees," as required by the Code section. It urges that "the accumulation in the case at bar is not of solid material. It is loose sand in the bed of the river, without vegetation, shifting with the changes of tide and wind. The accumulation is no permanent part of the land, but is a mere drift which at the caprice of the wind and tide changes constantly in breadth and depth. Such drifts are not accretion."

[1] Examination of the record discloses that defendant introduced evidence tending to define and characterize the land here in dispute as above described. However, in view of the lower court's findings, we must, under well-settled principles, accept plaintiff's evidence, which very definitely indicates that the land involved falls within the Code definition of alluvion.

Carmel Martin, called upon a previous trial of the cause, and whose testimony was admitted at the second trial upon stipulation of the parties, testified, in substance, that he was born near the mouth of the Carmel river in 1879; that he has always lived there except when away at school; that there is more sand now in the Otey property than there was in 1907; that it is higher up at the northern boundary and wider on the east and west; that the expanse of sand is greater; that the dunes along the northern boundary have been gradually getting higher all the years; that, after the sand lies there a while, the brush starts to work through, and the south winds start the sand moving; that it hits the brush and is precipitated, and the following year the brush reaches up through the sand and comes up above it; that that practice goes on year after year; that this is not true of the Otey property; that there is no brush on that, but that this practice takes place there because the winds blowing from the south start the sand moving, and as it drifts up it deposits sand all along the line; that there is a gradual elevation all the way along the river to the top of the sand dune.

J. H. Stewart, whose previous testimony was also admitted upon stipulation, asserted that he had lived in Carmel valley for fifty-nine years; that there has been little change in the mouth of the river in the last fifty-nine years; that sometimes it runs north, and sometimes it runs a little south, but it has been for the most part in the same place it is now for the last fifty-nine years; that three or four times it went out well to the north; that it has been opened many times artificially; that the Otey place looked much as it does now fifty-nine years ago, but not so much sand; that there has been a gradual accretion during the years; that a hill has been raised north of the septic tank; that the wind has rolled up the sand and it stops on the brush; that the wind and sand have been raising that hill continuously since he was a boy; that there is more sand; that every year the sand hill with the brush is higher.

Others testified substantially to the same effect.

In addition, the trial court, by consent of the parties, went upon and viewed the lands and premises in dispute. In Hatton v. Gregg, 4 Cal. App. 537, 540–542, 88 P. 592, 593, wherein plaintiff's title was quieted to an accretion to certain lands adjacent and riparian to the Carmel river, the river involved in the present case, it is held that information obtained from a view of the premises "is independent evidence that can be taken into consideration in determining the issues of the case." In that case, as here, it was urged that the trier of the fact, from the nature of things, could not, from such examination of the premises, "find that the land in dispute had been formed from natural causes, by imperceptible degrees, by the accumulation of materials, or by the recession of the bank of Carmel river." The contention was found to be without merit, it being declared that the court "could, upon a view of the premises, not only verify the evidence as to the character of the land in dispute as to being a sedimentary, sandy loam, but could observe the slope of the land from the original boundary of plaintiffs' land to the river, and the character and relative age of the brush or other vegetation upon the land, and any other characteristics tending to throw light upon the manner of its formation. From such facts * * * the court might reasonably conclude that the land in dispute has been formed by natural causes, by imperceptible degrees, by the accumulation of materials, and by the recession of the river." We find nothing in Fendley v. City of Anaheim, 110 Cal. App. 731, 294 P. 769, opposed to this conclusion.

We are not inclined to accept defendant's theory that the deposit did not result from natural causes but rather from certain artificial agencies located in the immediate vicinity. The septic tank and bunker to which defendant refers us had no existence prior to 1912 and 1914, respectively. Plaintiff's evidence, as already shown, goes back to 1873, and indicates that there has been but slight change in the premises in the past twenty years, and that such change as has occurred has been from natural causes and by imperceptible degrees. Moreover, the court below, when viewing the premises, was in a position to readily ascertain and determine what effect, if any, artificial agencies had upon the change in the premises.

[2] In its judgment quieting plaintiff's title, the court below excepted any and all land lying below ordinary high-water mark. That portion, if any, lying below ordinary high-water mark was awarded to defendant, as successor in interest of the state, pursuant to section 670 of the Civil Code. The fact that the "ordinary high water mark" is not definitely fixed in the judgment does not render it uncertain and erroneous. Ordinary high-water mark is the limit reached by the neap or twice-a-day tides (Forgeus v. County of Santa Cruz, 24 Cal. App. 193, 195, 140 P. 1092) and is readily ascertainable at any given time. Under section 3538 of the Civil Code that is certain which can be made certain.

We have examined other points and contentions made by the parties, and find nothing requiring further discussion. What we have said sufficiently disposes of the cause. Examination of the record satisfies us that the judgment is eminently proper, and it is affirmed.

We concur: IRA F. THOMPSON, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

134 Cal.App. 694

PEOPLE v. FRENCH.

Cr. 2432.

District Court of Appeal, Second District,
Division 1, California.
Oct. 27, 1933.

1. Perjury 🔑5.

Perjury is not committed where no oath is, or oath administered is not, required (Pen. Code, §§ 118, 118a).

2. Perjury 🔑1.

Perjury is not committed by failure to state fact in affidavit (Pen. Code, §§ 118, 118a).

3. Perjury 🔑11(2).

Applicant for county aid, who falsely stated in affidavit that he was without funds and in need of assistance, though ordinance required no statements with respect thereto, and who failed to state nature, location, and value of all his property, as required by ordinance, did not commit perjury (Pen. Code, §§ 118, 118a).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Information for perjury by the People against James S. French. From an order setting aside the information, the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

Condee & Spencer, of Inglewood, for respondent.

HOUSER, Justice.

The essential facts connected with this appeal are that, prior to the filing of an information against him in the above-entitled action, respondent, James S. French, had made an affidavit relative either to the obtaining of solicited personal financial assistance, or to employment, desired for himself, which he sought from the county of Los Angeles; and that, for the asserted reason that contained within said affidavit were certain statements of facts which were claimed to be false, a complaint for perjury was filed against said defendant. As a result of a preliminary examination before a magistrate, defendant was held to answer to the superior court on said charge. A demurrer to the amended information that was filed in the latter court having been sustained, and in pursuance thereof the action was dismissed, this appeal is presented to this court from the order "setting aside" the information.

The prosecution of defendant was predicated, firstly, upon the provisions of a county ordinance of the county of Los Angeles by which it was provided that "before any aid * * * shall be given to or for any person claimed to be a pauper, or poor or indigent person, such person shall make a verified written statement" of specified matters of fact; and, secondly, upon the provisions contained in sections 118 and 118a of the Penal Code.

The information filed against defendant contained the general accusation of perjury and detailed allegations relative to the administration of the oath to defendant to the affidavit in question; and which affidavit thereupon and therein was set out in full, as follows:

"I, James French, being first duly sworn, depose and say that I am the same person making this application; that I am a citizen of the United States and I have been a resident of the State of California for six years three months and a resident of Los Angeles County for six years three months; that I have not received public or private aid or aid from relatives or friends during this period. I do own property; that the county assessed valuation thereof is unknown; that the income from my property is nothing per month; that my income is four per cent (4%) interest on Three Hundred Thirty-two Dollars ($332.00) with People's Building and Loan, Inglewood (X James S. French) per month including income from property; that I have no relatives of the following degree of kinship, spouse, adult children, parent, brother, sister, adult grandchildren or grandparents who are financially able to support me; that I have no persons dependent upon me for support; that the rent at my present address is Twelve Dollars ($12.00) per month; that I am without funds except as above stated and in need of assistance; that I will promptly notify the Bureau of County Welfore of any change in my condition or financial affairs; that I have read or heard read to me the above and that the facts therein stated are true of my own knowledge. * * *

"WORK
"~~DIRECT~~ RELIEF
"(Strike out one.)"

The information also set forth a purported copy of those portions of the ordinance which were alleged to be pertinent to the offense charged, as follows:

"(c) No person shall be considered to be a pauper, or poor or indigent person, so as to be entitled to county aid, who shall have an income in excess of the regular charity budget for such a case, as approved by the Board of Supervisors.

"(d) Before any aid, except emergency aid not exceeding twenty dollars in amount, shall be given to or for any person claimed to be a pauper or poor or indigent person, such person shall make a verified written statement of the nature, location and value of all property in which such person has any interest, legal or equitable, with the legal description of any real property in which such person shall claim any interest, and the nature of any interest in or claim to such property held or made by any other person or persons with the names and places of residence of such person or persons and of the names and places of residence of all kindred of the applicant of the degree of husband, wife, children (other than minors) father or mother, brother or sister, grandchildren or grandparents. Such statement shall show the pecuniary ability of such relatives to assist the applicant so far as known to the applicant, and whether applicant has informed such relatives of his or her need and whether they are willing to assist applicant."

Thereafter within the information followed allegations relative to the utterance and the delivery by defendant of the required affidavit. The information was then concluded by an allegation of the particulars of the acts of defendant constituting the commission of the offense, as follows: "That in said affidavit said defendant swore that he was without funds, except as stated in the affidavit, and that he was in need of assistance; that these statements were wilfully false and untrue, and known to the defendant to be false and untrue, at the time said affidavit was made; that, in truth and in fact, said defendant was not without funds; was not in destitute condition, and was not in need of public assistance from the Department of Charities and the Bureau of County Welfare, within the meaning of said ordinance, and the defendant in said affidavit did wilfully and intentionally fail to state the nature, location and value of all property in which he, the said defendant, had any interest. All of which facts were known to said defendant at the time said affidavit was made; that the false statements contained in said affidavit were material to the said application for aid, in that said application for aid would not have been taken, considered and granted by the Department of Charities had the defendant disclosed his true financial condition."

Leaving out of consideration the fact that, by the terms of the ordinance, it has reference to persons who make application for financial assistance, or "county aid," and not to those persons, who, like defendant, as indicated by the affidavit, seek "work" from the county, it may be observed that the alleged false statements contained within the affidavit made by defendant consisted in his declaration that he was "without funds," except as stated in the affidavit, and that he was "in need of assistance." Also that defendant was charged with his failure to make certain specified statements required by the provisions of the ordinance. An examination of the language of the ordinance, by virtue of the provisions of which an affidavit was made a necessity "before any aid * * * shall be given, * * *" fails to reveal the necessity of an express declaration by an applicant for assistance either that he is "without funds," or that he is "in need of assistance." And in that connection, included within the several asserted reasons advanced by respondent as being a sufficient basis for the order of dismissal of the action, the point is made that, as defined by the ordinance, the matter to which appellant takes exception was immaterial; and therefore incapable of affording a sufficient foundation for a prosecution of defendant on a charge of perjury. For a consideration of the point thus suggested, in the circumstances here present it may be assumed (without so deciding), not only that the said ordinance was a valid and binding requirement placed upon defendant, but as well that, in the presence of certain conditions unnecessary of specification herein, the provisions of sections 118 and 118a of the Penal Code authorize a prosecution for the crime of perjury.

As hereinbefore has been indicated, it satisfactorily appears that contained within the affidavit made by defendant were statements of facts which by the terms of the ordinance he was not required to make, and to which reference hereinbefore has been had; and for the purpose of the question here involved, assuming the falsity of such statements of facts, the ultimate question is whether in such circumstances a prosecution for perjury may be maintained.

[1] In the case of People v. Millsap, 85 Cal. App. 732, 260 P. 378, the essential facts were that the defendant was prosecuted for the alleged commission by him of the crime of perjury in verifying an answer to a complaint in an action in which he was one of the defendants. Although the facts set up in such answer were material, both to the cause of action and to his defense thereto, because of the conclusion reached by the court that under the laws of this state, as they affected the peculiar circumstances of the case, the defendant therein was not required to verify his answer to the complaint, and although by his affidavit he made false statements of fact, he was not lawfully subject to prosecution in a criminal action for the crime of perjury. In principle, that ruling is supported by the decision in each of the cases of People v. Howard, 111 Cal. 655, 44 P. 342, and in In re Clark, 54 Cal. App. 507, 202 P. 50. In addition thereto, by the great weight of authority, as is shown by excerpts from a list of cases contained in the annotation to the case of State v. Parrish, 129 La. 547, 56 So. 503, as reported in 39 L. R. A. (N. S.) 96, perjury is not committed either where no oath is, or the particular one administered is not, required.

[2] It would seem so clear that discussion should be unnecessary either to illustrate or to establish the point that a criminal action against a defendant for the commission by him of the crime of perjury cannot be maintained on an allegation that in making an affidavit he failed to make a statement of any fact, however relevant or material such fact, if made, might be to the subject-matter in hand, or however mandatory the rule might be by which he was directed or required to make such statement as a prerequisite to the accomplishment of the object of the affidavit.

[3] The result of a more particular inquiry of the situation here presented would indicate that by the terms of the ordinance an applicant for "county aid" is required to make an affidavit, not that he is, or that he is not, "without funds," or that he is, or that he is not, "in need of assistance," but only as to the "nature, location and value of all property in which such person has any interest. * * *" In his affidavit defendant declared that "I do own property; that the county assessed valuation thereof is unknown; * * * my income is four per cent interest on $332. * * *" It will thus be noted that in those respects defendant made no direct attempt to state either the nature, the location, or the value of his property. The dereliction, if any, of defendant consisted in his failure to make an affidavit as to a required fact or facts, rather than in any affirmative or express false swearing with reference thereto. Nor by the provisions of the ordinance is an applicant for "county aid" required to make any affidavit as to the amount or the source of any income which he may receive, or to which he may be entitled. Such a declaration by an affiant, as far as it may relate to the requirements of the ordinance, would seem superfluous. Certainly it would have very little, if any, relevancy to the "nature, location and value of all property in which such person has any interest." The statement made by defendant that he was "in need of assistance" is so clearly a conclusion, rather than a statement of fact, besides being a declaration entirely extraneous to any assumed legal requirement, that any discussion of its relevancy to the question here under consideration would seem unnecessary.

It would serve no useful purpose to consider either or any of the other several points presented by the respective parties to this appeal.

Since defendant was not legally required to make affidavit of the facts which form the basis for his prosecution herein; and, since a criminal action for perjury will not lie for failure to make affidavit of facts, it follows that, without reference to other possible grounds upon which the action of the lower court might be sustained, the judgment of this court should be that the order of which complaint is here made be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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134 Cal.App. 700

SMITH et al. v. DRAKE et al.

Civ. 8986.

District Court of Appeal, First District, Division 1, California.

Oct. 28, 1933.

As Corrected Nov. 17, 1933.

Hearing Denied by Supreme Court Dec. 26, 1933.

1. Mines and minerals ⚷79(1).

Overriding oil royalty is not interest in land.

2. Mines and minerals ⚷79(1).

Purchasers of bankrupt's overriding royalty in oil produced under lease assigned by him to others acquired no interest in leasehold or right to oil in place.

3. Mines and minerals ⚷79(1).

Purchaser of bankrupt's reserved interest in oil produced under lease, assigned by him to one subsequently quitclaiming lease to lessors, who then executed lease to another, acquired no right to overriding royalty in oil produced by latter's assignee; bankrupt's assignee having abandoned original lease.

4. Mines and minerals ⚷79(1).

Lessees' reservation of royalty in oil, produced under lease assigned by them to others, did not authorize them or their successors to enter leased premises and drill for oil.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by J. A. Smith and another against Thomas G. Drake, Walter B. Barham, and others. From a judgment for defendants Drake and others, plaintiffs appeal.

Affirmed.

Fredericks, Hanna & Morton, of Los Angeles, for appellants.

Walter F. Haas and H. C. Johnston, both of Los Angeles, for respondent Pearl E. Leeper, executrix of estate of Frank E. Leeper.

Walter B. Kibbey and Wm. H. B. Haymond, both of Los Angeles, for respondents representatives of estate of C. L. Anderson.

Cree & Brooks, of Long Beach, for respondents Thomas G. Drake and Sarah E. Drake.

Clock, McWhinney & Clock, of Long Beach, for respondents John E. Carson and Bank of America Nat. Trust & Savings Ass'n, executor of estate of John E. Carson.

PER CURIAM.

Plaintiffs brought this action to recover a percentage of the oil produced on lot 8, block C, tract No. 3207, Bixby Heights No. 1 in the county of Los Angeles. Judgment was rendered in favor of defendants and from this judgment plaintiffs have appealed.

The facts in substance are as follows: Defendants Thomas G. Drake and Sarah E. Drake are the owners of said lot, and on or about May 6, 1922, they leased the same to Ed. R. Herwick and Ariel N. Herwick, husband and wife, by said lease granting to them the exclusive right to drill, operate for, develop, and remove petroleum, oil, naphtha, natural gas, asphaltum, and other kindred substances therefrom, the said Drakes to receive one-sixth of the oil or other kindred substances, the lease to continue for twenty years unless said wells fail to produce oil in paying quantities in a less period of time. This lease was recorded July 6, 1923. On July 18, 1923, the said Herwicks assigned the said lease to John E. Carson, Walter B. Barham, and Frank E. Leeper, reserving a royalty of 13⅓ per cent. Pursuant to said last-named instrument, the said assignees entered upon said premises and drilled a well thereon which produced oil from 1924 until some time prior to March, 1927. Leeper acquired the interests of his associates Barham and Carson in said lease. During this time the Herwicks were paid the royalty reserved by them. During the summer of 1927, Leeper grew discouraged over the conditions of the well and his efforts to make it producing, and offered to quitclaim to the Drakes the lease which had been assigned to him. At that time the Drakes refused to accept said quitclaim and insisted upon Leeper continuing his efforts to make the said well a producing one. Thereafter Leeper had trouble with water coming into said well, and finally, about the last of September, 1927, he again offered to quitclaim the said lease to the Drakes, informing them at that time that he was through with the lease and was going to quit, also informing them that he had sold all of the equipment of said well to Charles W. Camp. In the meantime he had moved the boiler and some of the equipment to another lease. The Drakes thereupon

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

agreed to accept said quitclaim and at his request accompanied him to Camp's office to accept delivery of the same. After said quitclaim was executed, Camp offered to lease the said lot from the Drakes for the purpose of drilling for oil and finally, after some haggling over the percentage of royalty that was to be reserved by the Drakes, a royalty of 10 per cent. was agreed upon. Thereafter, on October 1, 1927, the Drakes executed a lease to Camp. Camp then proceeded with the work of trying to produce oil from said well, but without success, and on or about the 23d of January, 1928, he assigned the said lease to C. L. Anderson, who, as consideration therefor, paid to Camp $15,000. Anderson thereupon took over the operation of said well and finally brought it into production about July 1, 1928, at an expense of about $200,000. In May, 1927, plaintiffs purchased, in the matter of the bankruptcy of Ed. R. Herwick, the portion of oil and gas reserved by the Herwicks in their lease to Leeper and others; this portion having been reduced to 8 per cent. in July, 1927. The trial court found that neither Camp nor Anderson had any knowledge of the claim of appellants to any oil in said premises until about April 17, 1928.

[1] Appellants rely for reversal mainly upon the point that the overriding royalty reserved by the Herwicks, and of which appellants claim to be the owners by virtue of the bankruptcy proceedings, is an interest in land, and that Camp and Anderson therefore had constructive notice of same, and that the purported assignment of the Herwicks, in which a certain percentage of the oil was reserved, was, in fact, a sublease; that therefore both Camp and Anderson took with notice of their claim. The rule adopted and followed in this state is against this contention of appellants. Brookshire Oil Co. v. Casmalia, etc., Co., 156 Cal. 211, 103 P. 927; Black v. Solano Co., 114 Cal. App. 170, 299 P. 843; Western Oil & Refining Co. v. Venago Oil Corporation (Cal.) 24 P.(2d) 971. All of these cases hold that an overriding royalty is not an interest in land. In Brookshire Oil Co. v. Casmalia, etc., Co., supra, in speaking of an oil lease the following language was quoted with approval: "This instrument does not vest in the so-called lessees any present title in the land. It grants only the right to do certain things thereon and to take certain mineral substances therefrom, and no title to such substances passes from the original owner until the same is severed from the realty. * * * 'The title is inchoate and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract.' [Citing authorities.]"

[2] The claim of appellants is based upon an overriding royalty for 8 per cent. of any oil or gas that may be thereafter produced from the premises under the lease from the Drakes to the Herwicks. Appellants, in acquiring the interest of the Herwicks of the 8 per cent. overriding royalty under said lease, did not thereby acquire any interest in the said leasehold, or any rights to the oil and gas in place, but only 8 per cent. of the oil and gas produced and saved. Western Oil & Refining Co. v. Venago Oil Corporation, supra.

[3] The court found that for more than three months prior to September 29, 1927, the said Leeper had been negotiating with the said Camp and with other persons for the sale to Camp of the secondhand and used piping, machinery, and material situate upon the said leasehold; that on the 29th of September, 1927, he reached an agreement with Camp and sold to him all of the said machinery and material on said leasehold; that prior to this said Leeper intended to quitclaim all of his interest in said leasehold to the said Drakes, and on the 29th day of September, 1927, did quitclaim all of his interest in said lease to the Drakes; that thereafter on October 1, 1927, the Drakes executed to Camp a lease upon said premises for the purpose of prospecting same for oil and other hydrocarbon substances.

It appears that the only oil produced on said premises after March, 1927, was that produced by Anderson under his lease from Camp. We are of the opinion that Leeper surrendered to the Drakes and abandoned the original lease from them to Herwick, and that therefore appellants have no right to an overriding royalty in the oil produced under the lease executed by the Drakes to Camp and by him assigned to Anderson.

There is no evidence supporting the contention of appellants that any fraud was perpetrated by the Drakes or Leeper or Camp in the cancellation of the lease of 1922 and the giving of the new lease to Camp by the Drakes, and this was so found by the court. The surrender of the said lease of 1922 to the Drakes by Leeper, and his abandonment thereof, is fully substantiated by the evidence, as is the acceptance of such surrender by the Drakes. In Hall v. Augur, 82 Cal. App. 594, 256 P. 232, it was held that an abandonment may be more readily found in cases of oil and gas leases than in most other cases.

[4] Appellants contend that their overriding royalty was not terminated by the surrender or abandonment by Leeper of the lease from the Drakes to Herwick and which they held as successors of the Herwicks.

The reservation by the Herwicks of a royalty in the oil produced under said lease did not confer upon the Herwicks or their successors the right to go upon the leased premises and drill for oil, but gave them only an interest in such oil, produced under said lease, after it had been reduced to possession.

The foregoing authorities are against appellants' contention.

The judgment is affirmed.

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134 Cal.App. 670

PEOPLE v. STROFF.

Cr. 1287.

District Court of Appeal, Third District, California.

Oct. 24, 1933.

1. Criminal law 🔑913(1).

Constitutional provision prohibiting granting of new trial for procedural errors unless resulting in miscarriage of justice limits application of statute entitling defendant to new trial if sentence is not pronounced within five days after plea of guilty (Pen. Code, § 1202; Const. art. 6, § 4½).

2. Criminal law 🔑913(1).

Failure of court to pronounce judgment determining degree of burglary within five days after plea of guilty of burglary *held* error of procedure, for which defendant was not entitled to new trial (Pen. Code, §§ 460, 1192, 1202; Const. art. 6, § 4½).

3. Criminal law 🔑1188.

Proper procedure is to remand cause to trial court for proper correction of irregular judgment.

4. Burglary 🔑10.

Burglar who left his revolver on platform just outside door leading into burglarized building was "armed" within statute making burglary by person armed with deadly weapon, burglary of first degree (Pen. Code, § 460).

> "Armed" with a dangerous weapon means furnished or equipped with weapons of offense or defense. "Equipped" means to furnish for service or against a need of exigency; to fit out; to supply with whatever is necessary to efficient action in any way; to provide with arms or armaments, stores, munitions, etc.
>
> [Ed. Note.—For other definitions of "Armed" and "Equip," see Words & Phrases.]

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Peter Stroff was convicted of burglary in the first degree, and he appeals.

Affirmed.

Blaine McGowan, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

On September 4, 1928, the defendant pleaded guilty to the crime of burglary, with which he was regularly charged and sentenced to imprisonment in the state prison at San Quentin. The record shows that at the time of passing sentence the court failed to designate whether the offense to which the defendant had pleaded guilty was burglary in the first or second degree. Thereafter, and in May, 1933, after hearing upon the appellant's petition for a writ of habeas corpus, this court remanded the appellant to the trial court in order that the degree of the offense to which the appellant had pleaded guilty should be ascertained and determined. In re Stroff for Writ of Habeas Corpus (Cal. App.) 22 P.(2d) 770.

In pursuance of the order and direction of this court, the trial court of Humboldt county, having brought the appellant before it, proceeded to take testimony to determine the degree of the offense to which the defendant had pleaded guilty, and thereupon found such offense to be burglary in the first degree. From this action of the trial court the defendant appeals.

Two grounds are relied upon for reversal: (1) That the trial court had no jurisdiction to proceed to determine the degree of the offense to which the defendant had pleaded guilty, by reason of the fact that a judgment determining the degree of the offense was not pronounced within 5 days after the defendant had entered his plea of guilty; (2) that the defendant was not armed at the time of the commission of the offense, and therefore was guilty only of burglary in the second degree.

The record shows a burglary, during the nighttime, of a certain store building in the county of Humboldt, and that the defendant owned a certain pistol or revolver which was found lying on the platform just outside of one of the doors leading into the store building. Whether that pistol was left on the platform before or after the entrance is not shown by the testimony.

In support of his first contention the appellant refers to a number of cases holding that where the court has failed to pronounce judgment within 5 days after a plea or verdict of guilty, a new trial must be granted to the defendant as a matter of right. These cases, however, by reason of the later decisions hereinafter referred to, can no longer be considered as authority. All of the cases cited by the appellant overlook the provisions of section 4½ of article 6 of the Constitution prohibiting the granting of a new trial for any error as to a matter of procedure unless such error has led to a miscarriage of justice.

Section 1192 of the Penal Code unquestionably deals with a matter of procedure. It reads: "Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree." This is but a preliminary step to be taken, in order, under the provisions of the indeterminate sentence law, to advise the proper authorities as to the term of imprisonment that may be imposed upon the defendant so pleading guilty. Imprisonment is the substantive part of the sentence. The advisory part to which we have just referred is for the direction of the board of prison terms and paroles.

[1, 2] While section 1202 of the Penal Code does direct that in the event sentence is not pronounced within 5 days the defendant "shall be entitled to a new trial," this section is not controlling in matters of procedure. Section 4½ of article 6 of the Constitution must be held to limit the application of section 1202 of the Penal Code, and the contention of the appellant that this section of the Code makes it mandatory upon the trial court to grant a new trial must be held as not well taken in view of the constitutional provision limiting the right to new trials when matters of procedure are involved.

That the earlier cases cited by the appellant are no longer controlling where the court fails to pronounce sentence within 5 days, is now clearly established. In People v. Zuvela, 191 Cal. 223, 215 P. 907, where sentence was not pronounced within the 5 days mentioned in the statute, the court held (quoting from the syllabus): "The failure to impose the sentence in a criminal case within the time specified by section 1191 of the Penal Code is an error of procedure, and section 4½ [of article 6] of the constitution operates to prevent the granting of a new trial for the error." This statement of the law is supported by the following cases: People v. Haines, 64 Cal. App. 628, 222 P. 183; People v. Powell, 83 Cal. App. 62, 256 P. 561; People v. Wilson, 101 Cal. App. 376, 281 P. 700; People v. Carter (Cal. App.) 19 P.(2d) 843. In this latter case this court held that a new trial will not be granted because of the error in failing to pronounce sentence within 5 days, unless an examination of the record discloses that the error complained of resulted in a miscarriage of justice.

[3] The rule is likewise well established that where an irregular judgment has been pronounced, the proper procedure is to remand the cause to the trial court in order that proper correction may be made. People v. O'Brien, 122 Cal. App. 147, and cases cited on page 158, 9 P.(2d) 902, 906. See, also, In re Stroff, supra. To the same effect is the decision of this court in Re Germino, 38 Cal. App. 497, 176 P. 701.

[4] Admitting the commission of the burglary, the appellant contends that the court was in error in finding the offense to be of the first degree, in that he was not armed with a deadly weapon. The building burglarized not being inhabited at the time, the provisions of section 460 of the Penal Code requires, in order to constitute burglary of the first degree, that he must have been armed with a deadly weapon. As shown by the evidence in this case the revolver belonging to the defendant was left on the platform just outside the building. Under such circumstances it is contended that the appellant was not armed within the contemplation of the Code.

A somewhat similar case was before the court in the case of People v. Hall et al., 105 Cal. App. 359, 287 P. 533. The defendants had in their possession automatic revolvers, but it appears that no use was made thereof. There it was contended, as here, that the court erred in finding the offense as of the first degree. In disposing of this contention the court used the following language: "Appellants claim that the trial court committed error in finding that they were armed with a dangerous or deadly weapon in perpetrating the offense to which they pleaded guilty. * * * This contention is based upon the claim that the weapons were not exposed to the victim at the time of the perpetration of the crime. As above stated, the evidence showed that both defendants were armed with a revolver, and that, in addition thereto, one of them was possessed of a black-jack. Whether or not they exposed these deadly weapons in order to carry out their criminal act is of no consequence. The fact that they had them in their possession available for immediate use is sufficient to bring the case within the statute. 'Armed' with a dangerous weapon means furnished or equipped with weapons of offense or defense." Citing State v. Lynch, 88 Me. 195, 33 A. 978. The definition of "armed" as given in 5 C. J. 285 is as follows: "Furnished or equipped with weapons of offense or defense."

Reference is also made in the testimony to a sawed-off shotgun, but this testimony is so indefinite that we do not base our decision thereon. There is nothing in the Code provision which requires that the deadly weapon, or the weapon which may be used in offense or defense must be held in the hand or hands of the person or persons committing the burglary. In this instance the appellant was certainly equipped with a deadly weapon. Webster defines "equip" and "equipped" as follows: "To furnish for service or against a need of exigency; to fit out; to supply with whatever is necessary to efficient action in any way; to provide with arms or armaments, stores, munitions, etc." If the appellant laid his revolver down on the outside of the building, it does not exclude the conclusion that he was there armed; that is, equipped with a deadly weapon or instrument ready for use in case of emergency. The mere fact that some person more skillful than the appellant might have intercepted the use of the deadly weapon does not at all controvert the conclusion that the appellant was armed; that is, equipped with the means of offense and defense. To hold, under the circumstances disclosed in this case, that the appellant was unarmed, would be to give precedence to a mere shadow rather than to substance.

The judgment and order are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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134 Cal.App. 687

PEOPLE v. LA FRENZ.

Cr. 1696.

District Court of Appeal, First District, Division 1, California.

Oct. 27, 1933.

1. Criminal law ⚷507(1).

Where accused killed deceased, according to witness' testimony, while accused and witness were executing planned robbery, witness was "accomplice" to murder, notwithstanding witness had contemplated no violence, and was not in room during killing (Pen. Code, § 1111).

[Ed. Note.—For other definitions of "Accomplice," see Words & Phrases.]

2. Homicide ⚷234(3).

Corroboration of accomplice's testimony *held* insufficient to sustain murder conviction (Pen. Code, § 1111).

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Joseph H. La Frenz was convicted of murder in the first degree, and he appeals. Reversed.

William F. Herron and Kennett B. Dawson, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., and Joseph A. Garry, Asst. Dist. Atty., of San Francisco, for the People.

KNIGHT, Justice.

This is an appeal from a judgment of conviction of first degree murder and from an order denying a motion for new trial.

The victim of the murder was Walter J. Mathias, who conducted a small restaurant in the Mission district, near Nineteenth and Folsom streets in San Francisco. On the morning of August 4, 1930, between the hours of 10 and 11 o'clock, he was found lying on the floor of the kitchen in the rear of his restaurant, unconscious and bleeding from a wound on the head, his skull having been crushed by a heavy blow inflicted with a blunt instrument. Without regaining consciousness he died about 3 o'clock in the afternoon of the same day. The police were unable to find any clue to the perpetrators of the crime until about a year and a half later. At that time, in March, 1932, one Henry Castro, living in San Mateo county, was confined in the county jail at Redwood City on a charge of failing to provide for his minor child; and while there he received a letter from his wife, through which the officers learned that Castro knew something about the murder of Mathias. Soon afterwards Castro related his story of the murder to the grand jury of the city and county of San Francisco, and on April 8, 1932, an indictment was returned charging appellant with the commission of the crime. At the time the indictment was found appellant was under sentence to the penitentiary for another crime committed subsequent to the Mathias murder, which, with two prior convictions of felony, was charged also in the indictment. In finding appellant guilty of the Mathias murder the jury fixed the penalty at life imprisonment. He was sentenced accordingly and pursuant to the provisions of section 644 of the Penal Code was adjudged an habitual criminal.

The evidence connecting appellant with the commission of the Mathias murder consisted of the testimony given by Castro, and appellant contended before the trial court that such testimony, if true, established as a matter of law that Castro was an accomplice to the murder and that his testimony connecting appellant with the crime had not been corroborated in the manner required by section 1111 of the Penal Code. The prosecution contended to the contrary, claiming that Castro was not an accomplice and that consequently corroboration was not essential. The court ruled that the question of Castro's status would be submitted to the jury as a question of fact, and accordingly the respective parties argued that issue before the jury. In furtherance of his contention that Castro was an accomplice, appellant offered instructions to that effect, which the court refused to give, but in lieu thereof gave to the jury certain definitions of an accomplice, together with instructions based on the provisions of said section 1111 of the Penal Code to the effect that a conviction could not be had upon the testimony of an accomplice unless it was corroborated by such other evidence as would tend to connect the defendant with the commission of the offense, and that the corroboration was not sufficient if it merely showed the commission of the offense or the circumstances thereof. In defining an accomplice the court stated in its instructions first that "an accomplice was one who actually participates in the commission of a crime," and later, in conformity with the definition given in said section 1111 of the Penal Code, instructed that an accomplice "is one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

As will be observed from the state of the record in which the cause was submitted to the jury, it cannot be determined definitely whether the jury's verdict declaring appellant guilty was founded on the conclusion that, as the prosecution claimed, Castro was not an accomplice and that therefore corroboration was not essential; or on the conclusion that he was an accomplice, as claimed by appellant, but that his testimony was corroborated in the manner required by law. In view of the position taken by the district attorney before the trial court and in his argument to the jury, it may be fairly assumed that the verdict was based on the conclusion first mentioned; that Castro was not an accomplice; and that consequently, accepting his testimony as true, it was not necessary that it be corroborated. However, so far as the decision on this appeal is concerned, it is immaterial upon which of said conclusions the verdict was based if, as appellant has contended throughout, the evidence establishes as a matter of law that Castro was an accomplice and his testimony was not corroborated in the manner required by said Code section.

[1] The Attorney General filed no brief in opposition to the appeal, and at the time set for oral argument confessed error, stating that the points urged by appellant as to this branch of the case were unanswerable. Thereupon, at the suggestion of the court, the district attorney's office was invited to present its views in support of the conviction, if it so desired; and in response thereto a brief was filed and oral argument presented, whereby it was sought to show that Castro was not an accomplice. After having given the matter full consideration, we are unable to sustain such view, for the reason that according to Castro's own testimony Mathias was killed by appellant while appellant and Castro were attempting to execute the plans of a criminal enterprise theretofore entered into between them to rob Mathias' restaurant; and that being so, under the law Castro was an accomplice to the murder and subject to prosecution therefor. People v. Boss, 210 Cal. 245, 290 P. 881, 882. In this regard Castro testified that he met appellant on the morning of the crime at the latter's home on Twenty-First avenue in San Francisco, after having driven there from his home in San Mateo county in response to a promise previously made by appellant to secure a job for him in San Francisco, and that soon after he reached there appellant induced him to join in the scheme to rob Mathias' restaurant, stating that Mathias kept in his possession some $400; that in pursuance of the plans laid for the robbery they drove out to the restaurant in appellant's machine, appellant at the time being armed with a revolver: that finding Mathias alone appellant entered the restaurant and inveigled Mathias into the kitchen in the rear, under the pretext of selling him some liquor; that while this was going on he, Castro, entered the front of the restaurant, robbed the cash register, obtaining therefrom only $1.50, returned to the parked automobile in front; and that appellant soon followed and they drove away. He further stated that soon after leaving the scene of the crime appellant told him that the plans did not turn out as he expected; that Mathias started to make trouble; and that he had "to hit him over the head." Continuing, Castro testified that he was not aware of the serious injuries inflicted on Mathias until that night when he read the newspaper, and that the next morning, through the press also, he learned that Mathias died from the effects of the blow on the head. As pointed out by the district attorney, Castro also testified that at no time did he contemplate that acts of violence would be resorted to in carrying out the plans for the robbery. Under the law, however, neither such fact, nor the fact that he did not actually participate in the acts of violence and that the same were committed out of his immediate presence, exculpated him from criminal responsibility for the murder which he asserts grew out of the criminal enterprise into which he voluntarily entered. As said in People v. Boss, supra: "The law is * * * well settled that where two or more persons enter into a conspiracy to commit a robbery or burglary and one of the conspirators commits a murder in the perpetration of the crime, all of said conspirators are equally guilty with said coconspirator of murder of the first degree, and it is no defense that those who did not actually participate in the killing did not intend that

life should be taken in the perpetration of the robbery, or had forbidden their associate to kill, or regretted that it had been done. People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L. R. A. 193." In People v. Perry, 195 Cal. 623, 638, 234 P. 890, 896, the same doctrine is stated as follows: "If a homicide is committed by one of the confederates while engaged in an attempt to perpetrate the crime of robbery in furtherance of a common purpose, the person or persons so engaged, but who did not actually do the killing, are as accountable to the law as though their own hands had intentionally fired the fatal shot or given the fatal blow, and such killing is murder of the first degree. The jury has no option but to return a verdict of murder of the first degree whether the killing was intentionally or accidentally done. * * * [Citing a number of earlier cases.]" And in a later case, People v. Smith, 215 Cal. 749, 12 P.(2d) 945, the court said that the authorities adhering to such doctrine were so well known that it would seem to be an unnecessary, irksome task to again cite them.

[2] Before the conviction can be sustained, therefore, it must appear that Castro's testimony was corroborated by other evidence tending to connect appellant with the commission of the crime; and after examining the record we are of the opinion that, as appellant contends and as the Attorney General concedes, it fails to disclose any such independent evidence. It is true, as the district attorney points out, independent evidence was introduced in corroboration of Castro's statement that he was at or near appellant's home early on the morning of the day of the crime, it being shown in this regard that his automobile worked free from the place where he had parked it near appellant's home, and ran down the hill into the side of a building; but appellant's home was more than five miles distant from the scene of the crime and there is no independent evidence whatever to show that at any time that morning Castro saw appellant or was in his company. Nor is there any corroboration of Castro's testimony that on the way back from the robbery he and appellant met appellant's brother, Charles, on the street. In this respect Castro was unable to state even remotely where they met, and appellant's brother, who was called as a witness on behalf of the prosecution, testified that such was not the fact, and his testimony on this point was supported by that of his mother. With reference thereto he stated that he met Castro about noon the day of the murder at his, La Frenz', mother's home on Granada avenue in the Ingleside district, which was also more than five miles distant from the scene of the crime; that appellant was there at the time, and had been there continuously since 8 o'clock that morning; and that Castro arrived alone and without his automobile. He further testified that Castro remained there until approximately 3 o'clock in the afternoon, at which time he left with appellant intending to drive to appellant's house for the purpose of removing Castro's machine from the side of the building into which it had plunged. Appellant did not testify as a witness at any stage of the case, nor was any evidence introduced of his having made any extrajudicial statements or declarations, his main defense being an alibi, which, as indicated, he sought to establish by the testimony of his relatives. The district attorney also points out that the autopsy surgeon testified that the injury to Mathias' head was inflicted by some kind of a blunt instrument, which he stated might have been the butt of a revolver, and in this connection independent evidence was introduced to show that in August, 1931, which was more than a year after the murder was committed, appellant had in his possession a revolver which Castro identified at the trial as the one he claims appellant was carrying at the time they set out to rob the restaurant. But there is no corroboration whatever of Castro's testimony that appellant carried a revolver on the day of the crime; nor are there any circumstances from which it may be inferred that, if the fatal blow was inflicted with a revolver, the weapon found in appellant's possession more than a year thereafter was the one used for such purpose.

For the reasons stated it is our opinion that the evidence cited by the district attorney fails to meet the legal requirements of said section 1111 of the Penal Code. In construing said section the decisions hold, it is true, that corroborative evidence of an accomplice is legally sufficient even though it be slight and when standing alone entitled to but little weight; furthermore, that it need not be corroborative of the precise facts related by the accomplice (People v. Negra, 208 Cal. 64, 280 P. 354); but in this connection it is also held that such independent evidence must do more than cast a mere suspicion on the accused (People v. Kempley, 205 Cal. 441, 271 P. 478; People v. Robbins, 171 Cal. 466, 154 P. 317; People v. Davis, 210 Cal. 540, 293 P. 32; People v. Janssen, 74 Cal. App. 402, 240 P. 799).

The judgment and order are reversed.

We concur: TYLER, P. J.; CASHIN, J.

134 Cal.App. 665

MORTON v. RICHARDS, County Auditor.

Civ. 5019.

District Court of Appeal, Third District, California.

Oct. 23, 1933.

1. Counties 🔑**3½.**

County charter amendment providing that county assessor should be allowed certain sum for clerk's fees and deputies' salaries *held* invalid as violating constitutional provision requiring fixing of such compensation by ordinance (Const. art. 11, § 7½, subd. 5).

> Const. art. 11, § 7½, subd. 5, authorizes charter to provide for fixing and regulation by boards of supervisors, by ordinance, of appointment and number of assistants, deputies, clerks, attachés and other persons to be employed in county offices, and for prescribing and regulating by such board of powers, duties, qualifications, and compensation of such persons.

2. Counties 🔑**3½.**

Where county charter amendments were conflicting if given immediate effect, it was court's duty to ascertain voters' intent and purpose in adopting amendments and Legislature's intent in approving them.

3. Officers 🔑**100(2).**

Where, at same election, county charter was amended to reduce assessor's salary and to broaden provision against decreasing officers' salaries during term, salary reduction *held* inapplicable to then incumbent (Const. art. 11, § 7½, subd. 2).

Mandamus proceeding by A. E. Morton against Lucy A. Richards, as County Auditor of the County of Butte.

Writ granted.

Coyle E. Bybee, of Chico, for petitioner.

Bond & Price, of Chico, and George F. Jones, of Oroville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

By this proceeding the petitioner seeks a writ of mandate against respondent in behalf of himself, directing the payment of his salary as assessor of the county of Butte, at the rate of $300 per month. Also, a like writ directing the payment of the salary of his chief deputy at the rate of $160 per month; and also, of the salary of his chief clerk at the rate of $125 per month.

It appears from the record that the petitioner was duly elected the assessor of the county of Butte, on August 26, 1930, and qualified as such assessor on January 5, 1931. At the date of the election and qualification of the petitioner as such assessor, the salary attached to the office was the sum of $3,600 per annum, payable in monthly installments of $300 each.

The respondent Lucy A. Richards is the duly elected, qualified, and acting auditor of the county of Butte. The monthly payments involved herein are for the month of August, 1933, the respondent refusing to draw warrants for a sum other than based upon charter amendments hereafter to be considered.

On the 27th day of June, 1933, there was submitted to the voters of Butte county certain charter amendments known as propositions 1, 2, 3, 7, and 14. Proposition No. 1 amended section 3 of article III, so far as involved in this action, to read as follows: "The Assessor shall be allowed the sum of $2500.00 per annum for clerk's fees, and $6000.00 per annum for deputies' salaries." Proposition No. 7 amended section 6 of article IV to read: "The annual salary of county officers shall be as follows: payable monthly on the first Monday of each month until changed as in this charter provided." (Then follows a schedule of payments, including subdivision E, reading as follows: "The assessor, $3000.00 per annum." Proposition No. 14 amended section 2 of article XII to read: "The compensation of any elective or appointive county or township officer shall not be increased or decreased during the term for which he was elected or appointed." Prior to amendment, section 2 read: "The compensation of any elective or appointive county or township officer shall not be increased or decreased during the term for which he was elected nor within six months preceding his election." The amendment to the charter included appointive officers as well as elective officers within the terms of the section. Prior to the amendment to the charter approved by the voters on June 27, 1933, subdivision E of section 6 of article IV of the county charter, fixing salaries, read: "The Assessor, $3600.00 per annum."

Two questions are presented for consideration: (1) What is the effect of amending section 3 of article III of the county charter attempting to regulate the compensation of assistants, deputies, and clerks? (2) The effect of amending subdivision E of section 6 of article IV of the charter reducing the salaries of the county assessor.

[1] Section 7½ of article 11 of the Constitution particularly specifies in different subdivisions thereof the powers that may be exercised by counties in adopting charters. Subdivision 2 authorizes the insertion in the charter of the salaries that shall or may be paid to sheriffs, county clerks, treasurers, re-

corders, license collectors, tax collectors, public administrators, coroners, surveyors, district attorneys, auditors, assessors, and superintendents of schools. The section further provides that the compensation may be authorized to be fixed by the board of supervisors. Nothing appears in this subdivision providing for setting forth in the charter the compensation or salaries to be paid to assistants, deputies, clerks, attachés, or other persons employed from time to time. The provision covering the compensation of assistants, deputies, etc., is set forth in subdivision 5, and reads as follows: "For the fixing and regulation by boards of supervisors, by ordinance, of the appointment and number of assistants, deputies, clerks, attaches and other persons to be employed, from time to time, in the several offices of the county, and for the prescribing and regulating by such boards of the powers, duties, qualifications and compensation of such persons," etc.

No argument is required to show the invalidity of the amendment to the charter attempting to fix therein the compensation of assistants, deputies, clerks, etc. All that is required is a mere setting forth of the Constitution showing where the power is vested to fix the compensation of such officers.

No action having been taken to fix the compensation of the chief clerk and chief deputy mentioned in the petition, as required by subdivision 5 of section 7½ of article 11 of the Constitution, it must be held that the salaries of these officers to which they are entitled has been unchanged, and that they are entitled to the warrants as prayed for. The manner in which the salary of such officers may be regulated or fixed was fully considered in the case of McPherson v. Richards (Cal. App.) 25 P.(2d) 534, to which reference is hereby made.

[2, 3] As hereinbefore stated, prior to June 27, 1933, and at the time the petitioner became the duly qualified and elected assessor of the county of Butte, the county charter provided that his compensation should not be either increased or decreased during his term of office. On June 27, 1933, there was adopted an amendment to the charter fixing the salary of the assessor at $3,000 per annum, being a reduction of $600 per annum, and at the same election the voters readopted the provision of the charter declaring that the compensation of the officers of Butte county should not be increased or decreased during the term for which they were elected or appointed, making the provision, as we have stated, apply to appointive as well as elective officers. The mere setting forth of these amendments negatives the idea that immediate effect can be given to both of them. Neither of the amendments occupy a position of priority so far as their adoption is concerned. Priority in this case, in legal effect, would be the giving consideration of the one which is adopted last in time. Here, they were both adopted at the same election, subsequently ratified by the Legislature in one act. Standing alone both amendments would constitute valid enactments. It is only when the attempt is made to give them immediate effect that a conflict arises. Under such circumstances it is the duty of the court to ascertain, if possible, the intent and purpose of the voters of Butte county in adopting the amendments to the charter and of the Legislature in approving the same. Or as said in 59 C. J. 948: "As the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state, to the intention or purpose of the legislature as expressed in the statute." And further, in the same volume, page 1051, the rule is further stated: "Statutes in pari materia, although in apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each, as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments." Here, as we have seen, neither of the provisions occupies the superior position of being a subsequent enactment.

What, then, must be held to be the intention of the voters and of the Legislature? We think the answer may be found in the terms of the charter. As heretofore stated, section 2 of article XII of the charter at all times during the incumbency of the petitioner as the assessor of Butte county, provided that his salary should neither be increased nor decreased. This intention was reaffirmed by the voters on the 27th day of June, 1933. Instead of subtracting from the terms of this provision of the charter, the voters of Butte county added thereto and included within the terms of the section words directing that the salaries of appointive officers after appointment should neither be increased nor decreased during the terms for which they were appointed. If this is true, and we do not see how any other conclusion can be reached as to the intention of the voters of Butte county, then and in that case it follows that it was the intent of the voters of Butte county and also of the Legislature, that the amendment to the charter fixing the compensation of the assessor, as well as of the county officers of the county, at a reduced figure, should not take effect until the expiration of the term of office of the present incumbent. The time of fixing the salaries of officers preceding an election not being material, is not considered herein.

Being legally entitled to the compensation as fixed prior to the amendment to the charter of June 27, 1933, it follows that the writs prayed for should be issued. And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

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134 Cal.App. 705

McCORMICK v. GREAT WESTERN POWER CO. OF CALIFORNIA.

TILLIE v. SAME.

Civ. 8776.

District Court of Appeal, First District, Division 1, California.

Oct. 30, 1933.

Rehearing Denied Nov. 29, 1933.

Hearing Denied by Supreme Court Dec. 29, 1933.

1. Appeal and error ⚿1099(7).

Where essential facts established at second trial were same as those established at first trial, decision on former appeal determining that evidence was legally sufficient to support finding of negligence became law of case.

2. Electricity ⚿14(3).

General practice in maintaining and operating electric power line will not excuse negligent act unless such practice is consistent with due care.

3. Electricity ⚿14(1).

Question whether power company was negligent in maintaining and operating power line must be determined from facts of particular case.

4. Electricity ⚿6.

In absence of contrary showing, presumption arises that owner of adjoining land owned to center of street, entitling him to full beneficial use, subject only to easement of public and power company for maintenance of power lines (Civ. Code, § 831).

5. Appeal and error ⚿1099(7).

Where it was determined on former appeal that evidence established prima facie case of negligence against power company in maintaining power line, absence of evidence at second trial relating to previous accidents *held* not to destroy prima facie case of negligence established by other proof.

6. Electricity ⚿14(2).

Determination of whether power company was negligent in maintaining power line in view of position of wires depends on whether circumstances present are such as would lead ordinarily prudent person to suspect that wires so placed would cause injury.

7. Electricity ⚿19(12).

Contributory negligence of structural steel workers on building, burned when steel rod came in contact with electric power line, *held* question for jury.

CASHIN, J., dissenting.

Appeals from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Separate actions by James J. McCormick, and by Robert Tillie, against the Great Western Power Company of California. From separate judgments in favor of the plaintiffs, the defendant appeals.

Judgments affirmed.

Thos. J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, for appellant.

Reisner & Deming, of San Francisco, for respondents.

PER CURIAM.

Plaintiffs in these consolidated actions were awarded damages by a jury for personal injuries suffered by them as a result of coming in contact with defendant's power wires strung along a public street in the city of Oakland. From the judgments entered on the verdicts the power company has appealed.

At a previous trial of the actions, judgments of nonsuit were granted, the trial court holding the evidence legally insufficient to establish against the power company a prima facie case of negligence. Plaintiffs appealed and the judgments of nonsuit were reversed, McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.(2d) 145, 81 A. L. R. 678; it being held on appeal that the facts proved were sufficient to support the conclusion that the power company was negligent in failing to take care of its wires after having received information from which it might be reasonably suspected that persons engaged in lawful pursuits in places where they had a right to be would come in contact with said wires and be injured thereby, in the condition and location in which said wires were then being maintained.

[1] At the second trial the essential facts established relating to the issue of the power company's negligence were the same as those established at the first trial; and on the present appeal said company urges again

the same legal contentions that it did on the former appeal in exoneration of its liability for the accident. It is evident, therefore, that the decision on the former appeal determining that the evidence was legally sufficient to support a finding that said power company was negligent, established the law of the case on that issue.

The main facts so established at both trials were in substance as follows: Said company maintained three high-tension wires, each carrying 11,000 volts of electricity, along a public street in Oakland in front of the property on which the accident occurred. The wires were strung on cross-arms attached to the tops of poles set near the curb of the sidewalk adjacent to the property. The cross-arms were fastened approximately 52 feet above the level of the sidewalk. One wire was attached to the cross-arm on the side of the pole nearest the property and the other two were fastened to the same cross-arm on the side of the pole nearest the street. About two months prior to the happening of the accident the division superintendent of the power company gained knowledge of the fact that the owner of the property was erecting thereon a five-story building reinforced with steel; and acting upon such knowledge said superintendent caused the wire nearest the property to be moved over 27 inches on the cross-arm toward the pole, so that, as relocated, said wire was in fact 10 feet 4 inches distant from the wall of the building when said wall reached the level of the wire. Nevertheless, plaintiffs, who were structural ironworkers employed on said building, were severely burned thereby when the end of a steel rod, which they were obliged to project over the wall of the building in order to put it in place, came in contact with the nearest wire, the evidence showing in this respect that when the end of the rod came within 8 or 10 inches of said wire the electricity arcked therefrom and the rod fell across the wire, causing the wire to burn in two, the loose ends swinging across the other two wires, severing them also; and plaintiffs were badly burned before they could be extricated.

[2-4] Among the legal contentions made by said power company on both appeals, in exculpation of liability for the accident, were that having complied with all franchises, permits, and regulations of the railroad commission and with the approved practice of best-managed companies in locating its poles and wires on said public street, it could not be held to have been negligent; that under such franchises and permits it had a superior right to occupy the street and that plaintiffs, in bringing a steel rod in close proximity to or in contact with said wires, were trespassers against the power company; and that consequently it owed plaintiffs no duty. In further support of the former decision on appeal in ruling adversely upon the foregoing contentions, it may be stated that it appears to be well settled that where no contractual relations exist and there is no assumption of risk—such being the situation here—the general practice with respect to the maintenance and operation of power lines will not excuse an alleged negligent act unless such practice is consistent with due care (Anstead v. Pacific Gas & Electric Co., 203 Cal. 634, 265 P. 487; Lim Ben v. Pacific Gas & Electric Co., 101 Cal. App. 174, 281 P. 634), and the question of negligence must be determined by the facts of the particular case in which it arises. Phoenix Assur. Co. v. Texas Holding Co., 81 Cal. App. 61, 252 P. 1082. And with respect to defendant's claim that plaintiffs were trespassers, the record discloses no evidence respecting the ownership of the street; and we must presume, therefore, that the owner of the adjoining land owned to the center thereof. Civ. Code, § 831; Porter v. City of Los Angeles, 182 Cal. 515, 189 P. 105. Such being the case, the owner was entitled to its full beneficial use subject only to the easement of the public and the power company. Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 117 1. 906, 36 L. R. A. (N. S.) 185.

It is true, as defendant points out at the former trial a letter was introduced in evidence written by the power company's superintendent to the general contractor of the building in which the accident occurred warning him of the presence of said wires and of the danger of contact therewith, and at the second trial this letter was produced but not offered in evidence. Its absence is of no vital importance, however, because an inspection of its contents shows that, if admitted, the letter could have served but two possible purposes: It might have been considered as a circumstance tending to establish the defense of contributory negligence, which was not inquired into or determined on that appeal; or, it might have been considered as additional evidence upon the question of the power company's knowledge of the probable danger of contact with its wires; and aside from said letter, as will hereinafter appear, there was ample evidence introduced at the second trial to establish that fact, the superintendent of the power company having in effect so admitted.

[5] It is also true that on the first appeal it was held that the trial court erred in excluding certain evidence offered by plaintiffs as to the happening of previous accidents, which they claimed were similar in character to and not too remote in place or point of time from the present one; and that at the second trial plaintiffs failed to establish those facts. The decision on the

former appeal did not go to the extent of holding, however, as the power company seems to contend, that such proof was indispensable to the establishment of a prima facie case of negligence on the part of the power company; nor was the reversal of the judgments of nonsuit placed on the ground alone of the exclusion of such evidence. As pointed out by the decision therein, the evidence was offered in the nature of additional proof of knowledge on the power company's part that there was danger of persons being injured by the presence of its wires in the condition and location in which they were then being maintained; and as pointed out therein also such evidence was rejected by the trial court upon the ground that there was no necessity for such proof —that the evidence already affirmatively showed knowledge on the part of the company of the dangerous situation of its wires. On the appeal, however, it was held that since the evidence was relevant and material plaintiffs were entitled to the benefit thereof even though it was cumulative; and that consequently its exclusion was error. It cannot be said, therefore, that the absence of such proof at the second trial had the effect of destroying the prima facie case of negligence established by the other proof.

The power company contends also, as it did on the first appeal, that the case of Sweatman v. Los Angeles Gas & Electric Corp., 101 Cal. App. 318, 281 P. 677, is decisive in its favor of the present case; and again we are unable to agree with such contention. An examination of the decision as reported shows that it did not go before and consequently was not passed upon by the Supreme Court. But aside from that fact, an analysis of the decision itself clearly demonstrates that it is not controlling here because it is based on circumstances materially different from those of the present case. In this regard it will be found, first, that the appeal therein was not taken, as here, from a judgment after trial on the merits. It dealt merely with the legal sufficiency of a pleading—the complaint—the trial court having sustained a demurrer thereto without leave to amend. Consequently, the question of the sufficiency of the evidence to establish a prima facie case of negligence was not considered or determined. Secondly, so far as the decision discloses, the complaint therein nowhere alleged, nor was it at any time claimed that the power company had any information whatever that a building was being constructed, in close proximity to its power wires. The accident happened in Los Angeles, and from what may be gleaned from the decision on appeal the charge of negligence attempted to be stated was based upon the theory that because it was "the usual thing for such building operations to be conducted in Los Angeles in like proximity to similarly charged electric wires in the streets," the power company was charged with constructive notice of the erection of this particular building and consequently with knowledge of the danger of contact with its wires. The trial court held in effect that such constructive notice was not legally sufficient upon which to base a charge of negligence, and its ruling was sustained on appeal, the reviewing court quoting in support of its affirmance, among other cases, that portion of the opinion in Polloni v. Ryland, 28 Cal. App. 51, 151 P. 296, 298, wherein it was said: "'An injury that is not the natural consequence of the negligence complained of, and that would not have resulted from it, but for the interposition of some new, independent cause *that could not have been anticipated,*' is not actionable." (Italics added.)

[6] In the present case there was the positive, undisputed admission of the superintendent of the power company, who was a witness in the case, that he knew some two months prior to the accident that a five-story reinforced steel concrete building was being constructed on this particular property in close proximity to said wires; that he also knew "that there were exterior structures and scaffolding, and so on, being placed on or adjacent to the building; * * * that men were handling ropes, scaffolding, and other material on and around the building; * * * that building material would be handled from the street up to the top of the building and around the building in general * * *"; and that it was on account of the situation thus created that caused him to move the wire nearest the building over on the cross-arm toward the street for a distance of 27 inches. In other words, as declared in Minter v. San Diego Consol., etc., Gas Co., 180 Cal. 723, 182 P. 749, and the other cases cited in the decision on the former appeal, the rule by which the responsibility of the power company is to be measured is whether the circumstances present are such as would lead an ordinarily prudent person to suspect that the wires so placed would cause injury. In the Sweatman Case there were no such circumstances pleaded or claimed; while in the present case, as shown, ample evidence was adduced to establish such fact. It is apparent, therefore, that the decision in the Sweatman Case is in no way decisive of the present one.

[7] It is further contended by the power company on the present appeal that in any event the evidence established as a matter of law that plaintiffs were guilty of contributory negligence. This question was urged but not passed upon at the first trial, and was not presented or considered on the former appeal. However, it was tried as an issue of fact at the second trial, and the trial court sustained the jury's negative find-

ing thereon; and we are convinced that the evidence relating thereto is sufficiently conflicting to place the matter beyond the power of the reviewing court to interfere therewith on appeal. Defendant's contention in this regard is based chiefly upon the claim that the wires were visible from the place within the building where plaintiffs were employed. But, as indicated, the evidence is conflicting on this point. It shows that a 30-inch wall extended above the floor on which plaintiffs were working, and although the wires were severed as a result of the accident, there is ample evidence to support the finding that the wires were below the level of the wall and could not be seen until an observer neared the wall. The crossarm to which the wires were fastened was painted yellow, and the words "high voltage" were painted thereon, and there is evidence to show that several times in the course of their work that day plaintiffs stepped on a platform which was within and about 4 feet from the side of the building next to the power line; but the evidence further shows that plaintiffs started to work on the building for the first time on the morning of the accident; and they both testified that they neither observed the power wires when they went on the job, nor saw them while they were working. It is apparent, therefore, that the evidence does not compel the conclusion, as defendant contends, that said wires were in plain view from the platform on which plaintiffs stepped while performing their work.

The judgments are affirmed.

I dissent: CASHIN, J.

219 Cal. 395

PEOPLE v. LIPPNER.

Cr. 3632.

Supreme Court of California.

Nov. 2, 1933.

Rehearing Denied Nov. 29, 1933.

1. Criminal law ⚷982.

Order admitting one pleading guilty of violating Corporate Securities Act to probation on condition that he reimburse investors *held* valid, though omitting express condition tending to rehabilitate him (Pen. Code, § 1203; St. 1917, p. 673, as amended).

2. Criminal law ⚷1147.

Very strong showing is required to justify reviewing court in setting aside trial court's order denying or revoking probation for abuse of discretion (Pen. Code, § 1203).

3. Criminal law ⚷982.

Trial judge *held* not to have acted arbitrarily or abused discretion in revoking probation of one pleading guilty of violating Corporate Securities Act for violation of condition that he reimburse investors, in view of probation officer's unfavorable reports (Pen. Code, § 1203; St. 1917, p. 673, as amended).

4. Criminal law ⚷979(2).

Superior court had jurisdiction to sentence one pleading guilty of violating Corporate Securities Act to two years in jail after revoking his probation within five-year term thereof (St. 1931, p. 950, § 18; Pen. Code, §§ 17, 1203, subd. 1; St. 1917, p. 673, as amended).

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

M. Lippner pleaded guilty of violating the Corporate Securities Act, and, from a judgment sentencing him to imprisonment in the county jail after an order revoking his probation, he appeals.

Affirmed.

Prior opinion, 16 P.(2d) 1020.

A. Brigham Rose, of Los Angeles, for appellant.

Ben B. Lindsey, of Los Angeles, amicus curiæ for appellant.

U. S. Webb, Atty. Gen., Alberta Belford, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

CURTIS, Justice.

This is an appeal from a judgment sentencing the defendant to imprisonment in the county jail, after an order revoking defendant's probation. The defendant pleaded guilty to three counts of an information filed against him in the superior court of the county of Los Angeles, charging him with three separate violations of the Corporate Securities Act (St. 1917, p. 673, as amended). Thereafter, and on June 16, 1928, the court, without pronouncing any judgment against said defendant, ordered that all proceedings against the defendant be suspended "and defendant granted probation for a period of five years under the following conditions: Defendant must reimburse the investors within one year and shall comply with such other terms as shall be set forth by the probation officer." On January 21, 1930, the court made a further order in the case as follows: "Terms of probation are modified as follows: Defendant is allowed four years to reimburse investors. All other terms of probation are to remain the same." At a hearing before said court, either to modify the terms of said probation or to determine whether the defendant had violated the terms thereof (the record does not clearly indicate the nature of said proceeding), at which hearing the defendant was present with his counsel, witnesses were examined, and evidence was admitted, the court, on June 6, 1932, made the following order: "This defendant having violated the terms of his probation, probation heretofore granted is revoked. No legal cause appearing why judgment should not be pronounced, the court pronounces judgment and sentence as to each of the counts, 1, 6, and 11 of the information." The court then pronounced judgment against the defendant that he be imprisoned in the county jail for the term of two years upon each of said counts, and that the sentences were to run concurrently.

It is from this order and judgment that the present appeal is taken by the defendant.

The grounds of appeal are threefold, and may be stated as follows: (1) That the condition contained in said order of probation that defendant reimburse the investors is void and, therefore, the violation thereof did not warrant revocation of probation; (2) that the trial court abused its discretion in finding that defendant had violated the terms of his probation and in revoking the order admitting him to probation; (3) that the court had lost jurisdiction to pronounce judgment against the defendant of imprisonment in the county jail for the period of two years, and for that reason said judgment was void.

[1] It will be observed that the original and amended order of probation set forth only one condition or term of probation, and that condition was that the defendant should "reimburse the investors." At the hearing at which defendant's probation was revoked, the trial court said: "The only purpose of granting probation was to give him an opportunity to reimburse these people." From

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

this record, the defendant asserts that the sole purpose of defendant's probation was to enable him to make restitution to those whom he had wronged, and that no provision was made, nor was any term or condition imposed by the court, which had for its object or purpose the restoration or rehabilitation of the defendant. The defendant contends that the prime, if not the sole, object and purpose of all legislation providing for the probation of persons convicted of crime is to rehabilitate them and thus enable them possibly to become useful members of society. It is admitted that the court may require, as one of the terms upon which a defendant is granted probation, and in fact it is expressly so provided in section 1203 of the Penal Code, that he make restitution to those he has wronged, but it is insisted that to make this the sole object of probation is such a departure from the spirit and true purpose of all probation legislation from its inception down to the present time as to render such a condition void and of no effect whatever, and that a violation of such a condition imposed under the circumstances just related would not constitute a legal or valid cause for the revocation of probation granted thereunder. The contention is made that a probationer who is released under the sole condition that he reimburse his victims might continue after probation to carry on his criminal practices and, so long as he complied with the condition of his probation, even if the funds used by him for that purpose were the fruits of his criminal acts, the court granting him probation would be powerless to revoke his probation for his subsequent violations of the law so long as he complied with the condition of his probation to restore to those whom he had injured that of which he had defrauded them. Defendant has, we think, overlooked, or at least has failed to recognize, the real import of that provision of section 1203 of the Penal Code which gives to the court, after the rearrest of a probationer, the power to revoke and terminate such probation, "if the interests of justice so require, and if the court in its judgment, shall have reason to believe * * * that the person so placed upon probation is violating any of the conditions of his probation, or *engaging in criminal practices, or has become abandoned to improper associates or a vicious life.*" By that portion of the section which we have italicized, the court has been given full authority to revoke the probation of a defendant, who, after being granted probation, engages in criminal practices or has become abandoned to a vicious life, even though there are no such conditions expressed in the order of probation. These grounds of revoking probation are, in effect, made conditions upon which every order of probation is granted. Their object and purpose are for the restoration and rehabilitation of the defendant. They not only are intended as aids to assist him in mending his former ways, but they are designed, in so far as the order of the court may accomplish that purpose, to deter him from future violations of the law. Had the trial court incorporated in its order of probation a condition that the defendant abstain from committing any crime, or from engaging in criminal practices, or from becoming abandoned to a life of viciousness, we apprehend that defendant would concede that such a condition had for its purpose his restoration and rehabilitation. As the Code section has for all practical purposes made these conditions a part of every order of probation, whether expressly set forth therein or not, it cannot be held that an order of probation omitting any express condition which tended to the restoration of the defendant for that reason only lacks any of the essential elements of a valid and legal order. We do not mean to be understood as intimating that a condition in an order of probation that defendant make restitution has no tendency toward restoring the defendant to a life of rectitude. There can be no real reformation of a wrongdoer, unless there is at least a willingness on his part to right the wrong committed. The effect of such an act upon the individual is of inestimable value, and to a large extent determines whether there has been any real reformation. The order admitting defendant to probation in its original form, and as amended, was, in our opinion, a valid order of probation, although it set forth expressly only, as the condition of defendant's probation, that he make restitution to those persons who had lost their money through the illegal acts of the defendant.

[2] The next contention of defendant is that, conceding the proceedings under which he was admitted to probation were in every way valid, the court abused its discretion in revoking his probation and pronouncing judgment of imprisonment upon him. This contention is based upon the alleged showing of defendant that, while he had not complied with the condition of his probation requiring him to "reimburse investors," he conclusively showed at the hearing that he was financially unable to make compliance, although he had done everything within his power so to do. Under these circumstances, the defendant contends that the action of the court in revoking his probation was arbitrary, and should not be sustained by this court. It is conceded that in proceedings of this nature the trial court is clothed with a wide discretion in the granting and revoking of the probation of a person convicted of crime. While he may not act arbitrarily in either denying probation or in revoking an order granting probation, yet it would require a very strong showing to justify a reviewing court to set aside an order of court either denying probation in the first instance or revoking probation after it was once granted, upon the

ground that the judge had abused his discretion. The defendant has directed our attention to no case decided by the courts of this state, or elsewhere for that matter, in which an appellate court has reversed an order of the trial court in the matter of either granting, denying, or revoking probation on the ground that the action of the trial court was arbitrary. We have not discovered any such authority. It does not follow, however, that such a case may not arise, or possibly has not arisen, but the dearth of such cases demonstrates the assertion above that only in a very extreme case should an appellate court interfere with the direction of the trial court in the matter of denying or revoking probation. For an interesting discussion of this question, see People v. Jones, 87 Cal. App. 482, 497, 262 P. 361. In that case there is a strong intimation that the action of the trial court in the exercise of its discretion of granting or denying probation is not subject to review on appeal. But that question was not necessary for the decision of any issue in that case, and for that reason the case cannot be regarded as an authority upon the question under discussion.

[3] In the case of the defendant, as we have seen, his probation was revoked after a hearing before the trial court at which the defendant was present with his counsel. The defendant had an opportunity and did testify fully as to every matter thought to be pertinent by either himself or his counsel. His former counsel testified on his behalf. The probation officer was also present with his report concerning the activity of the defendant while on probation. A transcript of the testimony taken at said hearing has been transmitted to this court for our examination and perusal. We have carefully read it. The proceedings of other hearings before said court relating to the conduct of the defendant since his admission to probation have also been made a part of the record herein by an order of this court, made since the transfer of this cause to this court upon the motion of respondent for the diminution of the record. While we think from this record the trial court upon said full hearing may well have extended the time within which the defendant was required to "reimburse the investors," we are not prepared to say that the trial judge acted arbitrarily or abused the discretion imposed in him by law in revoking the order previously made granting probation. It is true it was shown that defendant was then well along in years, being 69 years of age. He was not in good health, but was then suffering, and for some time past had suffered, from a double hernia. He was in the real estate business, which, during the period of defendant's probation, was shown to be exceedingly inactive. He had made offers to turn over practically all of his property for the purpose of applying the proceeds thereof to the payment of those whom he had defrauded. There was evidence also to the effect that during a considerable portion of said period of time he had been unable to support himself and family by his earnings. The showing thus made by defendant, as we have said, was sufficient to justify the trial court in extending the time of his probation. In fact, we feel free to state that, in our opinion, such action on the part of the trial court would have been preferable and more in accordance with the spirit of the humane provisions of our probation laws. However, we are unable to say that, in refusing to do so, the trial court acted either arbitrarily or that its action does not find support in the record before us. In the first place, it is evident from the testimony taken at the hearing that the probation officer, who had the supervision of the defendant during his probation, was not favorable to defendant. He was not satisfied with defendant's conduct during his probationary period. There had been accusations made that the defendant, through his wife, had engaged in rather extensive operations in the construction of an expensive apartment house necessitating the use of various sums of money. While the defendant made a detailed denial of such accusations, and apparently explained his actions in that matter satisfactorily to himself and counsel, it is apparent that he did not altogether satisfy either the probation officer or the court that his conduct in this and in other respects was free from criticism. We have already referred to the fact that, upon the motion of the respondent for the diminution of the record, the records of the proceedings of previous hearings before the trial court involving the conduct of defendant while on probation have been forwarded and are made a part of the record on appeal in this action. While there is nothing in these proceedings of any decisive importance, they do show that on more than one occasion before the hearing at which his parole was revoked defendant's financial entanglements had been the subject of consideration and investigation by the probation officer and the court. Upon this subject a number of reports of the probation officer had been made to the court. The defendant also had during the period of probation filed with the court various statements or reports as to his financial activities and resources. It is quite apparent that, for some considerable time before the court revoked defendant's probation, the probation officer had become distrustful of the sincerity of defendant's efforts to comply with the condition of his probation to "reimburse the investors." This is made perfectly clear by the following excerpts taken from the report of the probation officer dated January 26, 1932: "Since then [referring back to his report of July, 1931], the situation has remained as before

and no matter what smoke screen he may throw out to confuse the issue, it is evident that the probationer has no intent of complying with the court order, hoping to stall along until June, 1933, when jurisdiction will be lost." Other references might be made to statements appearing in these reports. Some of these are not so unfavorable toward defendant as the one quoted above, and in some cases the reports are in defendant's favor. These reports, together with evidence taken at the hearing, were before the court at the time of the revocation of defendant's probation. From this review of the condition of defendant's case as it was then before the court, we are unable to say that the court abused its discretion in revoking the order admitting him to probation. As we have said, a wide discretion in these matters is necessarily lodged in the trial court. The latter is guided in a large measure by the reports of the probation officer. The latter officer is provided by law to assist the court in dealing with probation cases. To hold that the court acted arbitrarily when it based its order of revocation upon the report of its probation officer would do violence to the whole scheme of the law upon the subject of probation. We do not mean to intimate that the court should substitute the judgment of the probation officer in place of its own. The court in the final analysis must act upon its own judgment in these matters. In doing so, it may reject in toto the report and recommendation of the probation officer, and make its decisions in total disregard of that officer and of his recommendations. On the other hand, as is frequently, and, we may say, as is usually, the case, the court may adopt a course in harmony with the conclusions reached by the probation officer. In the event it pursues this latter course, its acts can in no way be subject to the criticism that they are arbitrary or without the legal discretion with which the court is invested.

[4] The final contention of defendant is that the court lost jurisdiction to pronounce judgment against the defendant of imprisonment in the county jail. This contention is based upon the assertion that the defendant did not plead guilty to the commission of a felony, and therefore the court could only require defendant to remain on probation for a period of two years in this particular case. The defendant pleaded guilty to three separate charges of violating the Corporate Securities Act. Such an offense is punishable by imprisonment in the state prison for five years, or in the county jail for not exceeding two years. Section 18, Corporate Securities Act (St. 1931, p. 950). The court by its judgment sentenced defendant to the county jail, thus making the offenses of which the defendant was guilty misdemeanors (section 17, Pen. Code), the maximum punishment for which would be two years on each count, or six years in all. The court, however, made the sentence on each count to run concurrently with the sentences in the other two counts, thus fixing the maximum term of his sentence at two years. The defendant at the time judgment was pronounced had been on probation approximately four years. Did the court in this state of the record lose jurisdiction to pronounce said judgment of imprisonment in the county jail? The powers of the court in this respect are governed by the provisions of section 1203 of the Penal Code. By subdivision 1 of said section, it is provided that: "The court * * * in the order granting probation, may suspend the imposing, or the execution of the sentence and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence, except as hereinafter set forth." None of the exceptions is applicable to any questions involved in this case. The words "maximum possible term of such sentence" have been held to mean the maximum possible term of sentence which may be imposed by the court for the offense of which the defendant has been found guilty, or to which he has pleaded guilty. In re Giannini, 18 Cal. App. 166, 122 P. 831. In this action the defendant, as we have seen, pleaded guilty to three charges which were punishable either by imprisonment in the state prison or in the county jail. In Doble v. Superior Court, 197 Cal. 556, 241 P. 852, it was held that under such a plea the defendant is guilty of a felony. On page 576 of the opinion in 197 Cal., 241 P. 852, 860 of that case this court said: "A fair construction of section 17, in order to give effect to every part thereof, requires us to hold, and we do so hold, that in prosecutions within the contemplation of that section the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious, in that event, it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter." Therefore, when the court suspended judgment and placed defendant on probation, it was on his plea to three separate and distinct felonies, each punishable by imprisonment in the state prison for the term of five years. The maximum possible term of sentence under these three felonies was fifteen years. There is no question but that the court could have sentenced the defendant to state prison for the term of fifteen years at the time he placed him on probation. It was accordingly within the power of the court at that time to fix the period of defendant's probation at any term not exceeding the fifteen years, the maximum possible term of sentence which the court could have imposed upon the defendant. As the court fixed the term of probation at five years, and pronounced judgment against the defendant within that period, it acted within its juris-

diction, and the judgment so imposed is valid and binding upon the defendant.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.

Mr. Justice THOMPSON, being disqualified, does not participate herein.

ERICKSON v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.*

S. F. 14965.

Supreme Court of California.
Oct. 23, 1933.

Rehearing Granted Nov. 20, 1933.

1. Courts ⚷187.

Municipal court, when established, is court of record superseding justice's court, and in proper case may exercise all functions formerly belonging to justice's court (Const. art. 6; Acts 1925, p. 657, § 26).

2. Courts ⚷189(15).

Municipal court of San Francisco succeeding to jurisdiction of a superior court had jurisdiction to issue execution against resident debtor on judgment of municipal court of Los Angeles, since statute applying pleading and practice of superior courts to municipal courts controlled and not statute applicable to justice courts (Code Civ. Proc. § 831d, and § 905 as amended by St. 1929, p. 643).

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Petition by A. F. Erickson for writ of review to be directed to the Municipal Court of the City and County of San Francisco and Daniel S. O'Brien, Judge thereof. From a judgment of the superior court affirming an order of the municipal court and discharging the writ, petitioner appeals.

Affirmed.

For prior opinion, see 22 P.(2d) 533.

Stanley Burke, of San Francisco, for appellant.

Leo J. Rabinowitz, of San Francisco, and Ralph C. Curren, of Los Angeles, for respondents.

PRESTON, Justice.

On October 26, 1931, a judgment was rendered in the municipal court of the city of Los Angeles in favor of one Shane and against this appellant, A. F. Erickson, for the sum of $1,117.35. On March 11, 1932, an abstract of this judgment was filed in the municipal court of the city and county of San Francisco, wherein appellant Erickson resided. Upon the filing of said abstract of judgment, a writ of execution based thereon was issued by the clerk of said municipal court to the sheriff of said city and county, in pursuance of which he, on March 14, 1932, levied upon a certain automobile claimed to be the property of appellant. Appellant thereupon moved said municipal court for an order quashing said execution upon the ground that said court was without jurisdiction to issue it. This motion was denied on May 11, 1932, whereupon appellant debtor instituted certiorari proceedings in the superior court of the city and county of San Francisco to annul the order denying said motion and also to annul all the supplementary proceedings on said judgment had in said court. After a due return to the writ, the cause was regularly heard, whereupon the judge of said superior court, on November 28, 1932, confirmed the proceedings on execution and discharged the writ of certiorari. From this last order an appeal was taken, on December 7, 1932, to the District Court of Appeal, First Appellate District, which court affirmed the ruling of the court below by holding the writ of certiorari to be inappropriate as the order sought to be reviewed was an appealable one. 22 P.(2d) 533. Thereafter a transfer of said cause was had to this court. If the petitioner can be sustained in his claim that the municipal court is without jurisdiction to issue the execution, then, of course, certiorari is the proper writ by which to obtain relief. For if jurisdiction of the whole subject-matter is wanting, the order of the court could not be a special one after final judgment. Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001.

To properly present the merits of the case, we must review the following provisions of the Code of Civil Procedure. Under section 687 of said Code, as it read at all times prior to 1933, an execution on judgments of the superior court might issue from such court to the sheriff of any county of the state. Likewise, during the same period, sections 898 and 899 of said Code provided that, as to judgments of justices' courts, an abstract thereof might be filed with the county clerk of the county where rendered and such clerk might issue an execution thereon to the sheriff of any other county of the state.

Likewise, since 1872 we have also had sections 714–722, both inclusive, of said Code, providing for summary proceedings to enforce the judgments of superior courts after issu-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 29 P.2d 192.

ance of execution thereon. At all times after 1872 and prior to 1907, the provisions of sections 714–721, inclusive, of said Code, have been made applicable, by section 905 of said Code, to the judgments of justices of the peace in the county where rendered. It will be noted that section 722 of said Code is excluded, by said section, from application to judgments of justices' courts. A similar procedure to that found in section 722, was, by amendment in 1907, inserted in said section 905 (St. 1907, p. 881), reading as follows: "If the judgment debtor does not reside in the county wherein the judgment was entered, an abstract of the judgment, in the form prescribed by section eight hundred and ninety-seven, may be filed in the office of the justice of any town, township, or city wherein the defendant resides, and such justice may issue execution on such judgment, and may take and exercise such jurisdiction in proceedings supplemental to execution, as if such judgment were originally entered in his court."

Again, in 1921 (St. 1921, p. 123), and in 1929 (St. 1929, p. 643), sections 898 and 899 of the Code of Civil Procedure were supplemented by an additional amendment to section 905, reading: "'Service outside of county.' Where an execution issued by a justice court is to be served out of the county in which it was issued, the execution shall have attached to it a certificate under seal, by the county clerk of such county to the effect that the person issuing the same was an acting justice of the peace or a clerk of the justice court of said county at the date of the writ. Thereafter such execution may be served and levied against any property in any county of the state by the sheriff or any constable therein."

The question before us is: The presence or absence of jurisdiction in a municipal court of the city and county of San Francisco to issue said execution. From the above review of the provisions of the Code of Civil Procedure it will be seen that sections 714–721, inclusive, are made applicable to both justices' and superior court judgments. At the same time, however, section 722 applies only to superior court judgments. It may likewise be noted that all the provisions of said section 905 are intended to apply exclusively to proceedings upon judgments of justices' courts.

But the judgment we have before us is neither one of a superior court nor of a justice's court; it is rendered by a municipal court. In the enforcement of this class of judgments, what procedure shall obtain where the judgment debtor resides in a county other than the one where the judgment was entered? This necessarily involves an examination into the nature of a municipal court. In 1925 this court was authorized by an act of the Legislature (St. 1925, p. 648), exercising the power conferred upon it by certain amendments to article 6 of the state Constitution. Under said act a municipal court was set up in Long Beach and in Los Angeles in the fall of 1925 and on July 1, 1930, the municipal court of the city and county of San Francisco was created. Section 26 of said statutes of 1925, page 657, reads: That the municipal court "shall have and exercise all of the powers and shall do and perform all of the acts which were conferred upon, or required of, any police court, justice's court, police judge or justice of the peace, by law, whenever any such inferior court shall have been superseded by a municipal court. * * *"

[1] It is clear, therefore, that where a municipal court is found, such court supersedes the justice's court and may exercise, in a proper case, all the functions formerly belonging to the said justice's court. At the same time the municipal court is one of much larger jurisdiction than the justice's court and exercises more important functions under our judicial system. It has absorbed all of the jurisdiction of the justices of the peace in its territory and has acceded to a large portion of the jurisdiction formerly exercised by the superior court. Indeed, it is itself a court of record.

[2] It follows then that if we had before us a judgment rendered by a justice's court of some other county it would be altogether proper for the municipal court of the city and county of San Francisco to issue execution on such judgment against a resident debtor. But this does not dispose of the case before us. We have a judgment rendered by a municipal court over a subject-matter that perhaps was never within the jurisdiction of the superseded justice's court of the county of Los Angeles. Why should such a court, with this enlarged jurisdiction, be held to have adopted the justices' court provisions of the said Code and not the provisions applicable to judgments of the superior courts? We hold that it is necessary to look to authority other than section 905 of the Code of Civil Procedure to sustain the proceedings here under review.

It seems clear to us, however, that the "conformity" provisions of section 831d of the said Code must influence this situation. So much of this section as is here material reads: "The rules of pleadings and practice applicable to the prosecution of civil actions and enforcement of judgments in the superior court of this state shall apply to and govern the prosecution and maintenance of civil actions and enforcement of judgments in the municipal courts of this state, except * * *"

This provision seems to authorize the judgment creditor in the case before us to employ section 722 instead of section 905 of the Code of Civil Procedure and apply at least to a superior court in the city and county of

San Francisco for an execution on said judgment. Tuttle on California Municipal Courts, § 136, p. 240. But in San Francisco we have a duly created municipal court which has succeeded to the jurisdiction of the superior court in an action of the type here. Why may it not be held that the municipal court has power to enforce judgments of other municipal courts under the authority of said section 722 and the above-quoted "conformity" provisions of section 831d. We think such power must be ascribed to it. Any other conclusion would promote a miscarriage of justice. This conclusion too is in harmony with the several acts of the Legislature of 1933 making a single system of procedure applicable to the enforcement of the judgments of all the courts.

The abstract of judgment filed in this cause meets the requirements of section 674 of the Code of Civil Procedure as well as those of section 897 of the Code of Civil Procedure.

The action of the municipal court is therefore sustained, and the writ of certiorari is discharged.

We concur: WASTE, C. J.; CURTIS, J.; IRA F. THOMPSON, J.; LANGDON, J.; SEAWELL, J.

ANDERSON et al. v. DERRICK et al.*

S. F. 14736.

Supreme Court of California.

Oct. 31, 1933.

Rehearing Granted Nov. 27, 1933.

1. Corporations 🔑319(½).

In absence of statute, misfeasance or negligence of managing officers of corporation resulting in loss of its assets is injury to corporation for which it must sue.

2. Corporations 🔑1.

Court of equity will disregard corporate entity and recognize that stockholders, though without legal title to corporate assets, are equitable owners thereof and entitled to relief upon failure or inability of corporation to assert its rights.

3. Jury 🔑14(1).

Stockholders' action for damages for corporate directors' fraud in transferring corporate assets to one of their number *held* cognizable only in equity, so that stockholders were not entitled to jury trial as matter of right (Civ. Code, § 309, and § 363 as added by St. 1931, p. 1763, § 2).

4. Corporations 🔑312(1).

Statute making erring corporate directors answerable to stockholders for loss sustained by stockholders, and statute making directors liable to corporation and shareholders for unauthorized distribution of corporate assets, *held* not retroactive (Civ. Code, § 309, and § 363 as added by St. 1931, p. 1763, § 2).

5. Corporations 🔑617(1).

Dissolution of corporation prior to commencement of stockholders' action for directors' fraudulent acts did not create individual right of action in stockholders, where 2½ years remained within which representative suit could have been brought (Civ. Code, § 363, as added by St. 1931, p. 1763, § 2; Code Civ. Proc. § 1875, subd. 3; Rev. Code Del. 1915, § 1954, as amended by 34 Del. Laws, c. 112, § 9).

6. Evidence 🔑35.

Supreme Court judicially knows that laws of Delaware continue corporate existence of corporations for three years after dissolution for purpose of suits by or against corporate entity (Rev. Code Del. 1915, § 1954, as amended by 34 Del. Laws, c. 112, § 9; Code Civ. Proc. § 1875, subd. 3).

7. Trial 🔑396(4).

Findings in favor of defendants *held* not error, where plaintiffs failed to introduce any evidence in support of their cause of action.

8. Appeal and error 🔑1071(1).

Findings for defendants, if improper, *held* harmless, where plaintiffs failed to discharge burden of proof and trial court had no alternative but to enter judgment for defendants.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by E. H. Anderson and others against Victory A. Derrick and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

F. W. Sawyer and L. Seidenberg, both of San Francisco, for appellants.

Fitzgerald, Abbott & Beardsley, Carl H. Abbott, Edward B. Kelly, John L. McVey, and W. E. Rode, all of Oakland, for respondents.

WASTE, Chief Justice.

Plaintiffs instituted this action to recover damages alleged to have been suffered by them as the result of the fraudulent acts of the defendants who, as directors of the defendant Automatic Electrical Machine Company, a foreign corporation doing business in this state, are asserted to have conspired to cause, and actually did cause, the transfer of the entire corporate assets to one of their number thereby depriving the corporation and its stockholders, among whom are plaintiffs, of everything of value. The complaint con-

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*For subsequent opinion see 32 P.2d 1078.

cludes with a prayer that plaintiffs be given judgment in the sum of $45,000, representing the par value of plaintiffs' stock alleged to have been made valueless by the wrongful acts of the defendants.

Plaintiffs duly demanded a jury trial, contending that the action is one at law prosecuted in their individual capacities to directly recover such damages only as were suffered by them, as distinguished from the whole damage inflicted on the corporation or the stockholders as a group. The trial court concluded, in conformity with the contention of the defendants, that the primary wrong was done to the corporation and that the plaintiffs' damage, in common with that done to other stockholders, was secondary in character and resulted solely and alone from their stock ownership. This being so, the court held that the action was representative or derivative in character and cognizable only in equity, and that plaintiffs were not therefore entitled to a jury as matter of right. In the absence of a jury the plaintiffs declined to introduce any evidence, whereupon the court made findings in favor of the defendants and entered judgment accordingly. This appeal followed.

[1] Examination of the authorities satisfies us as to the propriety of the trial court's conclusion. In the absence of statute, it is the generally accepted rule that misfeasance or negligence on the part of the managing officers of a corporation, resulting in loss of its assets, as alleged herein, is an injury to the corporation for which it must sue. A stockholder cannot sue for damages because his stock is thereby rendered worthless. Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; Niles v. New York Cent. & H. R. Co., 176 N. Y. 119, 68 N. E. 142, 144; Ames v. American T. & T. Co. (C. C.) 166 F. 820; 6a Cal. Jur. 804, § 456; 14 C. J. 924, § 1444. In the Niles Case, supra, as here, the stockholder sought to recover damages at law for the depreciation in the value of his stock, which depreciation, in common with the loss to other stockholders, resulted from the acts of the corporate directors. In denying such relief it is therein declared: "True, the plaintiff has suffered a depreciation in the value of his stock as a result of the wrong, and in this respect the injury was personal to the holders of the stock. But every stockholder has suffered from the same wrong, and, if the plaintiff can maintain an action for the recovery of the damages sustained by him, every stockholder must be accorded the same right. The injury, however, resulting from the wrong, was, as we have seen, to the corporation. The depreciation in the value of the plaintiff's stock and that of the other stockholders was in consequence of the waste and destruction of the property and franchise of the corporation." In 13 Fletcher, Cyc. Corps., p. 227, § 5913, the principle is stated as follows: "Individual stockholders cannot sue corporate officers for damages on the ground of mismanagement, on the theory that such mismanagement has rendered their stock of less value or worthless, since the injury is not to them individually, but to the corporation, i. e., the stockholders collectively. * * * It is only where the injury sustained to one's stock is peculiar to him alone, and does not fall alike upon other stockholders, that he can recover as an individual."

[2] While an injury to a corporation resulting from wrongdoing, fraud, or negligence of corporate officers operates, indirectly, as an injury to stockholders, such injury is secondary and the injury to the corporation primary. It is for the corporation, therefore, to institute action for wrongs inflicted upon it by corporate officers. A stockholder has no primary right to institute such an action. Converse v. United Shoe Mach. Co., 185 Mass. 422, 70 N. E. 444; Id., 209 Mass. 539, 95 N. E. 929; McCloskey v. Snowden, 212 Pa. 249, 61 A. 796, 108 Am. St. Rep. 867. In equity, however, the rule is not inflexible. In a proper case, a court of equity will disregard the corporate body as a legal entity distinct from its members and will recognize that while the stockholders have not the legal title to the corporate assets, they are nevertheless the beneficial or equitable owners thereof and entitled to seek and procure appropriate relief upon the failure or inability of the corporation to assert its rights. Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827. Such actions are necessarily derivative in character and in their nature and genesis are equitable, the corporate or primary cause of action being either legal or equitable, and the shareholder's right, or secondary cause, being always equitable. Hawes v. Oakland, supra; Fletcher, Cyc. Corps., supra; 6a Cal. Jur. 805, § 456. In such a suit the stockholder is not entitled to secure the amount of the judgment for himself. Fox v. Hale, etc., Min. Co., 108 Cal. 475, 41 P. 328.

[3] Sufficient has been said to establish that the cause of action herein alleged, seeking, as it does, to recover damages for a wrong visited in common upon all the stockholders of the Automatic Electrical Machine Company, is derivative in character and therefore cognizable only in equity. This being so, plaintiffs were not entitled to a jury trial as matter of right. On page 42 of their opening brief the appellants concede that a conclusion that the action is derivative in character is fatal to their contention herein. In passing, it is interesting to note that the complaint in the present case, as is usual in stockholders' suits for and on behalf of the corporate entity, as distinguished from individual actions, names the corporation as a party defendant and contains the customary allegation as to the futility of a demand up-

on the corporate officers to initiate the necessary litigation.

[4] We find nothing in our statutory law opposed to the above conclusion. At the time of the perpetration of the alleged fraudulent acts of which complaint is here made, section 309 of the Civil Code, in the absence of authority from the commissioner of corporations, prohibited the directors of a corporation from dividing, withdrawing or paying to the stockholders any part of the capital stock, for a violation of which such directors were jointly and severally liable "*to the corporation*, * * * to the full amount of the capital stock so divided, withdrawn, paid out, or reduced. * * *" As it then read, the section did not purport to give to the stockholders in their individual capacities an independent and distinct cause of action for the redress of any wrong or damage suffered by them as the result of such violation. In other words, no liability was imposed on the directors in favor of the stockholders in their individual capacities. In 1929 (Stats. 1929, p. 1266, § 12), subsequent to the commission of the acts here complained of, the section was amended to make the erring directors answerable "to the *shareholders* of such corporation to the full amount of any loss sustained by such stockholders. * * *" The section was repealed in 1931 (Stats. 1931, pp. 1762, 1815), and superseded by section 363, Civil Code, wherein directors causing an unauthorized division or distribution of corporate assets among the stockholders were made jointly and severally liable "to the *corporation* and to *shareholders* and *subscribers* for the full amount of any loss sustained by the corporation, the shareholders, and/or subscribers." We need not here pause to determine whether the amended section 309 or its successor, section 363, impose a liability upon erring directors in favor of stockholders in their individual capacities. Even if such liability were then created, a point we do not decide, the amendment of the old section and the enactment of the new, being subsequent in point of time to the commission of the acts upon which this suit is based, cannot, in the absence of a contrary legislative intent, be held to be retroactive. In Estate of Parker, 200 Cal. 132, 142, 251 P. 907, 911, 49 A. L. R. 1025, it is declared that: "A statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage. 'Laws which create new obligations, or impose new duties, or exact new penalties because of past transactions have been universally reprobated by civil and common-law writers, and it is to be presumed that no statute is intended to have such effect unless the contrary clearly appears.'"

[5, 6] The dissolution of the defendant corporation prior to the commencement of this suit did not serve to create such individual right of action in the stockholders. The defendant corporation is a Delaware corporation. We will take judicial notice of the fact (Code Civ. Proc. § 1875, subd. 3) that the laws of Delaware (chapter 65, Rev. Code of 1915 [section 1954, as amended by 34 Del. Laws, c. 112, § 9]) continue the corporate existence for three years after dissolution for the purpose of prosecuting or defending suits by or against the corporate entity. The present action was instituted approximately six months after dissolution and when approximately two and one-half years remained within which a representative suit could have been brought.

[7, 8] As stated at the beginning of this opinion, the court below, upon the failure and refusal of the plaintiffs to introduce any evidence, made findings in favor of the defendants, and gave judgment accordingly. Plaintiffs now contend that the findings are unsupported by the evidence. In Monterey County v. Cushing, 83 Cal. 507, 510, 23 P. 700, 701, it is declared: "If no direct evidence be introduced upon any issue, the finding should be against the party who had the burden of proof. * * * To say that the burden of proof is upon a party is equivalent to saying that the presumption is against him. A presumption is indirect evidence (Code Civ. Proc. § 1957), and if not controverted, 'the jury are bound to find according to the presumption.'" The cited case and the one at bar differ only in degree. In the former there was no evidence offered on a particular issue while here there was no evidence offered on any issue. However, the findings, if improper under the circumstances here presented, are, at most, unnecessary and superfluous and can in no way detract from the propriety of the judgment entered. In the absence of any evidence, the plaintiffs failed to satisfy and discharge the burden of proof resting on them, and the trial court had no alternative but to enter judgment for the defendants.

The judgment is affirmed.

We concur: THOMPSON, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

219 Cal. 363

PEOPLE v. FORBES.

Cr. 3642.

Supreme Court of California.

Nov. 1, 1933.

1. Criminal law ⟹980(2).

On plea of guilty of murder of first degree, court must hear evidence to determine penalty (Pen. Code, § 190).

2. Criminal law ⟹1158(1).

On writ of error coram nobis involving only questions of fact, judgment must be affirmed unless evidence on which it rests is so unsubstantial or improbable as to amount to no evidence.

3. Criminal law ⟹1134(2).

In passing on writ of error coram nobis involving perfidious accusations against court pronouncing judgment, credibility of affiants, their motives, and interest in result must be considered.

4. Criminal law ⟹997.

In passing on writ of error coram nobis, involving charge that accused was induced to plead guilty of first degree murder on false promise that death penalty would not be inflicted, nature of crime is relevant in determining probability of accused's desire to escape jury trial (Pen. Code, § 190).

5. Criminal law ⟹980(2).

Accused must take notice that court must hear evidence to determine penalty on plea of guilty of first degree murder, and be prepared to offer evidence in mitigation (Pen. Code, § 190).

6. Criminal law ⟹997.

Where accused stipulated that transcript of confession as certified by reporter might be used on hearing to fix penalty on plea of guilty of first degree murder, and made no objection thereto, no complaint could be made on writ of error coram nobis of absence of reporter, particularly where other evidence justified sentence imposed (Pen. Code, § 190).

7. Criminal law ⟹1147.

Judgment fixing death penalty on plea of guilty of first degree murder and order denying writ of error coram nobis must be affirmed, absent abuse of discretion (Pen. Code, § 190).

8. Criminal law ⟹997.

Evidence on appeal from order denying writ of error coram nobis showed that accused pleaded guilty of first degree murder because he hoped to escape death penalty and that he was not entrapped to make plea (Pen. Code, § 190).

9. Criminal law ⟹980(2).

Evidence justified imposition of death penalty on plea of guilty to first degree murder (Pen. Code, § 190).

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Claude Forbes was sentenced to death on plea of guilty of first degree murder, and from an order denying issuance of writ of error coram nobis, he appeals.

Order appealed from affirmed, and writ denied.

H. Boyarsky, M. F. Ryan, and Emile Grossman, all of Oakland, for petitioner.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Charles D. Wehr, Asst. Dist. Atty., of Oakland, for the People.

SEAWELL, Justice.

[1] This is an appeal by petitioner from an order of the superior court of the state of California, county of Alameda, denying the issuance of the ancient writ of error coram nobis taken after judgment rendered, imposing upon him the death penalty upon a plea of guilty of murder of the first degree entered upon arraignment to an indictment charging him with murder committed in the manner hereafter set forth. Section 189 of the Penal Code provides that "all murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing * * * is murder of the first degree." Section 190 of the Penal Code provides that every person guilty of murder of the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury trying the same, and upon a plea of guilty the court shall determine whether he shall suffer death or confinement in the state prison for life. In order to determine which penalty shall be imposed the court must, upon a plea of guilty of murder of the first degree, hear evidence describing the commission of the crime, as to whether the killing was committed by lying in wait, or was willful, deliberate, and premeditated, or attended with unusual cruelty, in order to determine which of the two penalties prescribed by law, death or life imprisonment, should be imposed as the penalty for the commission of each particular murder.

[2-4] The office of the ancient writ of coram nobis was extensively discussed by this court in People v. Reid, 195 Cal. 249, 232 P. 457, 36 A. L. R. 1435, and it was there said that its application will rarely be warranted in view of our ample and liberal system of appeals and remedial writs, and, further, in

view of the plenary power of pardon, reprieve, and commutation conferred upon the chief executive of the state by the Constitution, to be freely exercised except in cases of habitual criminals, in the annulment of any judgment which may have been unjustly or improperly obtained in any court of the state. Without entering into a discussion as to the applicability of the writ to the situation presented, we will consider the case as one in which the writ was properly issued as a matter of right. The right to the writ as presented involves solely issues of fact which have been passed upon by the superior court of Alameda county, and falls within the universal rule which requires reviewing courts to affirm judgments of trial courts unless the evidence upon which the judgment is rendered is so unsubstantial or improbable as to amount to no evidence. Notwithstanding said rule, we are of the mind, in view of the perfidious nature of the charges which have been made by petitioner and his counsel against the trial court which pronounced the judgment, that it is due the trial judge, the officers of the law, and other witnesses who participated in the proceeding, that all of the facts upon which the charges are based should be fully set forth. In so doing, not only the positive contradictory averments of the several affiants and the credibility of each one become matters for sober consideration, but also the motives or lack of motives, and the interest which any of said affiants may have had in the result of the proceedings become important questions to be weighed with such other matters as may tend to influence the persons whose credibility is the object of scrutiny. The unusually cruel manner in which the crime to be hereinafter adverted to was committed, and the carnal and mercenary motives which prompted it, after long planning and deliberation, also have a place in determining whether or not the petitioner, as between two desperate alternatives, would be likely to chance his fate with a judge of the court, who, he hoped, might be temporarily disposed to relieve him of the extreme penalty of the law, rather than face a jury which would write its verdict after listening to an exceptionally wicked and harrowing crime to which there has not been offered one single mitigating circumstance.

Claude Forbes and Bess Nelson were jointly charged by an indictment returned against them on June 21, 1932, with having murdered Harry A. Nelson, on June 14, 1932. Harry A. Nelson and Bess Nelson were husband and wife and they resided together with their daughter, aged seven years, at the family residence No. 5314 Boyd avenue, Oakland, until about midnight, May 30, 1932, at which time she left the family domicile in company with Claude Forbes and did not return until a day or two after the homicide. Harry A. Nelson, the deceased, was deputy county assessor of Alameda county and served in the world war. He carried, it would seem, a war risk insurance policy in the sum of $10,000, and he and his wife owned the home, on which there appeared to be some incumbrance. They also had a joint deposit account in an Oakland bank of an undisclosed sum, but not less than $190 or $200. Each separately owned an automobile. The mother of Mrs. Nelson and the wife of Forbes resided at said family residence with the Nelsons. The mother did the cooking and household duties and Mrs. Forbes took care of the child and assisted in the housework. Mrs. Nelson's mother and Mrs. Forbes and the child occupied rooms at the rear of the house while the Nelsons occupied the front bedroom. Mrs. Nelson was away from her home much of the time during the day. She busied herself very largely in matters of fraternal types contrary to the wish of her husband. The Nelsons, with a few friends, devoted their home evenings frequently to playing bridge, which pastime seems to have furnished mutual grounds for accusations of improprieties, one against the other. There appears to have been a lack of conjugal confidence on the part of both spouses. Mrs. Forbes entered the Nelson household some two or three months before the homicide was committed to take care of the seven year old daughter. Her husband, Claude Forbes, petitioner herein, was not a frequent visitor at the Nelson home during the first period of his wife's employment, but as time went on his visits became more frequent. Finally he drove Mrs. Nelson quite frequently on her fraternity missions and he latterly became an occasional bridge guest. It must have become plain from the conduct of Forbes and Mrs. Nelson that improper relations existed between them, a fact which is admitted by both. Their illicit relations were openly revealed at about midnight, May, 30, 1932, when, after the bridge game had ended and the guests had left, except Forbes, a quarrel ensued between Nelson and his wife, and the husband told her that he wanted her to get out of the house and stay out; that he never wanted to see her again. He handed Forbes his hat, according to the story told by Forbes, and told him to go with Mrs. Nelson. It is a fact admitted by Forbes that he and Mrs. Nelson had engaged in sexual intercourse before this occurrence. Forbes and Mrs. Nelson left the Nelson home together and went to an Oakland hotel, where they registered as husband and wife under a fictitious name, occupying the same bed. On the following morning Mrs. Nelson went with Forbes to a clothing store and purchased on her account a suit of clothes for Forbes and other articles and then went to the bank in which she and her husband had a joint deposit and drew therefrom $190 and gave the money to Forbes. According to their agreement he purchased rail transportation to Minneapolis, Minnesota. From there they visited Mrs. Nelson's grandmother residing in that state. Failing in his plan to obtain employment, Forbes and Mrs Nelson left Minnesota on June 8th for California. They passed through San Francisco on June 11th and proceeded to Santa Cruz. There they registered at a hotel as husband and wife. While on their trip to Minnesota, they had discussed ways and means of getting Harry A. Nelson out of the way. When they arrived at Santa Cruz, Mrs. Nelson's funds were low and they discussed plans to "bump Harry off." That they conspired to commit the murder is admitted by both. On Monday, June 13th, Forbes went to a plumbing shop at Santa Cruz and bought a corrugated iron pipe twelve inches in length and approximately one and a fourth inches in diameter. He told the plumber that he was going to use it as a camp stake. He also purchased black friction tape which he used to cover the iron pipe. The wrapping was done in his room and doubtless was for the purpose of affording a firmer and better gripping surface. On the afternoon he took the autostage for Oakland. He knew the hour Nelson was accustomed to return from his evening ride. His original intention, as told by him, was to lie in wait in the garage and waylay Nelson as he alighted from the car. Upon arriving in Oakland, he bided his time by attending an out of the way picture show. Shortly before the hour that Nelson was in the habit of returning home, he hired a taxi and was driven to a street corner within two or three blocks of the Nelson home. It was his purpose to await Nelson's return to the garage and slay him there, but Nelson had unexpectedly returned as a light in his bedroom indicated. He then walked the streets of Oakland for several hours awaiting what he believed to be an opportune time to carry out his design. He returned to the Nelson home at about 3:30 o'clock in the morning and found the house darkened. He entered the child's playhouse and obtained a six-foot ladder, which he placed beneath a rear window, and obtained a piece of metal from the garage, which he used to jimmy the window through which he entered, after having removed his shoes. The Nelson child, petitioner's wife, Mrs. Nelson's mother, and the deceased were not awakened by his entrance. He wore gloves to avoid telltale fingerprints. Forbes then went to Nelson's room, turned on the light, and began to bludgeon Nelson, who was sleeping, into insensibility. The physician who conducted the autopsy testified that the skull of Nelson showed at least six or seven distinct fractures, some of which overlapped. Pieces of the skull punctured the brain tissue. Forbes, in his confession, said that with the first blow Nelson emitted a feeble, inarticulate sound, but uttered no sound thereafter. When Nelson was discovered the next morning by the household, his head was near the foot of the bed and the bed was drenched in pools of blood. Nelson never gained consciousness and died on the third day thereafter. He was a small man in stature, weighing 145 or 150 pounds, and was about five feet ten inches in height. Forbes left the house by the front door, threw the jimmy away at a point not far distant from the house, and disposed of the taped iron pipe in a vacant lot. It was afterwards found by some children playing in the lot. He went to a restaurant in Oakland after he committed the crime, where he ate his breakfast and read a newspaper until the autostage which operated between Oakland and San Jose set out on the morning trip. At the latter city he took a Santa Cruz autostage and arrived at the depot in Santa Cruz at 10:30 a. m. Mrs. Nelson was awaiting his return at the depot. She knew that his mission to Oakland was to do away with her husband. Both admit the purpose of the journey. Before he left for Oakland she warned Forbes to be careful as Nelson might have a gun on his person. Forbes seemed not disposed to go into full details of the horrible crime, but laconically replied to her questioning, "I gave Harry the works." He told her to watch the newspapers for results. He was quite certain that he had killed him, but he evinced anxiety as to the result. He and Mrs. Nelson expected to marry and become the owners of the Nelson home. Forbes said that he intended to divorce Mrs. Forbes. He had given some attention to the time required to establish a residence at Reno, Nev., for divorce purposes. He gave no care to the future of his wife as he said there was an understanding between them that when one tired of the other he or she was at liberty to obtain a divorce. Forbes and Bess Nelson were arrested on the afternoon of the day the crime was committed and subsequently charged with the murder. At first Forbes made an attempt to establish an alibi which he and Mrs. Nelson had prearranged, wherein it was to be claimed that he was at Pebble Beach on the night of the murder, but for one reason or other the alibi defense broke down. Cumulative evidence was so conclusive as to their participation in the crime that both finally confessed to its commission. Independent of the several confessions which were voluntarily given by both defendants other evidence established their guilt beyond a reasonable doubt. Many facts and circumstances corroborated their confessions.

Counsel who undertook the defense of Forbes and Bess Nelson were confronted with a case such as above outlined. There is no doubt that the several confessions of the defendants were legally admissible against them. The inculpatory facts and circumstances seemed irrefutable. Upon joint arraignment Forbes entered the double plea of not guilty and not guilty by reason of insanity. Mrs. Bess Nelson entered the single plea of not guilty by reason of insanity. Thereupon she moved for a severance of trial, which was denied, and a writ of mandate was issued by this court, but pending its consideration Forbes withdrew his pleas of not guilty and entered a single plea of guilty as charged. This action, of course, rendered the question of the right of severance moot and the writ was dismissed by stipulation of the attorney for Bess Nelson and the district attorney.

Bess Nelson went to trial and the jury found her sane. The same evidence received in the plea of insanity was, by stipulation of counsel, introduced in the proceeding to determine the penalty which should be imposed upon her as provided by section 190, Penal Code, and the court, on January 18, 1933, adjudged her guilty of murder in the first degree and sentenced her to the state prison for the term of her natural life. Prior to Bess Nelson's trial, on December 12, 1932, and at a time when she and her counsel were in court, Forbes appeared in court with his counsel and requested the trial judge, Hon. Fred V. Wood, that he be permitted to withdraw his said pleas of not guilty and not guilty by reason of insanity, and be given leave to enter a plea of guilty of murder of the first degree. The following proceedings were then had:

"The Court (addressing Forbes): You know what you are doing?

"Defendant Forbes: Certainly.

"The Court: Do you realize if you do that it may be the duty of the Court, if the crime is fixed at murder of the first degree, to sentence you to death?

"Defendant Forbes: Yes.

"The Court: Has anyone intimated to you or given you any encouragement as to what the Court would do in a case of this kind? (No answer.)

"The Court: Has anyone told you what the Court would do in the way of punishment?

"Defendant Forbes: No.

"The Court: You still want to withdraw your plea of 'not guilty' and your plea of 'not guilty by reason of insanity'?

"Defendant Forbes: Yes.

"The Court: Your counsel stated in chambers you wanted to change your plea and have the case continued for sentence until it is determined whether your co-defendant is sane or insane. Is that what you want to do?

"Defendant Forbes: Yes, your Honor.

"The Court: That is the understanding, is it?

"Defendant Forbes: Yes.

"The Court: That is your understanding from your conversations with Mr. Grossman?

"The Defendant: Anything that suits the convenience of your Honor.

"The Court: I thought from his talk in chambers that you would ask that sentence be postponed until after it is determined whether or not Mrs. Nelson is insane?

"Mr. Grossman (Forbes' attorney): That is satisfactory unless Your Honor wants to continue it to some other time.

"The Court: My own idea is that is the proper thing to do. You want to do that; have your sentence postponed until that matter is determined?

"Mr. Grossman: Yes, your Honor."

The defendant was thereupon arraigned and he withdrew his former pleas and entered a plea of guilty. At the request of the defendant, the time for pronouncing sentence was postponed to a time following the trial of Mrs. Nelson on the issue of insanity.

Upon the termination of the Forbes' plea. Judge Wood remarked: "This changes the whole situation here." He then inquired of Mr. Heafey, attorney for Mrs. Nelson, if he would be ready to go to trial within two or three days. Mr. Heafey thought he should have more time than two or three days to prepare for trial and the matter went over to the afternoon session, whereupon the trial day was set by consent of all on January 3, 1933. In the colloquy following the plea of guilty entered by Forbes, Judge Wood remarked that the action of Forbes "changes the whole situation." Deputy District Attorney Olney remarked: "We had no idea of the change of plea at all." At the request of Mr. Grossman, one of Forbes' attorneys, joined in by the defendant himself, the time for pronouncing judgment was definitely fixed for January 9, 1933. As the judge was about to fix a day for pronouncing sentence the following proceeding occurred:

"The Court: Very well, the case is continued. The case of People v. Bess Nelson in the insanity matter is set down for January 3, 1933, at 10 o'clock a. m., by consent, and the case of People v. Claude Forbes at the defendant's request is set down for Monday, January 9, 1933, at 9:30 a. m., which is fixed as the time for pronouncing judgment. Of course, if you want to withdraw that plea you may do so.

"Mr. Grossman: Which plea do you refer to?

"The Court: I am referring to the defendant Forbes' plea of guilty. I am just saying if he desires to withdraw his plea he may do so.

"Defendant Forbes: I am satisfied. I do not desire to change the plea, sir."

The trial of Bess Nelson was concluded on January 14, 1933. On January 17, 1933, the time for pronouncing judgment upon Forbes having been regularly continued to that day, the trial judge, upon a hearing to determine the penalty which the crime merited, found the crime to be murder of the first degree and adjudged that petitioner should suffer death. The petitioner offered no evidence at the hearing in mitigation of the commission of the willful, deliberate, premeditated, and cruel killing, which was related at great length and with much detail at said hearing.

[5, 6] This brings us to a consideration of the merits and substance of the petition for the writ. Petitioner, through his attorneys Emile Grossman and H. Boyarsky, alleges that he was "the victim of fraud, inadvertence, misapprehension, duress, mistake and excusable neglect, which ordinary prudence could not have guarded against," whereby he was influenced to withdraw said pleas and enter a plea of guilty and that he was deprived of a trial on the merits. It is averred by petitioner that on or about December 9, 1932, one of his counsel, Emile Grossman, visited him at the county jail and informed him that he had entered into an agreement with Judge Fred V. Wood, whereby petitioner was "to be permitted by said Judge Wood to withdraw his plea of not guilty and not guilty by reason of insanity and to enter in lieu thereof a plea of guilty, and whereby your petitioner was to consent that the passing of sentence upon your petitioner be continued until after the trial of Bess Nelson, co-defendant herein, and whereby your petitioner was to receive a sentence of life imprisonment; that said Emile Grossman advised your petitioner to withdraw his said pleas of not guilty * * * and enter a plea of guilty; that your petitioner, relying upon the said statements of Emile Grossman, agreed with said Grossman to withdraw his said plea of not guilty * * * and enter a plea of guilty; that the said Emile Grossman thereupon informed your petitioner that the said Honorable Fred V. Wood desired that said agreement should be kept secret, and that your petitioner at no time should say anything or conduct himself in any manner as to indicate to the public and press that such agreement existed and that all proceedings herein were to be conducted in such manner as to conceal said agreement and so as to give the impression to the public and press that no such agreement existed; that on the 12th day of December, 1932, in pursuance of said agreement and understanding, your petitioner appeared before the said Honorable Fred V. Wood, and through his attorneys, Emile Grossman and H. Boyarsky, moved the said court to be permitted to withdraw his pleas heretofore entered of not guilty." The petition alleges a number of continuances which petitioner requested but which have no evidentiary weight. His averment that he had no previous notice of the day fixed for pronouncing judgment upon him is contrary to the fact. The provisions of section 190, Penal Code, was notice to him that the court was required to hear testimony in order to determine the degree of punishment to be imposed. He could not have been surprised or misled by the court complying with the procedural requirement which occurs in all cases of pleas of guilty. He cannot now complain that he sat mute with his attorneys at his side while evidence of his wicked crime was given by the several witnesses. That he offered no evidence, if any there was, which was not included in the ample statements and confessions made by himself and Mrs. Nelson, was a matter wholly within the control of his attorneys, who might have examined each witness at length and, no doubt, could have obtained a continuance, upon the asking, for the production of evidence tending to mitigate the offense, if such existed. Nor has he any complaint that the stenographer, who reported in shorthand and transcribed into print the confession of petitioner and the testimony taken before the grand jury, was not present at the hearing. He made no objection to the introduction of said transcription of testimony. In fact, he stipulated that said testimony might be used at the hearing as certified by the reporter. The office of the writ coram nobis is not to be used to test alleged errors of this kind. The testimony before the court at the hearing was amply sufficient to establish the degree of punishment imposed without reference to the reporter's transcript. There is no merit in the claim that the transcript shows that all or any of the confessions of Forbes or Mrs. Nelson were improperly obtained. On the contrary, they are exceptionally free from suspicion that they were obtained by promise of immunity or reward, or coerced by menace, duress, or any other fraudulent practice.

Upon the foregoing verified petition the matter came before Hon. Frank M. Ogden, judge of the superior court of Alameda county. Emile Grossman, one of Forbes' counsel, made an affidavit in support of the petitioner. He includes in his affidavit a letter dated January 14, 1933, addressed to Judge Wood, in which nothing important appears other than his anxiety as to the result of the proceeding. He complained that testimony was to be received to determine the punishment. He said that he could see no purpose for taking testimony and that such action indicated to him that Mr. Wehr, who had charge of the prosecution of the case, intended to ask that the death penalty be imposed. He also wrote that before Forbes withdrew his double plea Mr. Wehr assured the attorneys for the defense that he would recommend life imprisonment if they could persuade Mr. Heafey, the attorney for Mrs. Nelson, to withdraw her plea of not guilty by reason of insanity. This he avers Mr. Heafey refused to do, and Mr. Wehr indicated he would accept a plea of guilty of murder of the second degree if she would withdraw her plea. Affiant avers that he and Judge Wood engaged in conversation for at least one-half hour discussing the withdrawal of pleas of not guilty by Forbes and entering a plea of guilty instead. He also averred that Judge Wood expressed his personal opposition to the infliction of capital punishment and stated that his mind was unalterably fixed on the subject. At the conclusion of the conversation Judge Wood said: "After all, I cannot prevent the defendant Claude Forbes from withdrawing his present plea." Affiant thereupon stated that he would immediately take the matter up with Forbes and would advise him, due to Judge Wood's assurance of being opposed to capital punishment, to withdraw his plea. He went to the county jail immediately thereafter and advised Forbes that in view of Judge Wood's views on capital punishment, to withdraw his former pleas and enter a plea of guilty. Forbes, according to Grossman, was very dubious for a time and would not consent, but after receiving his assurance that there was no possibility of receiving the death penalty, he agreed to withdraw his pleas. Affiant communicated his conversation to Mr. Boyarsky. Feeling assured that the matter would turn out as he anticipated, he did not appear in court at the time fixed for imposing sentence. Affiant avers that when he entered Judge Wood's chambers, which open to the courtroom, he closed the door after him, but Judge Wood immediately opened the door and remarked that he always kept his door open, as he considered the chambers a part of the courtroom, which is public; that Judge Wood required affiant to pledge himself to secrecy as to all that had occurred. He further said he did not want the matter to get to the newspapers and that he did not believe the people waiting in the courtroom could have heard what was said by him and Grossman. The affiant closes with the averments that the affidavit dated January 20, 1933, contains the first public statement of the matter that happened in Judge Wood's chambers, and that he would not have advised Forbes to change his plea "had it not been for the statements made by Judge Wood aforesaid and the reliance of affiant and Claude Forbes thereon." Affiant admits that at least two other persons having business with the judge entered his chambers while he was there.

H. Boyarsky, associated with Grossman, also filed an affidavit in which he avers that he telephoned to Assistant District Attorney Charles Wehr, in charge of the prosecution, and attempted to effect a compromise whereby Forbes should plead guilty and receive a life sentence. He, like his associate, must have appreciated, under the state of the case, that all reasonable hope of escaping the extreme penalty of the law was slight, and he therefore began to negotiate what each terms a "compromise," whereby Mrs. Nelson was to enter a plea of guilty of murder in the second degree and Forbes was to receive a life sentence. According to his affidavit, he opened negotiations with Mr. Wehr, the attorney in charge of the prosecution, and Mr. Wehr stated that he would be willing to recommend a plea of second degree murder for Mrs. Nelson and would recommend a life sentence for Forbes if he, Boyarsky, could persuade Mr. Heafey, attorney for Mrs. Nelson, to induce her to enter such a plea. That Mr. Heafey refused to entertain the proposition. Mr. Heafey has made no affidavit in the case corroborating Mr. Boyarsky, but it does not seem possible that he would have refused to accept such an offer. Mr. Wehr's affidavit absolutely denies that he made at any time any statements to Mr. Boyarsky which could possibly justify the averments of Mr. Boyarsky's affidavit. Reference to Mr. Wehr's affidavit will presently be made. Boyarsky does not claim to have had any conversation with Judge Wood as to the withdrawal of said pleas but he repeats the averments of his associate as communicated to him as to veiled secrecy and the other matters set forth in the Grossman affidavit. It will be observed that Grossman does not make a single definite, positive, or direct averment that Judge Wood agreed or promised not to impose the extreme penalty of the law on condition that Forbes change his pleas. In fact, it is not denied that Judge Wood hesitantly permitted Forbes to withdraw his pleas of not guilty. His offer to permit Forbes to withdraw his plea of guilty in open court on the day he entered it and his examination of him before its entry as to whether he realized that it might become the duty of the court to impose the death penalty upon a plea of guilty, and whether any one had intimated to him or given him "any encouragement as to what the court would do in a case of this kind," and petitioner's answer "No," it would seem, is an answer of itself to petitioner's charges based largely upon inferences drawn from questionable premises.

Judge Wood prepared an affidavit which is before us. He avers that on December 9, 1932, attorney Grossman entered his chambers and closed the door; that he immediately arose and threw the door open with the remark that he always kept the door open; that Grossman said that he was going to plead Forbes guilty. Affiant replied that he would not do that; that it would be better to let a jury pass upon the case. Grossman then said: "Well, Forbes is guilty, what is the use of putting the taxpayers to the expense of a trial?" To this remark Judge Wood replied, "Well, I don't know as I can prevent Forbes from entering a plea of guilty if he desires to do so." Grossman then said: "Mr. Wehr was willing to recommend life imprisonment for Forbes if he could get Forbes and Mrs. Nelson to plead guilty to first degree murder. He took the matter up with Mr. Heafey, who refused to so advise her. Mr. Wehr said that he might offer a further inducement to Mrs. Nelson. If Wehr was willing to do that I do not see why he should ask for the death penalty if Forbes pleads guilty and saves the expense of a trial. It has been so long since the crime was committed, anyway, that a jury would not give the death penalty."

Affiant made no reply to the above statement that Grossman intended to plead Forbes guilty as he believed that Grossman had no hope of saving Forbes' life if the case went to a jury and he believed the statement was made for the purpose of influencing him. Affiant said to Grossman that if he pleaded guilty sentence must be pronounced within five days (as the statute requires) after the entry of the plea. He then said to Grossman that if the matter was left to his determination, he would prefer to continue the sentence until the jury had passed upon Mrs. Nelson's plea of not guilty by reason of insanity. He further informed counsel that the request for a continuance must come from the defendant himself. Affiant avers that nothing further of importance, to his recollection, was said and that his entire conversation with Grossman did not extend over five minutes; that Grossman was in his chambers for a somewhat longer period, but the conversation was interrupted by the entrance of the clerk of the court and two or three others who had business with the court; that the words "secret" or "secrecy" were not mentioned during the short conversation had with Grossman, and at no time did affiant intimate in any way what disposition he would make of the case if Forbes entered a plea of guilty; that Grossman did not at any time ask if he would or would not impose the death penalty if the matter were submitted to him, nor was any reference made as to affiant's personal attitude toward capital punishment, or that the newspapers knew it was a fact that he was opposed to capital punishment. He denies that he told Grossman of several or any cases wherein he had refused to inflict the death penalty; denies that Grossman upon leaving his chambers, or elsewhere, said that he would take the matter up with Forbes and advise him to withdraw his former pleas and enter a plea of guilty; denies by specific averments all reference made by Grossman as to the secrecy that should be maintained by Grossman in keeping the agreements from the public and the press or that such subjects were mentioned at all during Grossman's visit to his chambers; denies that he said anything which would indicate or intimate what his judgment in the matter would be, or which would in any way encourage or influence Forbes to change his plea. Affiant avers that Grossman did not at any time manifest any belief that he had been assured that the death penalty would not be imposed.

It is further averred that attorney Grossman had his stenographer present upon permission of Judge Wood, reporting the proceedings of the eight-day trial of Mrs. Nelson on the insanity plea, and that both Grossman and his associate Boyarsky were frequently present in court and they were therefore well informed as to the kind and nature of the evidence that would be produced against Forbes if he should go to trial before a jury.

Charles W. Wehr, assistant district attorney of Alameda county, has filed an affidavit in the proceeding, in which he states that on or about October 15, 1932, H. Boyarsky, attorney for Forbes, approached him and stated that he desired to plead Forbes guilty if he would recommend to the court a sentence of life imprisonment if he would enter a plea of guilty of murder, and that he stated to Boyarsky "that the murder of Harry Nelson was one of the most cold-blooded and brutal murders in the history of Alameda county; that there were no mitigating circumstances in favor of said defendant, and that no fact existed which would justify your affiant in making such recommendation, and that he would not do so." Attorney Boyarsky replied that the case against Bess Nelson was not nearly as strong as the case against Forbes, and that if affiant would recommend life imprisonment for Forbes upon his plea of guilty, that Forbes would testify against Bess Nelson upon her trial. Affiant replied that he would not call Forbes as a witness under any circumstances; that he would not vouch for his credibility; that Forbes, "in the home of Harry Nelson, under the guise of friendship, seduced deceased's wife, had broken up deceased's home, had taken deceased's wife and lived with her in adultery, had decided to murder Harry Nelson in order to secure the Nelson home, and for the purpose of collecting the life insurance upon Nelson's life, which amounted to $11,500.00, had entered Nelson's home in the nighttime and beaten him to death with a club in his own bed as he slept; and that it should be apparent to Boyarsky, without argument, that neither affiant nor anyone connected with the prosecution of said case would vouch for the credibility of Forbes, or call him as a witness." Boyarsky asked him if he would submit the proposition to the District Attorney Warren and he said he would not. Affiant told him if both Mrs. Nelson and Forbes would enter pleas of guilty of murder that he would submit the whole matter to his superior officers. Heafey refused to plead Mrs. Nelson guilty of murder and he had no further conversation with Mr. Boyarsky. Affiant denies that he at any time consented to recommend life imprisonment for Forbes upon a plea of guilty. Affiant further avers that he had no information or knowledge that Forbes intended to enter a plea of guilty, and was not in court on the day he entered it.

Other affidavits filed in the case show that the conduct of the attorney and the defendant himself was positively inconsistent with the claim that either of said attorneys for the defendant or the defendant had been given any promise or intimation that Forbes would be relieved of the extreme penalty of the law provided he entered a plea of guilty.

Dr. Walter Rapaport, one of the alienists appointed by the court to examine Forbes and investigate his sanity upon his plea of insanity, avers that on January 16, 1933, Herman Boyarsky, one of the attorneys for Forbes, called him up by telephone, the day before sentence was to be imposed, and asked his assistance in Forbes' behalf, stating that he was having trouble in getting testimony that he could use in mitigation of the crime. He requested the alienist to testify as to Forbes' low grade of mentality, as he was afraid that he would hang. Upon being informed that his testimony would not help Forbes, Boyarsky said "I do not know what I am going to do because I have been unable to get any testimony that I could use that would influence the court to be lenient in the case."

M. F. Enos, the bailiff who conducted Forbes from the county jail to the courtroom, avers that the defendant did not at the time sentence was imposed upon him evince any surprise or emotion nor did he make any statement indicating that he had expected or was promised a lesser degree of punishment than that which he received. When returning to the jail after sentence was pronounced, Bess Nelson, from an upstairs window, called, "Oh, Claude, what did you get?" Forbes, looking up at her, indicated by drawing his finger across his throat.

The affidavit of the clerk of the court is to the effect that Grossman's conversation with the judge in his chambers could not have exceeded ten minutes and that he and others interrupted his stay several minutes; that he heard none of the conversation referred to in Grossman's affidavit.

Boyarsky filed a rebuttal affidavit in which he either directly denied or made some qualification of the averments as set forth in the affidavits of Assistant District Attorney Wehr and Dr. Rapaport.

[7-9] Upon the foregoing proceedings we are requested ex gratia to nullify the solemn judgment of the court which rendered judgment of sentence, and the court which heard the matter on petition for a writ of error coram nobis. Unless it can be said as a matter of law that the court abused its discretion it is not within the power of this court to disturb the judgment. The petitioner was given the alternative by the code of the state of pleading guilty or standing trial. After long deliberation, he elected to change his pleas of not guilty and not guilty by reason of insanity to a plea of guilty. His situation was desperate and he elected, with the advice of counsel, to chance his fate with the court rather than a jury, a privilege expressly given by law. He hoped, of course, to win some favor by his change of plea or he would not have made it. He was admonished by the court to disabuse his mind of any hope that the plea of guilty would influence the court to mitigate the penalty if the killing was committed with the intent and in the manner for which the law exacts the extreme penalty.

What vicious motive could have moved the trial judge to have tricked petitioner into entering a plea which would have enabled him to satisfy a lust for imposing the death penalty is not suggested, and we are unable to attribute such a heinous and unnatural act to any human being except upon most satisfactory evidence. Such a finding was not, as found by the trial judge, justified by the evidence and circumstances adduced in the instant case.

People v. Dabner, 153 Cal. 398, 95 P. 880, 881, was a case very similar in several important respects to the one at bar except the killing in that case was not as merciless as the killing in the instant case. Siemsen and Dabner had planned to rob a Japanese bank located in San Francisco. Dabner was but a youth, aged eighteen years. Siemsen was his senior. They entered the bank in the daytime and inveigled its manager into a back room with the pretense of transacting business with him. While there Siemsen assaulted him with a piece of gas pipe, which one of them had concealed on his person, so violently that he died from the effects thereof. Another employee was called to the rear room by Dabner and he was also beaten into insensibility, Dabner assisting in the assault. Siemsen and Dabner were apprehended and while held in detention Dabner confessed to the crime. Upon arraignment Dabner pleaded guilty to murder. The court heard evidence to enable it to determine the degree of the crime and upon the evidence determined it to be murder of the first degree without mitigating circumstances, and punishable with death. When subsequently brought before the court for judgment and sentence upon the said plea, the defendant asked leave to withdraw his plea of guilty and enter a plea of not guilty to the charge. Evidence and affidavits in support of and in opposition to this application were introduced. The court refused to allow the withdrawal of the plea of guilty and pronounced judgment and sentence of death. The appeal was taken from the judgment. In support of the application to withdraw the plea of guilty, substitute a plea of not guilty, and go to trial before a jury, it was shown that the defendant was only eighteen years old, had resided near Petaluma until a few months before the crime was committed, and had borne a good reputation, and that he was not strong-minded, but was easily influenced by others. It was also claimed that he was insane. The grounds of his motion were that his plea of guilty was made through inadvertence, without due deliberation, in ignorance of the law and the consequences of his plea, in obedience to the advice and instruction of his father, and in the belief that if he made that plea, a jury would be called to fix his punishment and that he would be sentenced only to life imprisonment. Evidence was given tending in some degree to support some of these grounds. An attorney was appointed to represent him upon arraignment and he was given two days to consider his plea. At the expiration of the two days other counsel were appointed to act as his attorneys and the case was continued for two days more. After demurrer overruled, his attorneys stated to the court that the defendant, against their advice, wished to plead guilty and they wanted to withdraw from the case. The court then went fully into the matter of his plea and fully informed defendant of his rights and what consequences might follow his plea of guilty, whereupon he stated that he wanted to plead guilty as it was the advice of his father. His plea of guilty was entered, his attorneys withdrew from his case, and when he came up for judgment and sentence, he made application for leave to withdraw his plea of guilty, which was denied. This court, after a full review of the facts of the case, said:

"It must be conceded that the court justly concluded that the defendant made his plea after ample time for deliberation and not in ignorance of the law, or facts, nor of the course of procedure to follow, and with full knowledge thereof. Doubtless he was prompted by the hope that he would escape death and be condemned only to imprisonment, and he seems to have been induced to indulge this hope largely by the suggestions and advice of his father. But we do not think this fact of sufficient force to have required the court to permit a withdrawal of this plea after the event had proven that his hope was vain. If this was so, then the punishment upon a plea of guilty must always be something less than the greatest allowed by law, for the defendant in pleading guilty, always hopes for less, and, if his disappointment was sufficient to give the right to withdraw the plea, it would in such a case always be withdrawn. It was not until the court had declared that the penalty would be death, and after a subsequent delay of six days, that the defendant applied to withdraw and change his plea.

"There was no contention to the effect that there was any serious doubt as to the defendant's guilt, or that evidence could be produced which would tend to prove that the offense was anything less than murder of the first degree, or even to mitigate its atrocity and lay the foundation for a verdict of imprisonment for life, except the claim that the defendant was insane and that prior to his departure from Petaluma, 10 months before the time of sentence, he had borne a good reputation for honesty, integrity, and good behavior. The evidence of his insanity was very slight, but nevertheless the court appointed three physicians to examine him in that respect, and they unanimously pronounced him sane. His previous good character might have some bearing on the fact of his participation in the crime, if that were in doubt, but there is no pretense that he did not aid and assist therein with deliberation and previous knowledge of the character of assault which was to be made. A cold-blooded, cruel, and deliberate murder is not rendered any the less atrocious by the fact that the person committing it was previously of good reputation.

"Section 1018 of the Penal Code provides that the court may at any time before judgment permit the withdrawal of a plea of guilty and a substitution of a plea of not guilty. It is a matter within the sound discretion of the court, and its action must be upheld unless an abuse of discretion is shown. The following remarks of the court in People v. Miller, 114 Cal. 16, 45 P. 987, are particularly applicable here: 'The mere fact that a defendant, knowing his rights and the consequences of his act, hoped or believed, or was led by his counsel to hope or believe, that he would receive a shorter sentence or a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by jury, presents no ground for the exercise of this liberal discretion. People v. Lennox, 67 Cal. 113, 7 P. 260. To hold that it did would be equivalent to saying that a defendant might speculate upon the supposed clemency of a judge, with the right to retract if, at any time before sentence, he began to think that his expectation would not be realized. * * * Only after it is made manifest that defendant is to suffer the extreme penalty, and that no further delay will be permitted, do counsel produce the affidavit, itself made upon the day of the hearing, but not offered until that moment, and ask to be allowed to retrace all these steps thus advisedly taken. What conclusion can be reached except the one that, because the court was about to pronounce sentence of death, defendant and his counsel, knowing that he could not fare worse at the hands of a jury, and might fare better, sought an opportunity to essay the other chance.'

"If we could perceive anything in the evidence which would have called for a lesser punishment than that the trial court was about to impose, some reason might appear why defendant should have been permitted to withdraw his plea and put his fate before a jury. No showing of this kind is made. * * *

"His voluntary confession does not lessen or soften the character of his crime. But, whatever its effect may be, it was addressed to the discretion of the court below, and it is not of sufficient weight to control our action to such an extent as to justify us in declaring that that discretion was abused. The responsibility in such matters rests upon the superior court. This court has no function to perform regarding it, except to see that the discretion of that court is not unreasonably exercised. As a matter of law the action of the superior court is justified by the facts. * * *"

All that was said in the Dabner Case is singularly applicable to the instant case. Petitioner was not lacking in understanding, as a perusal of his confession and statements will show, and there were no mitigating circumstances which tended to lessen the punishment prescribed by law.

The order appealed from is affirmed, and the writ is denied.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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219 Cal. 357

REGAN v. ALBIN et al.

GOLDEN EAGLE MILLING CO. v. SAME.

L. A. 14135, 14136.

Supreme Court of California.

Nov. 1, 1933.

Rehearing Denied Nov. 29, 1933.

1. Licenses 🔑39.

Corporation stock issued prior to 1931 in violation of terms of corporation commissioner's permit is void (St. 1917, p. 679, § 12).

2. Licenses 🔑39.

Stockholders in insolvent corporation *held* not estopped from claiming nullity of stock issued in violation of terms of permit because they received dividends for three years without attempting rescission, in absence of showing that stockholders knew of nullity prior to action, and that creditors relied upon stockholders' representations in extending credit to corporation (St. 1917, p. 679, § 12).

3. Licenses 🔑39.

Stockholders' silence or acquiescence is insufficient to estop them from claiming invalidity of stock issued in violation of terms of permit, in action against them by insolvent corporation's creditors (St. 1917, p. 679, § 12).

4. Estoppel 🔑102.

Estoppel cannot ordinarily be invoked to validate contract which is void through violation of law.

PRESTON, J., dissenting.

In Bank.

Appeals from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Actions by Edward Regan (substituted for John C. Hodge), and by the Golden Eagle Milling Company, against Alice T. Albin and others. From judgment for defendants, plaintiffs appeal.

Affirmed.

For prior opinion, see 16 P.(2d) 1029.

Hibbard & Kleindienst, all of Los Angeles, for appellant Regan.

Patterson, Bailey & Montgomery, Patterson & Montgomery, William S. Scully, and Frederick I. Richman, all of Los Angeles, for appellant Golden Eagle Milling Co.

O'Melveny, Tuller & Myers, Walter K. Tuller, Kent Allen, Jackson W. Chance, William R. Law, and Andrew T. Jenkins, all of Los Angeles, amici curiæ.

Chapman & Chapman, L. M. Chapman, and John S. Frazer, all of Los Angeles, for respondent L. E. Dixon.

Smith & Breslin, of Los Angeles, for respondents Alice T. Albin, Luzerne Britten Eaton, Alice E. Slate, Eaton A. Gruwell, and Frank C. Laurie.

J. E. Stillwell, of South Pasadena, and Robert E. Austin and John N. Helmick, both of Los Angeles, for respondents F. H. MacPherson and others.

Mitchell, Silberberg & Knupp, M. B. Silberberg, Guy Knupp, and James W. Mack, all of Los Angeles, amici curiæ.

LANGDON, Justice.

The above-entitled actions were brought to enforce stockholders' liability for debts of a corporation, under the law existing prior to 1931. They were consolidated and tried under an agreed statement of facts.

Pasadena Milling Company, Inc., incorporated in California, had on November 30, 1925, an indebtedness of $146,241.92. On that date it secured a permit from the corporation commissioner to sell stock. The conditions of the permit were that it could (1) sell one share of common stock to each of five directors at $100 per share *for cash;* (2) sell 760 shares of common stock to Pasadena Milling Company for its assets, subject to the above-stated indebtedness; and (3) sell 500 shares of preferred and 235 shares of common stock at par, for cash, *but not until sale and receipt of the consideration for the shares to be issued under* provisions (1) and (2), supra. The permit also read: "This permit is issued *upon the condition* that *a true copy of said permit be exhibited and delivered* to each prospective subscriber for or purchaser of said securities before his subscription therefor shall be taken or any sale thereof made." Included in the document were figures showing the financial condition of the corporation. Upon the granting of the permit, subscriptions were taken and stock was sold. Defendants are purchasers of said stock. Plaintiffs represent creditors of the corporation, and are seeking to hold defendants liable for its debts. The position of defendants is that their shares were never validly issued to them, and that consequently they are not stockholders and cannot be held. The trial court gave judgment in favor of defendants, and plaintiffs appealed.

Defendants attack the validity of the sales of their shares in the following particulars: First, the subscriptions were in all cases taken without exhibiting or delivering to the subscribers a copy of the permit, and in two instances, no subscription agreements were signed at all. Second, the five shares were sold to the directors, but none of them paid cash as required by the permit. An attempt is made by plaintiffs to avoid the effect of the failure to *exhibit* the permit by pointing out that the subscription agreement had printed on its reverse side a copy thereof, and on the front a reference thereto. Gridley v. Tilson, 202 Cal. 748, 262 P. 322, is cited, but the passing observation on the point, which was not an issue in the case, is not controlling here. Besides, the failure to sell the five directors' shares for cash has precisely the same effect as a violation of any other condition. Hence it appears from the admitted facts that all of the stock sold to defendants was issued in violation of some condition of the permit. Under these circumstances, are the defendants stockholders or liable as such to creditors?

[1] The rule that a security issued without a permit or in violation of the terms of a permit, is *void* under former section 12 of the Corporate Securities Act, has been frequently declared, and must now be taken as well settled in this state. See cases cited, infra. In 1931 (St. 1931, p. 949), a provision making such a security *voidable* was substituted for the old section (see Ballantine, California Corporation Laws, § 513), but this has no application to the instant case.

[2, 3] There remains the question whether the defendants, though they may not be actual stockholders, are estopped to set up this fact against plaintiffs. In this connection it is urged that plaintiffs extended credit to the corporation, and that defendants received dividends and made no attempt to rescind their contracts of sale for over three years. It may be preliminarily observed that there is no showing of inequitable conduct on the part of defendants, for it does not appear that any one of them knew of the invalidity of his shares prior to this action. Furthermore, plaintiffs make no showing of innocence, nor of reliance upon any acts or representations of defendants. In short, the record is devoid of actual proof sufficient to support a claim of estoppel. It need hardly be pointed out that mere silence or "acquiescence" by defendants in their position as stockholders is not enough to justify the application of the doctrine.

[4] In addition to the definite lack of factual basis for this position of plaintiffs, there is the companion rule to the one first stated herein, that an estoppel cannot ordinarily be invoked to give validity to a contract which is void through violation of law. This rule has likewise been repeatedly declared, and has been applied in a number of cases in this state dealing with shares of stock void because of the absence of, or nonconformity with a permit. See Walker v. Harbor Realty, etc., Corp., 214 Cal. 46, 3 P.(2d) 557; Pollak v. Staunton, 210 Cal. 656, 293 P. 26; Reno v. American Ice Machine Co., 72 Cal. App. 409, 237 P. 784. The precise question now before us has also received the attention of the appellate courts in this state. In Herkner v. Rubin, 126 Cal. App. 677, 14 P.(2d) 1043, shares had been issued in violation of conditions of the permit, and creditors sought to hold the defendant stockholder liable. It was held that no liability could be imposed. An application for a hearing in this court was denied. In Honn v. Hamer, 81 Cal. App. 276, 253 P. 336, and Live Oak Cemetery Ass'n v. Adamson, 106 Cal. App. (Supp.) 783, 288 P. 29, the same conclusion was reached.

With the authorities in this state so uniformly contrary to the position of plaintiffs, their principal reliance is upon certain decisions of the federal courts, which, upon examination, do not conflict with the views expressed above. Typical of these is In re American Aluminum Metal Products Co. (D. C.) 15 F.(2d) 234. In that case one Dempsey agreed to purchase shares in a corporation in which he subsequently became a director and officer. The permit authorized sales only for cash. He paid only partly in cash and his contract gave him an option to cancel. Subsequently he gave notice of cancellation and returned the stock. The corporation was adjudicated a bankrupt, and he filed a claim as a general creditor to recover the money he had paid. The court disallowed the claim, pointing out that he was in pari delicto with the corporation, and could not share with innocent creditors. It is apparent that this situation, where an officer and director of the corporation is the purchaser and is actually found to be in pari delicto, and seeks to share with innocent general creditors in the *assets* of the corporation in bankruptcy, is decidedly different from the situation presented here, in which *innocent* purchasers, asserting no claim to a share in the assets of the corporation, merely seek to avoid an unlimited proportional liability as shareholders which they did not, as a matter of law, assume. Certain general language in the American Aluminum Metal Products Co. Case was limited by the later decision of the same court, In re Builders' Finance Ass'n, 26 F.(2d) 123, and the very recent case of Cecil B. De Mille Productions v. Woolery (C. C. A.) 61 F.(2d) 45, which reviews and follows the controlling California cases holding the illegally issued stock void, and the doctrine of estoppel inapplicable, leaves no doubt as to the proper interpretation to be placed on the earlier federal decisions.

Plaintiffs have also referred us to our recent decisions in Eberhard v. Pacific Southwest Loan & Mortgage Corp., 215 Cal. 226, 9 P.(2d) 302, and Braunstein v. Title Guarantee & Trust Co., 216 Cal. 780, 17 P.(2d) 104; and to the District Court of Appeal decision in Kehrlein v. Builders' Mortgage Co. (Cal. App.) 22 P.(2d) 242. These cases are all distinguishable in that in each party guilty of the illegal act sought to take advantage of his own wrong. Thus, in the Eberhard Case, the corporation, having issued securities in violation of the law, attempted to assert their invalidity against the innocent purchaser thereof, in order to escape payment.

We conclude that defendants are not liable as stockholders for the debts of the corporation.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.

PRESTON, Justice.

I dissent.

I cannot indorse the doctrine pronounced in the foregoing opinion. I do, however, realize that to hold otherwise would require a disapproval of several cases, principally opinions of the District Court of Appeal, and also differentiation of some of the cases decided by this court.

The theory of the present holding seems to be based on the postulate that the corporation would have no standing in a suit on the stock subscription agreement nor any defense to an action for rescission of the sale of stock under such conditions; hence a creditor of the corporation would have no better standing. This conclusion, I think, is unsound and does not follow from the premises.

The liability of the stockholder to the creditor is a primary one. The creditor has not been a party to violation of any of the terms of the permit. The alleged violations of the permit offend no rule of public policy and violate no mandate of statute. The conditions imposed by the permit were such as sprang only from the exercise of a discretionary power by the commissioner who issued it. The stockholder may have condoned or even participated in the violation of the terms of the permit. Estoppel should apply because of a wait of three years by the stockholder without complaint and the receipt during all that period of dividends upon the stock. Now that insolvency has overtaken the corporation, the claimed invalidity is urged. Would such claim have been made had the corporation continued on its career of prosperity? I think the whole doctrine of this class of cases should be recast and that a proper line of distinction should be drawn between cases where estoppel does and cases where estoppel does not apply.

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219 Cal. 340

TRIMBLE et al. v. TRIMBLE et al.

S. F. 14601.

Supreme Court of California.

Nov. 1, 1933.

1. Husband and wife 🔑14(4).

Statutory presumption that where property is acquired by married woman and her husband they become tenants in common is rebuttable (Civ. Code, § 164).

2. Husband and wife 🔑49½(7).

Evidence supported finding that presumption of gift by husband where property was acquired in name of husband and wife was overcome (Civ. Code, § 164).

3. Husband and wife 🔑265.

Respective rights of husband and wife in community property are determined by law in force at date of its acquisition.

4. Husband and wife 🔑267(7).

Deeds to community property executed by husband without consideration and without wife's consent *held* valid as to one-half of property, but voidable by wife as to her half-interest (Civ. Code, § 172, and § 172a as added by St. 1917, p. 829).

5. Husband and wife 🔑247.

Amendment making one-half of community property subject to testamentary disposition by husband affects only community property acquired since amendment became effective (Civ. Code 1923, § 1401).

6. Husband and wife ⚷267(8).

Debts of deceased husband and costs of administration *held* not deductible from husband's half of community property which he conveyed before death, where conveyances were made subject to life interest in wife, and other community property, not conveyed by husband, was apparently sufficient to pay debts and expenses.

LANGDON, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Elizabeth G. Trimble and the Central National Bank of Oakland, as executor of the last will and testament of Alexander J. Trimble, deceased, against Russell Trimble, by Willard Trimble, his guardian ad litem, and others. From the judgment, plaintiffs appeal.

Affirmed in part, and reversed in part, with directions.

For prior opinion, see 21 P.(2d) 939.

Dutton & Gilkey and Lewis E. Lercara, all of Oakland, for appellants.

Fernhoff & Sevier, Milton Sevier, and V. Lewis Kaye, all of Oakland, for respondents.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, and L. R. Weinmann and W. E. Licking, both of Oakland, amici curiæ for respondents.

CURTIS, Justice.

This is an action to set aside deeds of alleged community property, made by decedent husband without the consent of his wife.

The decedent, Alexander J. Trimble, and plaintiff Elizabeth G. Trimble were married on April 17, 1892, and lived together as husband and wife up to the time of his death. On December 21, 1915, they purchased with community funds a house and lot, herein called the Fruitvale property. On February 1, 1920, they contracted to purchase an orchard, herein called the Contra Costa property, and payments were completed and a deed taken August 21, 1925. Each of the deeds was in the names of both spouses. Early in 1929, Alexander Trimble became seriously ill, being confined to his bed with a nurse in constant attendance. On May 23, 1929, he made deeds of the above-mentioned properties in favor of his children, defendants herein, reserving a life estate to his wife. He died testate June 19, 1929. By the terms of his will, all of his property was left to his wife. On October 29, 1929, she commenced this action to set aside the deeds to defendants. The trial court found that all of the land was community property; that it was conveyed to the defendants for valuable consideration; that as a result the defendants were owners of the Fruitvale property, subject to plaintiff's life interest therein; and that plaintiff was entitled to a one-half interest in the Contra Costa property, subject to administration of the decedent's estate. Plaintiff appealed.

[1, 2] There are two issues of fact which must be considered prior to any discussion of the law. The trial court found that both parcels of land were community property. Appellant contends that under the presumption established by section 164 of the Civil Code, where property is acquired by a married woman and her husband, they become tenants in common, a one-half interest therein being the separate property of the wife, and the remaining one-half interest being the community property of the spouses. See Dunn v. Mullan, 211 Cal. 583, 296 P. 604, 77 A. L. R. 1015, Estate of Regnart, 102 Cal. App. 643, 283 P. 860. This presumption is, of course, rebuttable, and the trial court found that it had been overcome by the evidence. While the record is meager, we have concluded that the finding may be upheld. One witness testified to an express declaration of Mrs. Trimble that all of the property was community property. One of the sons testified that his father had declared with reference to the Contra Costa property that "he had bought a place for himself to take care of his future, in case he would lose his job, he would have an income for himself the rest of his life." This declaration, according to the witness, was made in the presence of Mrs. Trimble. There is, of course, no doubt that the property was purchased with community funds, and the presumption of gift by the husband may be deemed sufficiently controverted by the evidence.

The second issue of fact is presented by the deeds to defendants. They are entitled "Deeds of Gift" and recite a consideration of "love and affection." In spite of this language, however, the court found that the true consideration was a promise by the children to pay for the medical expenses and nurse's compensation during his illness. There is testimony in the record showing that the plaintiff attempted to discharge the nurse, and that the children, at the decedent's request, agreed to keep her and pay her wages; but there is no evidence at all to show that this obligation was undertaken as consideration for the transfer of the properties. Our examination of the record convinces us that the instruments are what they purport to be, namely, deeds of gift, and that there is no evidence to support the finding of the court that they were transfers for valuable consideration.

[3-5] The determination of these two issues of fact leaves for decision practically

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

one question of law and that is the legal effect of these two gift deeds executed by Alexander J. Trimble to his children, the defendants herein. The two parcels of land involved herein were acquired by Mr. and Mrs. Trimble at different dates. The respective rights of husband and wife in community property are determined by the law in force at the date of its acquisition. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; McKay v. Lauriston, 204 Cal. 557, 269 P. 519. In 1915, when the Fruitvale property was acquired by the Trimbles, the law in force gave to the husband the management and control of the community property, but prohibited him from making a gift thereof or conveying the same without a valuable consideration unless the wife in writing consent thereto. Section 172, Civ. Code. In 1920, when the Contra Costa was contracted for, and in 1925, when the deed to said property was received, the statute gave the husband the same management and control of the community real property, but provided that the wife must join with him in executing any instrument by which the community property or any interest therein is sold, conveyed, or incumbered. Section 172a, Civ. Code, as originally adopted in 1917 (St. 1917, p. 829). It will thus be seen that while the section of the Code in force on the respective dates when the two parcels of real property were acquired differed in some respects, yet in each case the statute required the wife either to join in or consent to a deed made by the husband during the lifetime of the wife, whereby he sought to convey an interest in community property. Section 172, Civil Code, at the time the Fruitvale property was acquired, required her signature or consent in case there was no consideration for the deed, and section 172a Civil Code, at the time of the acquisition of the Contra Costa property required her signature or assent to all conveyances of the community real property. Conveyances of community property acquired since the effective dates of these Code sections by a husband without the consent, either oral or written, of the wife, have been before the courts on several occasions. It has been held, almost without exception, that such conveyances are not void but are voidable as to the wife's half of the community property and valid as to the husband's half. The following cases so hold: Dargie v. Patterson, 176 Cal. 714, 169 P. 360; Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67; Pretzer v. Pretzer, 215 Cal. 659, 12 P.(2d) 429, 430; Rice v. McCarthy, 73 Cal. App. 655, 239 P. 56; Schelling v. Thomas, 96 Cal. App. 682, 274 P. 755; Pomper v. Behnke, 97 Cal. App. 628, 276 P. 122. The only apparent conflict in the decisions is found in the case of Bone v. Dwyer, 74 Cal. App. 363, 240 P. 796. If the opinion in that case contains anything in conflict with the doctrine above announced, it is out of line with the authorities in this state. In Dargie v. Patterson, supra, the deceased made a gift of community property without the consent of his wife. The latter, after the death of her husband, sought to set aside the deed under section 172 of the Civil Code, as amended in 1891 (St. 1891, p. 425), which provided that the husband could not make a gift of community property unless the wife in writing consent thereto. This court held that the deed should be set aside as to one-half of the property, but that it was valid as to the husband's half. In Lahaney v. Lahaney, supra, the court passing upon the same question quoted with approval (page 328 of 208 Cal., 281 P. 67, 69) the following statement from Dargie v. Patterson, supra, at page 718 of 176 Cal., 169 P. 360: "The only logical conclusion is that the wife's right to assail the conveyance where, as here, the action is brought after the husband's death, is limited to an undivided half of the property. During his lifetime the husband, notwithstanding the statutory limitation upon his power of disposition, is the owner of the community property. The proviso attached to section 172 does not impair his right to dispose of the property, so far as concerns his own interest, and that of those claiming under him." Continuing, this court in the Lahaney Case said, "There would thus seem to be no escape from the effect of our holding in the case of Dargie v. Patterson, supra, wherein this court upheld the gift to a stranger of the husband's one-half of the community property and only set aside his conveyance as to the wife's, or widow's, undivided one-half interest therein."

In the more recent case of Pretzer v. Pretzer, supra, the same question was before this court, and in deciding it we said: "A deed to community property, executed without the wife's consent, while ineffective as to her interest, is valid and binding as to the husband's one-half interest. [Citing authorities.] This being so, the grantee named in such a deed would acquire an interest in the property and the deed should not therefore be decreed to be wholly void and should not be canceled. From what we have said, it follows that the portion of the judgment canceling the deed is erroneous, as is also the portion quieting respondent's [the wife's] title to all of the property as the wife was the owner of but an undivided one-half interest therein."

We must recognize the force and effect of these decisions of the courts of this state as decisive of the question here involved unless a different rule than that approved in the authorities cited above prevails since the amendment of section 1401 of the Civil Code in 1923 (St. 1923, p. 29). Prior to the amendment of 1923 of section 1401 of the Civil Code, on the death of the husband one-half of the community property went to the wife, and the other half was subject to his testamentary disposition, and in the absence of such disposition went to his descendants, provided there were descendants (Civ. Code 1915, § 1402). By said amendment (now incorporated in the Probate Code as section 201), on the death of either husband or wife one half of the community property belongs to the survivor, and the other half is subject to the testamentary disposition of the decedent, and in the absence of such disposition, goes to the surviving spouse, subject to the provisions of section 1402, Civil Code, which are not material here. This section of the Code (1401), in providing for the descent of one-half of the community property of the decedent spouse, simply announces a rule of succession to community property after the death of one of the spouses, and does not purport to fix or define the interest of the spouses in the community property during the life of the spouses. Estate of Phillips, 203 Cal. 106, 263 P. 1017. The rights of the spouses in community real property, as we have seen, is controlled by section 172a of the Civil Code already referred to. The authorities we have cited, as previously shown, hold that by this section of the Code the husband may, without the consent of his wife, dispose of by deed his half of the community property, and such conveyance is binding upon his wife after his death. This right was in no way dependent upon nor limited nor affected by the provisions of section 1401, Civil Code, either before or after its amendment in 1923.

But even if the right of the husband to dispose of his interest in the community property by gift deed, without the consent of his wife, were in any wise changed by the amendment of 1923, section 1401 of the Civil Code, this legislation would affect only community property acquired since that date, and would not in any way affect or impair the right of the husband by such a gift deed to convey property then owned by him and acquired previous to the effective date of that amendment. His rights in the community property as fixed by law in force at the time of its acquisition were vested rights, and the statute should not be construed so as to deprive him of any such rights. Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. As was said by this court in that case, "The operation of the amendment must be confined at least to community property acquired after its passage."

In the recent case of McKay v. Lauriston, 204 Cal. 557, 269 P. 519, the provisions of section 1401, Civil Code, as amended in 1923, giving the wife testamentary power over her one-half of the community property was before this court in a controversy between the husband and the devisees of his deceased wife. The property involved had been acquired after the marriage of the parties. The wife died after the amendment of section 1401 in 1923, the exact date of her death being August 16, 1926. She left a will by which she attempted to bequeath to her two daughters one-half of a parcel of land which was the community property of herself and husband. It was claimed by her devisees that, although the property was acquired prior to 1923, the devise was valid as the deceased died subsequent to the amendment of section 1401 in 1923. In deciding that question this court said (page 565 of 204 Cal., 269 P. 519, 522): "It is claimed, however, by appellants that by the subsequent amendment of section 1401 of the Civil Code in 1923, which section was in force as thus amended at the date of the death of said Hattie A. McKay, she was given power to make testamentary disposition of one-half of the community property. There is no question but that by said section 1401 of the Civil Code, as amended in 1923, the wife at her death has been given the power to dispose by will of whatever interest in community property she may have at the time of her death. We have already seen, however, that at the time said real property was acquired the provisions of the Code then in force gave to the wife no right in the community property which she could dispose of by will. Could a subsequent statute or an amendment to the statute in force at the time the property was acquired invest the wife with a right which she did not possess prior to the enactment of said statute or amendment? This question has frequently been before the courts of this state, and particularly in proceedings where the nature and extent of the interest of the wife in the community property of herself and husband have been the subject of controversy. It has been consistently and repeatedly held by this court, beginning with the case of Spreckels v. Spreckels, reported in 116 Cal. 339, 58 Am. St. Rep. 170, 36 L. R. A. 497, 48 P. 228, down to cases of recent determination that amendments whereby it was sought to lessen, enlarge, or change in any manner the rights of the respective spouses in community property will not be given retroactive effect so as to affect the respective rights of the parties in community property acquired prior to the enactment of such amendments. [Citing authorities.]"

From the foregoing authorities we are of the opinion that the deeds executed by the deceased without consideration and without the consent of his wife are valid conveyances as to one-half of the property sought to be conveyed, but may be avoided by his wife as to her half of said community property. This action was instituted for that purpose, and it must, therefore, be held that subject to her life estate, she is the owner of one-half of said two parcels of land and the defendants are the owners of the other half.

Under the ruling as just stated, it will be necessary to modify the judgment rendered by the trial court. By its judgment upon the theory that said deeds were executed for a valid consideration, the trial court found and adjudged that, subject to the life interest of Elizabeth G. Trimble, the defendants were the owners of the whole of the Fruitvale property, and of an undivided one-half of the Contra Costa property. This judgment correctly determines the rights of the parties as to the Contra Costa property, but it is erroneous in awarding to the defendants the whole of the Fruitvale property, subject to said life estate. Only one-half of the Fruitvale property should have been adjudged to belong to the defendants, subject, of course, to the life estate of their mother.

[6] Another claim is made by the appellants which should be disposed of. This claim involves the debts of the deceased and the costs and expenses of administration. It is contended by the appellants that in no event should the court exempt the husband's half of the community property from the payment of his debts and the costs and expenses of the administration of his estate. Appellants, therefore, ask that the judgment be further modified by the insertion therein of a provision subjecting the husband's half of the community property to the payment of these debts and expenses equally with the community property left undisposed of by him. This contention would have considerable force if the husband had conveyed one-half of all the community property belonging to him and his wife. But, as we have seen, his conveyances were made subject to a life interest of his wife in both parcels of land. Furthermore, there was a third piece of real property, which was community property, and which was not included in either of said deeds. The value of this third parcel is not disclosed by the evidence. It further appears that in addition to these three parcels of real property, the community property left by decedent included a bank deposit of approximately $3,000 and a life insurance policy of $5,000. There is no showing made that the deceased was at the time of his death indebted to any appreciable amount. Nor is it shown that the costs and expenses of administration were other than those usually incurred in the settlement of an estate of the size and character of that left by the decedent. It does appear that the court made an order for a family allowance of $100 per month in favor of the surviving wife. Attorney's and executors' fees and incidental expenses should not, in the natural order of events, bring the cost of administration up to anywhere near the $8,000 and over of the community property undisposed of by the husband. It seems quite evident to us that the amount of community property in the hands of the executors, exclusive of the wife's one-half of the two pieces of real property involved herein, is more than sufficient to meet all the legitimate and necessary costs of administration without subjecting the husband's half to the payment of any part of said costs and expenses.

The judgment, in so far as it adjudicates the rights of the parties herein to the Contra Costa property, is affirmed, but is reversed as to the Fruitvale property, with directions to the trial court to enter a judgment in accordance with the views herein expressed.

We concur: WASTE, C. J.; PRESTON, J.; THOMPSON, J.; SEAWELL, J.

LANGDON, Justice.

I dissent. I cannot find authority or logic to support the proposition that the husband has a legal "right" to do something which the statute specifically prohibits him from doing, namely, give away the community property or any part thereof without the consent of the wife. If the statute prohibits it, it is voidable at the instance of the party injured, the wife. The "one-half" theory does not arise out of any right of the husband, but as a result of the fact that nearly all the cases were concerned with situations arising after the husband's death, where the *wife's right* was less, prior to the 1923 amendments. At that time she could ordinarily not receive more than one-half of the community property; hence, giving her one-half fully protected her rights. Today, giving her one-half does not protect the right which the statute expressly confers upon her: To take the whole of the community property, upon death of the husband, unless the husband give one-half away *by will*. A voidable conveyance by the husband is not a substitute for a will.

The majority opinion relies upon the decision in Dargie v. Patterson, 176 Cal. 714, 169 P. 360, 362, which has been followed in many subsequent cases and which should be accepted as a sound and adequate statement of the controlling principles. But an examination of that decision shows that it does not support the conclusion reached by the foregoing opinion.

The rule, and the reasons for the rule, are thus stated in Dargie v. Patterson, supra, 176 Cal. 720, 169 P. 360, 362: "The widow, upon showing the existence of the facts bringing a conveyance within the terms of the proviso of section 172, is entitled, so far as her rights are concerned, to treat that conveyance as a nullity. She has the right to avoid the conveyance so far as is necessary for the protection of her interest in the property conveyed. *As to her, the case must be regarded as if there had been no conveyance*, and the property had, accordingly, *remained a portion of the community* *estate, of which the husband had died seized.* Upon his death, she succeeded to one-half of such community estate as heir of the husband." (Italics ours.)

It is at once obvious that the conclusion of the Dargie Case, to the effect that the wife could recover but one-half of the property, cannot determine the problem presented by the instant case. At the time of that decision the wife's right in community property upon the death of the husband was to receive one-half thereof, save in certain exceptional cases not relevant here. Since 1923, the wife has had the right to receive the whole of the property, in the event that the husband makes no other testamentary disposition thereof. Her *interest*, therefore, is greater than it was at the time of the Dargie decision, and, in accordance with the principles therein declared, her recovery must be greater. We must, in judging plaintiff's claim, regard this case "as if there had been no conveyance," and the property had "remained a portion of the community estate." Dargie v. Patterson, supra. The decedent made no testamentary disposition of his property save to his wife. Consequently she is entitled to succeed to the whole thereof.

Nor can there be any distinction between the two pieces of land on the ground that one was *acquired* prior to the 1923 amendment. It is settled that the right of inheritance is completely subject to legislative control, and that the statute enlarging the wife's right to succeed to community property upon the husband's death applies to property acquired prior to its enactment. Estate of Phillips, 203 Cal. 106, 263 P. 1017. The instant case falls within the rule of the last-mentioned decision. There is no attempted testamentary disposition by the husband to third persons. He has simply made a gift in violation of the statute prohibiting such gifts. The wife has the right, as explained in the Dargie Case, to restore the property to the estate. Thereafter she is entitled to the share she would receive under the rules of succession, which, as we have seen, is in this case the entire property. See McMurray, Community Property, California Jurisprudence 1930 Supplement, § 87, p. 126; Modern Woodmen of America v. Gray, 113 Cal. App. 729, 734, 299 P. 754. Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67, is not in conflict with this view, for in that case the wife was one of the grantees, and claimed under the deed. See 18 Cal. Law Rev. 400. But more important is the fact that the husband in said case died September 9, 1922, prior to the 1923 statute discussed herein, and the question could not, therefore, have been raised.

The judgment should be reversed.

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219 Cal. 351

TRAVELERS' INS. CO. OF HARTFORD, CONN., v. FANCHER et al.

S. F. 14528.

Supreme Court of California.

Nov. 1, 1933

1. Husband and wife 🔑249.

Where premiums of policy issued on life of husband after coverture are paid entirely from community funds, policy becomes community asset.

2. Insurance 🔑586.

Designation of beneficiary in life policy initiates in beneficiary's favor an inchoate gift of policy proceeds, which, if not revoked by insured prior to death, vests in beneficiary at time of insured's death.

3. Husband and wife 🔑265.

Husband may not make gift of entire community property without wife's written consent.

4. Husband and wife 🔑265.

If husband makes gift of entire community property without wife's written consent, entire gift is not a nullity, but is subject only to wife's right to have it revoked as to half to which she would be entitled upon his death, and as to remaining half, gift is valid.

5. Husband and wife 🔑273(1).

One-half of proceeds of policy issued on life of husband who died intestate, premiums for which were paid out of community assets, *held* payable to widow in her own right and not as administratrix; other half being payable to children who were named as beneficiaries (Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1).

> Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1, provides that upon the death of either husband or wife, one half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent and, in the absence thereof, goes to the surviving spouse.

LANGDON, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action in interpleader to determine title to proceeds of life insurance policies, by the Travelers' Insurance Company of Hartford, Connecticut, against Dorothy H. Fancher, individually and as administratrix of the estate of Charles R. Fancher, deceased, and others. From the judgment, named defendant appeals.

Judgment modified and, as modified, affirmed.

For prior opinion, see 20 P.(2d) 1004.

John S. De Lancey, of Oakland, for appellant Dorothy H. Fancher.

Probasco & McClean, of Oakland, for appellant William H. Hadly.

L. R. Weinmann and W. E. Licking, both of Oakland, for respondents.

PER CURIAM.

This cause was ordered transferred from the District Court of Appeal to this court for further consideration. After giving the opinion of that court considerable study, we are of the opinion that it correctly disposes of the questions presented on this appeal, and we, therefore, adopt it as the opinion of this court. It was prepared by Mr. Justice Knight, concurred in by Presiding Justice Tyler and Justice Cashin, and is as follows:

Charles R. Fancher and appellant were married during the year 1918, and lived together thereafter until June 25, 1931, at which time Fancher died intestate, leaving surviving him as heirs at law appellant and two minor children, aged ten and twelve years, respectively. During the marriage and between April, 1925, and April, 1929, inclusive, on Fancher's application, the plaintiff insurance company issued to him five policies of life insurance, aggregating $48,000, wherein he designated the children as beneficiaries. All of the premiums were paid out of community assets, and for that reason upon Fancher's death conflicting claims arose between appellant and the guardian of the children as to the proceeds of said policies; each claiming the full amount thereof. Thereupon the insurance company instituted this action in interpleader to have the rights of the respective claimants judicially determined. In deciding the matter the trial court followed the decision rendered in New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61, holding that inasmuch as the policies were paid for out of community funds they constituted community assets, and that therefore the widow was entitled to one-half of the proceeds thereof as her share of said community assets, and that the children were entitled to the remaining half as beneficiaries named in said policies. The widow has appealed, contending that the rule of the New York Life Ins. Co. Case, supra, awarding the widow only half the proceeds of the policy was in effect nullified by the amendment of 1923 to section 1401 of the Civil Code (which, in 1931, with slight changes, was superseded by section 201 of the Probate Code); and that under the provisions of said amended section she is entitled to the entire proceeds of the policies regardless of the fact that the children were named therein as beneficiaries. We are unable to sustain such contention.

[1-4] As shown by a number of later cases, among them being Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 238 P. 1034, and Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 243 P. 431, the doctrine of the New York Life Ins. Co. Case, supra, is based on the following legal propositions: First, where premiums of an insurance policy issued on the life of the husband after coverture are paid entirely from community funds, the policy becomes a community asset. Second, the designation of a beneficiary in a policy of life insurance initiates in favor of the beneficiary an inchoate gift of the proceeds of the policy, which, if not revoked by the insured prior to his death, vests in the beneficiary at the time of his death. Third, the husband may not make a gift of the entire community property without the written consent of the wife; but if he attempts so to do, in contravention of the wife's rights (as in the case of a life insurance policy, by naming a third party as beneficiary) the entire gift is not a nullity; it is subject only to the wife's right to have it revoked as to the half to which she would be entitled upon his death; and as to the remaining half, the gift is valid and immune from attack by the surviving wife or by those who under the law of succession would inherit the husband's share in case he made no disposition thereof up to the time of his death. Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, and Dargie v. Patterson, 176 Cal. 714, 169 P. 360.

[5] Section 1401 of the Civil Code, as amended in 1923 (St. 1923, p. 29, § 1), relied upon by appellant, read as follows: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse. * * *" As appears from the decisions construing said amended section, two changes were brought about thereby: First, the wife was given the right, equal with that of the husband, to make testamentary disposition of the one-half of the community property to which she would be entitled if she survived the husband, a right which she did not before possess; and, secondly, it changed the rule of inheritance by substituting the surviving wife for the husband's descendants as successor to his half of the community property in case he made no disposition thereof up to the time of his death. Estate of Phillips, 203 Cal. 106, 263 P. 1017, 1019; McKay v. Lauriston, 204 Cal. 557, 269 P. 519; Siberell v. Siberell, 214 Cal. 767, 7 P.(2d) 1003. It is with this latter change that we are here concerned, and with

respect thereto the Supreme Court in the Estate of Phillips, supra, said: "It is clear that said section 1401, as amended in 1923, in so far as it provides that the wife in case of the death of her husband intestate shall inherit the half of the community property which was subject to his testamentary disposition, is a statute of descent and succession, or a rule of inheritance." And in amplification of the foregoing statement the court goes on to point out that under the law of succession, as it stood prior to the amendment of 1923, the husband's half of the community property remaining undisposed of at the time of his death, went to his descendants, and not to his surviving wife; and that under the law of succession as changed by the amendment of 1923, the husband's share of the community property remaining undisposed of at the time of his death goes to his surviving wife and not to his descendants. Nowhere, however, as appellant seems to contend, does the amended Code section purport to vest in the wife, during the lifetime of the husband, any additional ownership in his share of the community property, nor give to her any right of control thereover. It will be seen, therefore, that the enactment of said amended section in no way affected the power of the husband, as it theretofore existed under the doctrine of the Spreckels and Dargie Cases, supra, to make a valid gift of his share of the community property to take effect upon his death. In other words, the fact that by virtue of said amended section the surviving wife is substituted for the husband's descendants as inheriting heir to his share of the community property remaining undisposed of at the time of his death places her in no better position to assail the validity of the husband's gift of his share of the community property, after his death, than his descendants would have been in, under the rule of the Spreckels and Dargie Cases, if such substitution had not been made. Moreover, it is evident that if appellant's theory of the law were adopted, a husband would be precluded entirely from making any provision for his children out of his share of the community property, by way of life insurance, unless his wife consented thereto, or unless in addition to designating his children as beneficiaries in the policy, he confirmed the inchoate gift thus made to them by executing a will to that effect. We do not believe that such was intended to be the law.

Appellant's position in this matter doubtless finds support in the last sentence of section 24 of the treatise on community property in the 1930 supplement to California Jurisprudence; also in a single paragraph in the decision in Modern Woodmen of America v. Gray, 113 Cal. App. 729, 299 P. 754, which apparently was based on the comment made in California Jurisprudence. In this regard the author of the treatise says: "The widow, therefore, under the rule of succession prior to 1923 would take at least one-half of such proceeds notwithstanding the special contract with the insurance company (citing Civ. Code, §§ 1401, 1402). Since 1923, if the reasoning in New York Life Ins. Co. v. Bank of Italy is to prevail, she should receive all of such proceeds." Section 24 of said treatise. The "reasoning" of the New York Life Ins. Co. Case upon which the author bases the foregoing conclusion is not particularized in the treatise; nor is any authority cited in support of the conclusion except California Law Review, wherein the same author severely criticised the decision in the New York Life Ins. Co. Case, supra. Whether or not such criticism was justified is wholly unimportant at this time, however, because by judicial process the doctrine of the New York Life Ins. Co. Case, supra, has long since become the well settled law of this state. The Supreme Court denied a hearing of the appeal before that court; and as indicated, since then the decision has been cited and quoted approvingly in a number of cases, the last one being Dixon Lumber Co. v. Peacock (Cal. Sup.) 19 P.(2d) 233, 234, wherein the court said: "It has been determined that an insurance policy in legal contemplation is property and that the proceeds of a policy, the premiums on which have been paid from the community, are community property. New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61; Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 243 P. 431. It has also been held while the insured may have the right, by contract with the company, to change the beneficiary in such a policy without the wife's consent where she is originally named as such, yet any such change without her consent and without a valuable consideration is voidable as to her, as she may maintain an action after his death to recover her one-half of the community. New York Life Ins. Co. v. Bank of Italy, supra, and Blethen v. Pacific Mutual Life Ins. Co., supra." Furthermore, a careful analysis of the decision in the New York Life Ins. Co. Case fails to disclose any reasoning which in our opinion warrants the conclusion that since 1923 the surviving wife is entitled to all the proceeds of a life insurance policy issued and paid for under the circumstances present in that case. Consequently we are unable to subscribe to such conclusion, or to follow the dictum to that effect in the case of Modern Woodmen of America v. Gray, supra.

The form of judgment entered in the present case, however, requires modification. Pursuant to stipulation of appellant's counsel and in accordance with the prayer of appellant's answer, the trial court awarded appellant's half of the proceeds of said policies to her as administratrix, etc.; whereas, under the authorities above cited she is doubtless entitled to the same in her own right, without qualification, as her share of the community assets. Therefore, to that extent the judgment is modified, and as thus modified it will stand affirmed, respondents to recover their costs of appeal.

LANGDON, Justice.

I dissent, for the reasons expressed in my dissent in Trimble v. Trimble (Cal. Sup.) 26 P.(2d) 477, this day filed.

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219 Cal. 384

PERRY v. D. J. & T. SULLIVAN, Inc., et al.

S. F. 14891.

Supreme Court of California.

Nov. 1, 1933.

Rehearing Denied Nov. 29, 1933.

1. Negligence 🔑55.

Contractor and subcontractor employed on building each owed to other's employees same duty of exercising ordinary care as was owed to public generally (Civ. Code, §§ 1708, 1714, 3281).

2. Negligence 🔑55.

Where subcontractor's foreman voluntarily assumed to refasten ladder used by contractor's employees after ladder had been unfastened by subcontractor's employees, he owed them duty of using due care to make ladder safe (Civ. Code, §§ 1708, 1714, 3281).

3. Evidence 🔑595.

In determining whether subcontractor used ordinary care to refasten ladder used by building contractor's employees, jury were entitled to make legitimate inferences to establish other facts not directly in evidence (Civ. Code, §§ 1708, 1714, 3281).

4. Negligence 🔑136(16).

Whether subcontractor's foreman who undertook to refasten ladder used by building contractor's employees knew that ladder had formerly been fastened at top *held* for jury (Civ. Code, §§ 1708, 1714, 3281).

5. Negligence 🔑136(22).

Whether subcontractor's foreman undertaking to refasten ladder used by building contractor's foreman was negligent in not refastening ladder at top *held* for jury (Civ. Code, §§ 1708, 1714, 3281).

6. Negligence 🔑136(27).

Whether use of ladder by building contractor's foreman upon assurance by subcontractor's foreman, who had undertaken to refasten ladder, that it was safe, was contributory negligence, *held* for jury.

7. Negligence 🔑113(1).

Where gist of action by contractor's foreman for injuries from fall of ladder was failure of subcontractor's foreman, who had assumed to make ladder safe, to refasten ladder at top, it was unnecessary to plead assurance by subcontractor's foreman that ladder was safe.

8. Negligence 🔑119(6).

In action to recover for failure of subcontractor's foreman to refasten ladder at top, evidence that foreman assured contractor's foreman that ladder was safe *held* admissible, though such assurance was not pleaded.

9. Master and servant 🔑302(1).

Where lowering of roof by subcontractor unfastened ladder used by building contractor's employees, refastening of ladder and assurance of safety for inspection purposes *held* within scope of employment of subcontractor's foreman.

10. Negligence 🔑66(1).

Where subcontractor's foreman had undertaken to refasten ladder used by building contractor's employees, assurance that everything was all right and that it was all fixed could not be limited to bottom of ladder only, but referred to entire ladder.

11. Negligence 🔑119(7).

Where complaint alleged that ladder causing accident to contractor's foreman came unfastened while subcontractor was raising roof, there was no variance where subcontractor was engaged for that purpose and proof showed that ladder became unfastened when roof was lowered to final position after being raised.

12. Damages 🔑132(1).

$22,000 *held* not excessive for serious injuries sustained when building contractor's foreman, 45 years of age, and making daily wage of $10, fell from unsecured ladder.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Charles L. Perry against D. J. & T. Sullivan, Incorporated, and another. From a judgment for plaintiff, defendants appeal.

Judgment affirmed.

For prior opinion, see 19 P.(2d) 519.

Daniel W. Burbank, C. F. Laumeister, William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

Ford & Johnson, Oliva & Fall, David A. Fall, and Fletcher A. Cutler, all of San Francisco, for respondent.

CURTIS, Justice.

This is an appeal from a judgment for damages in favor of respondent and against appellants in the sum of $22,000, in an action to recover on account of personal injuries sustained by the plaintiff in a fall from a ladder. After the return of the verdict by the jury in favor of the plaintiff, defendants' motion for judgment notwithstanding the verdict was denied, and after the entry of the judgment, the defendants' motion for a new trial was denied.

The facts of the case in the main are not disputed. The Industrial Construction Company was engaged, under a contract with the owner of a one-story building located on Fillmore street, in San Francisco, in converting said building into a two-story brick building. This work required the raising and lowering of the existing roof, and the contract to perform this particular work was let by the Industrial Construction Company to a subcontractor, D. J. & T. Sullivan Company, hereinafter referred to as the Sullivan Company. John B. Smith was foreman in charge of the work by the Sullivan Company. Charles L. Perry was the foreman of the Industrial Construction Company and had under his direction the carpenters, bricklayers, and laborers engaged in the remodeling of the building. The Sullivan Company was an independent contractor, and it is conceded that under the contract the sole work of said company was to raise and lower the roof of the building. It was the duty of the employees of the Industrial Construction Company to do all of the bricklaying, carpentry work, and the work of removing the roof from its connection with the original concrete walls so that the Sullivan Company could raise it. The system employed was to raise the roof of the building to an elevation of approximately 8 inches higher than the height to which the exterior walls were to be constructed, in order to permit the bricklayers and carpenters sufficient room to work; build up the old walls to the correct height; and then lower the roof back on the newly constructed walls. The Sullivan Company, in pursuance of said plan of work, raised said roof to the required height of 8 inches above the ultimate height of the building and left the job. The work of raising the roof was done by means of screws and it was not necessary for any of the employees of the Sullivan Company to go upon the roof. It was necessary, however, for the carpenters and employees of the Industrial Construction Company to have access to the roof, and Perry, the foreman of said company, removed the glass from a skylight which was on the roof, and constructed a ladder running from the second floor through the skylight to the roof. It was necessary because of the limited space that the ladder should be placed in a position almost perpendicular, about 80 degrees to 85 degrees. In order to render this ladder more safe, it was spiked at the bottom to two double planks, one on top of the other, which extended on joists across an opening to the lower floor. The double planks in turn were spiked to the joists. Perry had ordered one of his men to fasten the ladder with spikes at the top, but not being satisfied with the job, had himself put an extra collar around the top of the ladder to make it safe. This collar consisted of two pieces of wood, 1 inch by 6 inches, on each side of the ladder and a third piece of the same dimensions across the front of the ladder to prevent the ladder coming forward toward any one coming up it. On August 28, 1929, when Perry came to work in the morning, he found that Sullivan Company was there ready to lower the roof onto the walls. Approximately an hour before the accident Perry saw Smith, foreman for the Sullivan Company, and another employee of that company, loosening the base of the ladder by striking it with a jack handle. Perry did not see any one loosen the top of the ladder, and there is no testimony as to whether or not the bottom of the ladder was completely loosened by the foreman and employee of the Sullivan Company. Thereafter the crew of workmen under the supervision of Smith lowered the roof onto the walls of the building and prepared to leave the job. According to the testimony of Perry, he was on the lower floor when Smith called to him to come up to the second floor and go up to the roof to see that the job of lowering the roof had been properly performed. Smith at the time was standing at the base of the ladder. Perry noticed that the bottom of the ladder had been refastened and shook it up and looked down to see that it was secure. Smith said, "Everything is all right." Perry inquired, "Did you fasten that ladder?" Smith replied, "That is all fixed." Perry, who was a large man weighing approximately 190 to 200 pounds, then ascended the ladder. Just as he reached the top of the skylight, the ladder swung out from the top, he tried to grasp hold of something but missed, and he fell through the opening of the second floor to the concrete floor of the first story. Perry was so seriously injured that he was in the hospital for two months, and at the time of the trial two years later was unable to carry on his work as construction foreman. There can be little doubt, and it seems to be conceded by both sides, that the proximate cause of the accident was the fact that the ladder, being unfastened at the top, swung outward and away from the curb of the roof. When the roof was lowered the weight bore directly on the ladder, with the result that the nails and cleats holding the top of the ladder pulled out and broke so that when the roof came down, the top of the ladder went up, wholly free and loose, through the opening in the skylight.

Under these facts and circumstances, as above narrated, who was responsible for the accident, and who is liable for the serious injuries suffered by the plaintiff Perry? The jury found that the accident was due to the negligence of the defendant Smith, and brought in a verdict for $22,000 against said defendant and his employers, the Sullivan Company. Appellants challenge the verdict of the jury, and the judgment based thereon, and contend that, conceding the facts to be as above set forth, respondent's own negligence was the sole proximate cause of his injuries, and that it can be said, as a matter of law, that appellants were not negligent. With this contention we cannot agree.

[1] Appellants first argue that respondent Perry in nailing the ladder to the roof, which the Sullivan Company was under contract to lower, must be deemed as to said company to be a mere licensee to whom said appellants owed no duty other than to refrain from willful and wanton injury. This is not the true rule. There is no dispute as to the status of the employers of the respondent, and the appellant Smith respectively while on the premises of the owner. Each was there under contract to perform separate and distinct work on the building, independent of each other. As to the owner, they were each invitees, and as to each other they were strangers between whom there was no privity of contract. As such contractors, they owed to the employees of each other the same duty of exercising ordinary care for their safety during the progress of the work as they owed to the public generally. Sections 1708, 1714, and 3281, Civ. Code; 8 Thompson on Negligence, § 685; Hall v. Barber Door Co. (Cal. Sup.) 23 P.(2d) 279. The duty of care in the instant case was not only to refrain from the infliction of willful or wanton injury, but to exercise ordinary care for the safety of the employees of the other contractor on the building.

[2] Appellants claim that the responsibility for the safe condition of the ladder was the responsibility of the respondent and not the responsibility of the appellants, and insist that inasmuch as there was no duty on the part of the appellants to keep the ladder in a safe condition, they should not be held liable for any injury resulting from the fact that the ladder was not in a safe condition. They point out, that, according to the testimony of Perry himself, the only duty of the Sullivan Company was to raise and lower the roof, that all of the carpentry work was to be done and performed by employees of the Industrial Construction Company, for whom he was foreman, and that he had never seen any of the Sullivan Company men on the roof, and that it was not necessary for them in the discharge of their duties to have access to the roof. It is true that if none of the employees of the Sullivan Company had interfered in any manner with the ladder, no responsibility for any injury occurring as a result of the dangerous condition of the ladder could be placed upon the Sullivan Company or their employees for the reason that there was no obligation upon them to keep the ladder in a safe condition. But that is not the situation here. Smith, foreman for the Sullivan Company, did interfere with the ladder and voluntarily assumed control of it, and having done so, he thereby undertook the duty of using ordinary care to see that it continued to be safe for the use of others engaged in work on the building, whose duties required them to make use of the ladder. We do not wish to state that by the voluntary assumption of control over the ladder by Smith, he thereby became an insurer of the safety of any one thereafter using the ladder. We do state, however, that by such voluntary assumption of control over the ladder he did incur the duty of using ordinary care to the end that no injury should occur as a result of a dangerous condition of the ladder. "The true rule of liability on the part of a voluntary undertaker should be this, that he be required to exercise that degree of care and caution which would seem reasonable and proper from the character of the thing undertaken." Avery v. Thompson, 117 Me. 120, 103 A. 4, 6, L. R. A. 1918D, 205, Ann. Cas. 1918E, 1122. "One who undertakes to do an act or perform a service for another is bound to use reasonable care and skill in the performance thereof and is liable for his failure in this respect, although his undertaking was purely voluntary and he was not under any obligation to do such act or perform such service." 45 Cor. Jur. p. 646; Parker v. Hodgson, 172 Ala. 632, 635, 55 So. 818. There is in the record the testimony of Perry that about an hour prior to the time of the lowering of the roof he saw Smith and another employee of the Sullivan Company knocking the base of the ladder loose with a jack handle and that subsequently he observed Smith refastening the ladder at the bottom. It follows that, although in the first instance no duty was cast upon the appellants to replace or maintain the ladder in a safe condition, when they voluntarily assumed the duty of refastening the ladder, they were obligated to exercise due care in the performance thereof, and were liable for any failure in that respect.

[3, 4] Appellants' position is that they did exercise due care in refastening the ladder at the base thereof, and that since there is in the record no evidence to show that appellants knew that the ladder had been fastened to the roof at the top, and no evidence that the appellants ever had any actual or constructive notice or knowledge that the ladder had become unfastened when the roof was lowered, in the absence of such knowledge, appellants cannot be said to be negligent in failing to remedy some defect in the ladder, of which they were in total ignorance. It must be borne in mind that the jury, in determining the question of whether or not the appellants used ordinary care under the circumstances, were entitled to indulge in legitimate inferences to establish other facts not directly in evidence. Moore v. McDonald, 122 Cal. App. 61, 9 P.(2d) 556. While it is true that there is no direct evidence in the record that Smith had actual notice of the fact that the top of the ladder had been fastened to the roof—there being in the record no evidence as to whether Smith did or did not actually know of the fastening of the ladder at the top—there is direct evidence from which it is reasonable to infer that Smith did have notice of this fact. Thus, the evidence relative to the physical facts of the case would justify the inference of actual knowledge. The fact that the ladder, which was approximately 20 feet in height, was placed in an almost perpendicular position, together with the fact that a collar of wood had been nailed around the ladder at the top, would of itself be notice to anyone handling the ladder that the ladder was fastened at the top. These facts coupled with the fact that Smith knocked the ladder loose at the bottom preparatory to lowering the roof clearly demonstrates that Smith was in fact aware that the ladder was fastened at the top. Otherwise, why should he pry the ladder loose at the bottom? If Smith did know that the ladder was fastened at the top, and we think the inference is logical and reasonable that he did know, then he must have known of the possibility that the lowering of the roof would detach the ladder at the top and render it unsafe for the use of the workmen on the building. This being so, when he undertook to fasten the ladder, it was his duty in the exercise of ordinary care to ascertain whether or not the top of the ladder had in fact become unfastened and if it had become unfastened to replace it in the condition it was in before he assumed control over it.

[5] Although appellants concede that the proximate cause of the accident in this particular instance was the fact that the top of the ladder, being unfastened, swung away from the wall, nevertheless they question whether the ladder unfastened at the top was so dangerous as to require appellants to appreciate the danger of leaving it unfastened at the top. They point out that subsequent to the accident two other men descended the ladder before it was refastened and neither of them fell to the floor below. This fact is not conclusive proof that the ladder was not in a dangerous condition. Undoubtedly, after the serious accident to Perry, the men using the ladder exercised extreme caution in the use of the ladder and the conditions were not therefore the same. Moreover, it is a fact that the man who descended the ladder immediately after the accident to Perry was a much lighter man than Perry. Whatever may have been the reasons why the other men were not injured, the fact remains that Perry was injured, and that the jury were satisfied from the surrounding circumstances that the danger should have been anticipated by the appellants.

We are satisfied from the foregoing discussion that it cannot be said, as a matter of law, that appellants were not negligent under the facts and circumstances of this case. They are not, therefore, entitled to a reversal upon the ground that the evidence was insufficient to justify or sustain the verdict or judgment.

[6] Appellants further argue, however, that notwithstanding the fact that it may be determined that they were negligent, the plaintiff Perry was himself cognizant of the condition of the ladder when he ascended it, or in the exercise of due care should have been cognizant of it, and being contributorily negligent, he is equally responsible for the accident and cannot hold appellants therefor. They point out that Perry, having himself nailed the ladder to the roof, and having put the collar around it to render it safe, unquestionably knew that it had been fastened at the top, and knew that it was necessary in order to be safe for use that the ladder should be fastened at the top. Therefore, they claim that he was charged with knowledge of the fact that the lowering of the roof would unloosen the ladder at the top, and that when he used the ladder without first ascertaining definitely that it was in fact fastened he was guilty of contributory negligence, which barred his recovery. This argument would undoubtedly be persuasive were it not for the fact that Perry was expressly assured by Smith, foreman for the appellants, that the ladder "was all right, that it was all fixed." Under the circumstances that Perry had seen Smith take charge of the ladder, knocking it loose at the bottom, and had ascertained that it had been refastened at the bottom by Smith, Perry was entitled, as an ordinarily careful man, to rely upon this assurance of safety on the part of Smith. He was entitled to believe that Smith, having unloosened the

ladder from its former safe condition, had replaced it to the same condition. This assurance of safety by Smith changed the situation as far as Perry was concerned and relieved him of the charge of being contributorily negligent in failing to appreciate the danger arising from the unsafe condition of the ladder. We are satisfied that the verdict of the jury which impliedly found that respondent was not guilty of negligence, either primary or contributory, finds sufficient support in the evidence.

[7] Appellants' complaint that the negligence which is pleaded by the plaintiff in his complaint is that defendants "negligently and carelessly unfastened and left unfastened said ladder at the top thereof, and thereby rendered said ladder dangerous and unsafe," and insist that the assurance of safety cannot, therefore, form a predicate for a charge of negligence against Smith. It is true, as alleged, that the assurance of safety by Smith is not specifically pleaded as the basis of the action by the plaintiff. But, it is to be noted, the assurance of safety is not relied upon plaintiff as the foundation of his cause of action. The gist of the negligence upon which the action is predicated is the failure of the appellants, after they had assumed to make the ladder safe for use, to fasten the ladder at the top after it had become detached by the lowering of the roof. The effect of the assurance of safety was merely to relieve the plaintiff Perry from the claim of negligence in failing to ascertain for himself the condition of the ladder which, in the absence of an assurance which falsely lulled him into a sense of security, he, as an ordinarily prudent person, would have been under a duty to ascertain. It was not necessary, therefore, that this assurance of safety be pleaded and set forth as an element in a charge of negligence alleged therein.

[8, 9] As a verbal act which negatived appellants' charge of contributory negligence, the testimony setting forth this assurance of the safe condition of the ladder was clearly relevant and admissible. And we are satisfied that it was, under the circumstances, within the scope of Smith's employment as foreman of the Sullivan Company. As such foreman it was his duty to raise and lower the roof and to do so as expeditiously as possible. The trend of the directions of Smith to Perry to go on up to look over the work indicated that Smith had undertaken to fix the ladder in order that the work performed by his crew of workmen could be inspected by Perry without any delay, and that his motive in urging Perry to go on up the ladder, saying, "You had better go up there, look it over, because I have to get out of here," was that Perry might give his approval of the work, and the workmen for Sullivan Company could remove their equipment and leave the job immediately.

[10] Appellants attempt to minimize the effect of this assurance by claiming that Smith was only referring to the bottom of the ladder and was not referring to the top of the ladder at all. We cannot accede to this suggestion. We do not believe that when Smith stated to Perry, "Everything is all right; it is all fixed," he intended merely to assure Perry that the bottom of the ladder was all right, and that Perry was not entitled to accept this statement as an assurance that the top of the ladder was safe. Undoubtedly, Smith was referring to the whole situation, and Perry was fully justified in accepting it as such.

[11] Appellants also complain of a variance between the pleading and the proof in that the complaint alleges that the ladder became unfastened while the defendants "were engaged in *raising* the roof of said building," whereas the proof showed that the ladder became unfastened while defendants were lowering the roof. It is true that appellants were in fact lowering the roof at the time the ladder became unfastened, but this lowering of the roof was done in the course of their general contract to raise the roof of the entire building to change it from a one-story to a two-story building, and the loosening of the ladder may, therefore, properly be said to have occurred while appellants were doing the job of raising the roof of the building.

[12] Appellants, in addition to their principal contention above discussed, set forth various errors in the conduct of the trial. These errors would not justify a reversal of the judgment. They consist in the main of alleged errors committed in the giving or refusing to give certain instructions. We have examined with care these instructions, as well as the instructions as a whole, and find no error was committed. We are also convinced that the alleged prejudicial conduct of respondent's attorney did not have the effect claimed by appellants and a reversal would not be warranted upon that ground. And, in view of the uncontradicted evidence with reference to the very serious nature of respondent's injuries, considered in conjunction with the fact that at the time of the injury he was an able-bodied man, 45 years of age, making a daily wage of $10 per day, we cannot say that the verdict rendered was excessive.

We have not deemed it necessary to discuss, either generally or in detail, the authorities cited to us by the opposing parties. They each involve different facts and elements and none of them is exactly analogous. We think that an extended discussion would serve no good purpose, and would tend to confuse rather than clarify the issues herein involved.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.; SEAWELL, J.

AMERICAN CO. v. CITY OF LAKEPORT et al.*

Sac. 4623.

Supreme Court of California.

Oct. 30, 1933.

Rehearing Granted Nov. 27, 1933.

1. Municipal corporations 🔑73.

Statute requiring city purchasing property at sale for delinquent assessments to levy and collect taxes to pay amount of assessments into redemption fund does not violate constitutional provision prohibiting Legislature's imposing taxes on municipal corporations or inhabitants thereof (Gen. Laws 1931, Act 8209, § 12; Const. art. 11, § 12).

2. Taxation 🔑28.

Constitutional provision prohibiting delegation of power to levy taxes or assessments *held* inapplicable to municipal corporations (Const. art. 11, § 13).

3. Municipal corporations 🔑871.

Statute requiring city to transfer into redemption fund amount of delinquent street improvement assessment where city purchases property does not violate constitutional provision prohibiting gift or loan of public money (Gen. Laws 1931, Act 8209, § 12; Const. art. 4, § 31).

4. Municipal corporations 🔑871.

Funds directed toward public purpose are not within constitutional prohibition against gift or loan merely because of incidental benefit to individual (Const. art. 4, § 31).

5. Municipal corporations 🔑864(1).

Constitutional provision limiting city's indebtedness does not apply to liability imposed by law, as distinguished from one incurred voluntarily (Const. art. 11, § 18).

6. Municipal corporations 🔑864(1).

Constitutional debt limit *held* inapplicable to contingent obligation arising under statute requiring city purchasing land at delinquent assessment sale to pay amount of assessment into redemption fund (Const. art. 11, § 18; Gen. Laws 1931, Act 8209, § 12).

7. Municipal corporations 🔑865(2).

Happening of contingency of assessment becoming delinquent, whereupon city purchasing at delinquent sale was required to pay amount of delinquent assessment into redemption fund, *held* not "incurring of debt" within constitutional provision limiting indebtedness (Gen. Laws 1931, Act 8209, § 12; Const. art. 11, § 18).

[Ed. Note.—For other definitions of "Debt" and "Incur," see Words & Phrases.]

8. Municipal corporations 🔑864(1).

City's obligation to pay money into bond redemption fund on purchasing land at delinquent street improvement assessment sale was not voluntary, but was imposed by statute, so that constitutional debt limit did not apply (Gen. Laws 1931, Act 8209, §§ 11, 12, 16; Const. art. 11, § 18).

9. Taxation 🔑1.

Where tax is imposed upon all property without regard to benefit received, it is "tax" and not "special assessment."

[Ed. Note.—For other definitions of "Special Assessment" and "Tax; Taxation," see Words & Phrases.]

10. Constitutional law 🔑284(2).
Municipal corporations 🔑968(½).

Where general tax is levied to meet delinquencies in assessments for local improvements, notice and hearing are unnecessary (Gen. Laws 1931, Act 8209, §§ 12, 16(a); Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

11. Constitutional law 🔑284(2).
Municipal corporations 🔑968(½).

Where street improvements could be made by use of ordinary funds derived from general taxation without notice and hearing as to individual benefits, deficiency in fund raised by local assessment could be met by general taxation without notice and hearing (Gen. Laws 1931, Act 8209, §§ 12, 16(a); Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

12. Constitutional law 🔑283.
Municipal corporations 🔑957(1).

Statutes requiring city purchasing lands at delinquent street improvement assessment sale to pay amount thereof into redemption fund, and, if necessary, to levy tax therefor, do not deny due process (Gen. Laws 1931, Act 8209, §§ 12, 16(a); Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

13. Municipal corporations 🔑956(1).

Commencement of foreclosure proceeding could not, under statute, be deemed excuse for nonperformance of city's duty, after purchasing at delinquent assessment sale, to levy taxes to pay into redemption fund amount of delinquent assessment (Gen. Laws 1931, Act 8209, §§ 11, 12, 16(a).

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 32 P.2d 622.

14. Municipal corporations ⚷956(1).

City purchasing property at delinquent assessment sale has mandatory duty to levy taxes to pay amount of assessment into redemption fund, where city has no funds with which to do so (Gen. Laws 1931, Act 8209, §§ 11, 12).

15. Municipal corporations ⚷956(1).

In statute respecting sale for delinquent assessment, section respecting levy of special tax not exceeding 10 cents on each $100 of assessable property *held* not limitation on section requiring city as purchaser at delinquent assessment sale to levy and collect taxes to pay amount of assessment into redemption fund (Gen. Laws 1931, Act 8209, §§ 12, 16(a).

In Bank.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Mandamus proceeding by the American Company against the City of Lakeport and others. From a judgment sustaining a demurrer to the petition, petitioner appeals.

Reversed, with directions.

Orrick, Palmer & Dahlquist, of San Francisco, for petitioner.

H. A. Postlethwaite, and Samuel W. Gardiner, both of San Francisco, Nutter & Rutherford, and A. P. Hayne, all of Stockton, and O'Melveny, Tuller & Myers and James L. Beebe, all of Los Angeles, amici curiæ.

E. C. Pyle, of Los Angeles, amici curiæ, for Paul B. Hammond, Theodore E. Hammond, Harry H. Duryea and others.

William H. Hazell, of Lakeport, Norman E. Malcolm, of Palo Alto, and Leon Thomas David, of Los Angeles, for respondents.

James H. Mitchell, City Atty., of Burbank, A. L. Sebille, City Atty., of Brawley, and H. F. Orr, City Atty., of Ventura, amici curiæ.

Everett W. Mattoon, Co. Counsel., and R. C. McAllaster, Deputy Co. Counsel, both of Los Angeles, amici curiæ, for L. O. McKelley.

LANGDON, Justice.

This is an appeal from a judgment of the superior court of Sonoma county, sustaining, without leave to amend, respondents' demurrer to petitioner's application for a writ of mandate. The case involves the construction and constitutionality of certain sections of the Improvement Bond Act of 1915.

In 1925 the city of Lakeport commenced proceedings under the Improvement Act of 1911 (Stats. 1911, p. 730, as amended; Deering's Gen. Laws 1931, Act 8199) to improve Main street in said city. Its resolution of intention declared that the work would be paid for by special assessments levied upon an improvement district described therein. The contractors performed the required work, but the property owners failed to pay the assessments. Thereupon the contractors procured the issuance of bonds to them, evidencing the unpaid assessments, under the Improvement Bond Act of 1915 (Stats. 1915, p. 1441, as amended; Deering's Gen. Laws 1931, Act 8209). Assessments which became due in 1927, 1928, and 1929 were not paid, and, in accordance with section 12 of said act, a sale of the properties was held. No purchaser appeared, and the tax collector made an entry reciting a sale to the state. Petitioner became the assignee and holder of delinquent bonds in the principal amount of $9,755.33, and sought to compel the city to levy taxes to provide funds for the payment thereof. The petition alleges that the city and city treasurer have failed and refused to transfer money from the city treasury into the bond redemption fund, and that the tax collector has failed to demand and the city has failed to levy or collect any tax to pay the delinquent assessments. Respondents demurred to the petition on three chief grounds: First, that the statute imposes no mandatory duty on the city to provide such funds by taxation; second, that, if such a mandatory duty does exist, the statute imposing it is unconstitutional; and, third, that, if any such valid obligation exists, it is limited in amount to 10 cents on each $100 of assessable property. The lower court in an elaborate opinion considered these issues, and held that sections 12 and 16 of the act were unconstitutional solely on the ground that they constituted a denial of due process of law. We are unable to agree with this conclusion, and are of the opinion that the statute is valid, that it imposes a duty upon respondents which is enforceable by mandamus, and that the petition should have been granted.

It is first necessary to state the important provisions of the statute. The Improvement Bond Act of 1915 provides a method of issuing bonds to represent assessments, the assessments being levied under some other statute such as the Vrooman Act of 1885 (Deering's Gen. Laws 1931, Act 8194), the Street Opening Act of 1903 (Deering's Gen. Laws 1931, Act 8198), or the Improvement Act of 1911. Improvement Bond Act of 1915 (Deering's Gen. Laws 1931, Act 8209) §§ 1, 2. These other statutes provide for the levy of assessments, and the Improvement Act of 1911 also permits bonds to be issued; but the assessments or bonds under said act are in specific sums on particular parcels of property, usually in odd denominations, and payable on varying dates. The Improvement Bond Act of 1915 provides for a more marketable type of security, bonds issued serially in even denominations, secured by assessments payable at the same time and in the same manner as general taxes. Sections 6, 8. The unpaid assessments constitute a trust fund for the payment of principal and interest of the bonds. Section 11(a). When an assessment becomes due and is unpaid, the methods of enforcement indicated in sections 11, 12, and 16 become applicable.

Section 12, which is the provision invoked by petitioner, reads in part as follows: "Upon default in payment, the lands securing such installments and assessments *shall be sold* in the same manner in which real property in such city is sold, for the nonpayment of general municipal taxes, and be *subject to redemption within one year* from date of sale in the same manner as such real property is redeemed from such delinquent sale, and upon failure of such redemption shall in like manner pass to the purchaser. The *city may be the purchaser* at any delinquent sale in like manner in which it becomes or may become the purchaser of property sold for nonpayment of the general municipal property tax, and in the event of its so becoming the purchaser *shall pay and transfer into said redemption fund the amount of the delinquent assessment and of the delinquent interest* thereon upon which said sale is made. In cases where the municipal property tax is collected by county or city and county officials and sales for nonpayment of such taxes are made to the state, the state shall be the purchaser at any such sale hereunder, but shall hold the title acquired at such sale upon behalf of the city and shall account to the city for any moneys received upon redemption or from the sale of such property, *the city* for the purposes of this act *being deemed the real purchaser.*" This last provision applies to respondent city, the taxes of which are collected by the county tax collector. The section further provides: "In the event of there being *no available funds* in the treasury with which to make such payment, the tax collector shall delay the entry of the certificate of sale until such funds are available, *making demand in the meantime upon the city council that a suitable amount be included in the next tax levy for* the purpose of providing funds with which to make such payment; provided, however, that the period of redemption from such tax sale shall not be extended thereby nor the rights or privileges of the property owner be thereby in anywise affected."

Section 11, subdivision (c), provides that for nonpayment of any assessment or installment, upon order of the city council, the same may be collected by a foreclosure suit in the superior court. This is declared to be "a *cumulative* remedy."

Section 16, subdivision (a), provides: "The city council *may*, and in the event of demand by the tax collector therefore as provided in section twelve hereof *must*, at the time of fixing the annual tax rate and levying the taxes to be collected for general municipal purposes, levy a *special tax* upon the taxable property in the city for the purpose of paying for the lands *purchased or to be purchased* at such tax sales, but not to exceed for each local improvement *ten cents on each one hundred dollars of assessable property.*"

These are the relevant provisions of the statute which is under dispute. The attack which respondents make upon it relates to its constitutionality, and also to its interpretation. Numerous amici curiæ have appeared on both sides of the controversy, and these are not wholly in agreement upon the grounds for their respective positions. However, as to the constitutional questions, there is no dearth of authority in point, and we therefore proceed first to their solution.

[1] Article 11, § 12, of the California Constitution, reads as follows: "The *Legislature* shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other *municipal purposes*, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." The contention of respondent is that the statute violates this section, in that the Legislature has imposed a tax upon the property within the city for a purely municipal purpose. But it is clear that the Legislature has not, by sections 12 and 16, levied a tax. It has merely fixed the liability of the city to pay for property purchased, and has required the city to levy and collect taxes in an amount suitable for this purpose. In several cases arising under statutes having similar provisions, it has been held that there was no interference with the powers of the municipality. Macmillan Company v. Clarke, 184 Cal. 491, 194 P. 1030; People v. Lodi High School District, 124 Cal. 694, 57 P. 660; Hallahan v. City of Port Angeles, 161 Wash. 353, 297 P. 149. In the last-named case the court said (297 P. 149, 150): "Nowhere in the act is there any imposition of a tax upon the city, or the inhabitants thereof, but the act makes it a condition precedent to the ordering of a local improvement, and the payment thereof by local assessments, that the guaranty fund shall be created. The city may or may not order a local improvement, but, if it does, the assessment for the benefit of the guaranty fund must be made, and this is imposed by the city and not by the act of the Legislature. Since the tax is imposed by the city and not by the Legislature, the act is not in conflict with * * * the Constitution. * * *"

[2] Section 13 of the same article of the Constitution is also invoked by respondents. It provides that the Legislature "shall not del-

egate to any special commission, private corporation, company, association or individual" the power to levy taxes or assessments. This section is inapplicable to a municipal corporation, and hence constitutes no objection to the statute. Gadd v. McGuire, 69 Cal. App. 347, 231 P. 754; City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433.

[3, 4] Article 4, § 31, of the Constitution, prohibits any gift or loan of public moneys; and it is argued that, if the city is compelled to pay the delinquent assessments, it will thereby make a gift of public funds to private bondholders. This precise question was considered by us in Stege v. City of Richmond, 194 Cal. 305, and we there said at page 318, 228 P. 461, 466: "The argument assumes that in the improvement of streets the work is a private matter. On the contrary, such work is for a public purpose. The city might have expended its general funds for that purpose." It is well settled that funds directed toward a public purpose are not within the constitutional prohibition merely because of incidental benefits to individuals. Veterans' Welfare Board v. Jordan, 189 Cal. 124, 208 P. 284, 22 A. L. R. 1515. In a similar case, Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, the court said at page 138, 70 A. L. R. 166: "But the laying out and improvement of streets, alleys, sewers, and the like is essentially a public purpose benefiting the entire community, although the work is done in but a portion of the city, and, in the absence of any legislative restriction, each portion of the city might be thus improved at the general public expense, and no taxpayer could be heard to complain thereof. In other words, in order to erect any public improvement by the creation of special improvement districts, both general benefits to the municipality and special benefits to particular property must be conferred. * * * When, therefore, the Legislature provided that, as to special improvement districts created in the future, a fund shall be created to insure the prompt payment of bonds and warrants issued in payment of such improvements, it but modified the special improvement district law to impose upon the general public, within the municipality, a conditional obligation to pay a small portion of the cost of erecting the public improvement, whereas it might have, lawfully, imposed a much greater burden upon the municipality. * * * That the purchasers of bonds or warrants shall, in the future, have greater security for the payment thereof than they have had in the past, is but incidental to the public purpose of the act before us, and does not militate against its validity." See, also, Imboden v. City of Bristol, 132 Tenn. 562, 179 S. W. 147.

[5, 6] Article 11, § 18, of the Constitution, prohibits a city from incurring "any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors. * * *" It is contended that the liability imposed by sections 12 and 16 of the act is violative of this provision. The answer to this objection has already been given in several prior decisions in this state, and it is briefly, first, that the constitutional provision does not apply to an obligation or liability imposed by law as distinguished from one incurred voluntarily by the municipality; and second, that the liability under the act is not direct, but dependent upon several contingencies, namely, that the assessment become delinquent; that no person appear at the sale to purchase the property; and that the owner fail to redeem it after sale.

The rule that the inhibitions of the constitutional debt limit do not apply to contingent obligations has long been settled in this state. In Doland v. Clark, 143 Cal. 176, 76 P. 958, 960, where a city by certain contracts agreed to pay for certain services for five years at a monthly rate, it was held that there was no violation of article 11, § 18, the court saying: "It is evident that they [the contracts] did not create any liability at the time they were executed, except a contingent future liability. * * * The amounts to become due on completion of the contracts by appellant might never become a liability upon the city. A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens. * * * There may be ample funds to pay the rental when it accrues, as provided in the contracts, if it ever should accrue." See, also, McBean v. Fresno, 112 Cal. 159, 44 P. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191.

[7] It is contended, however, that the obligation, contingent at the time the bonds were issued, became fixed and certain upon the happening of the contingency—the occurrence of the delinquencies—and that the unconstitutionality thereof is now established. It is readily apparent that the happening of the contingency does not constitute the "incurring" of a "debt" within the meaning of the constitutional provision. The validity of the obligation must be determined as of the time it was incurred. Otherwise, the whole doctrine of contingent liability is repudiated, since upon the happening of the contingency an obligation validly assumed becomes illegal. Cases from other jurisdictions, involving the contingent obligation of a municipality to meet delinquencies in a bond redemption fund, have uniformly held that no violation of constitutional debt limitations resulted. See Comfort v. City of Tacoma, 142 Wash. 249, 252 P. 929; Kelly v. City of Sunnyside, 168 Wash. 95, 11 P.(2d) 230; Corey v. City of Fort Dodge, 133 Iowa, 666, 111 N. W. 6.

[8] A more conclusive answer to the objection is found in the rule that the constitutional debt limit applies only to obligations voluntarily assumed by the city, and not to those imposed by law. The general principle is well settled. In Lewis v. Widber, 99 Cal. 412, 33 P. 1128, the constitutional provision was held inapplicable to salaries of public officers fixed by statute. In City of Long Beach v. Lisenby, 180 Cal. 52, 179 P. 198, it was held inapplicable to a liability resulting from a judgment against the city for a tort. See, also, Mills v. Houck, 124 Cal. App. 1, 12 P.(2d) 101.

That the present obligation to feed the bond redemption fund by taxes is not voluntary, but imposed by statute, seems too clear for dispute. It is true that the city might have accomplished its street work by a general tax levy, or left it undone altogether. But the statute under which the city acted was intended to provide a reasonable method of doing street work, and no penalty should be imposed upon it for availing itself of the procedure. By doing so, it did not voluntarily incur an obligation. At the time it commenced the work, the liability was contingent only. Later, when the contingencies occurred, a liability was imposed upon the city by the statute, and not by any voluntary act on its part. This point has already been considered and determined by the decisions in three prior California cases, each dealing with the statute now before us. In the first of these, Federal Construction Co. v. Wold, 30 Cal. App. 360, 158 P. 340, the court observed that the liability under the Improvement Bond Act of 1915 was contingent and hence not within the constitutional restriction. The opinion also states (30 Cal. App. 361, 158 P. 340, 341): "* * * It has been held that this section of the Constitution only refers to the acts or contracts of a municipality, and not to liabilities which the law places upon municipalities. Lewis v. Widber, 99 Cal. 412, 33 P. 1128; Welch v. Strother, 74 Cal. 413, 16 P. 22; Cashin v. Dunn, 58 Cal. 581." In the second case, Stege v. City of Richmond, 194 Cal. 305, 318, 228 P. 461, 466, we said: "The city might have expended its general funds for that purpose. It was not compelled to do so, and when it elected to proceed under the general street improvement laws it simply adopted the means provided by law whereby it might in accordance therewith exercise a public function without incurring a contractual liability such as is contemplated under section 18 of article 11 of the Constitution and the bond act of 1901. When the city elects to proceed under said act, it assumes the burden of discharging its duties thereunder to the end that the assessment may be enforced. See Federal Construction Co. v. Wold, 30 Cal. App. 360, 158 P. 340."

The third case, City of Pasadena v. McAllaster, 204 Cal. 267, 267 P. 873, is cited to us by both petitioner and respondents. In it this court gave full consideration to the particular question now before us, and declared the principle hereinbefore stated. The facts were peculiar in that certain land *owned by the city* had been included in an assessment district. It was held that the liability to meet the assessments on such land was *direct* and not contingent. This determination was carefully limited to municipally owned property, for as to such property the municipality assumed a primary liability to pay the full amount of the assessment, just as any other landowner, instead of a contingent liability to feed a bond redemption fund in the event of delinquencies. In distinguishing Stege v. City of Richmond, supra, and approving Federal Construction Co. v. Wold, supra, we said (204 Cal. 277, 267 P. 873, 876): "In the Federal Construction Company Case it was held that the obligation of the municipality to purchase all property offered at delinquent sales for the nonpayment of street assessments, in the absence of other purchasers, pursuant to the Improvement Act of 1911 (St. 1911, p. 730) and the Improvement Bond Act of 1915 (St. 1915, p. 1441), was an obligation imposed on the city by law and was not a liability prohibited by the constitutional provision. In such a case the payment out of the public treasury is for the purchase of a *loan or advancement* to facilitate and make effectual the proceedings under the act *and which the city later may recover*." (Italics ours.)

The foregoing decisions, in our opinion, have established the validity of the bonds as against this ground of attack.

[9, 10] It is finally urged by respondent, and the lower court held, that sections 12 and 16 of the statute constitute a denial of due process of law in violation of both the California and United States Constitutions (Const. Cal. art. 1, § 13; Const. U. S. Amend. 14). The theory is that, if all the property owners in the city are to be taxed to meet the delinquent assessments, those outside the district are, in effect, being subjected to an *assessment* in the guise of a *tax;* and that such an assessment is invalid where they have had no notice or hearing as to any benefits which they are to derive from the particular improvement. The conclusion of the lower court that the tax was, in fact, an assessment, is unwarranted. The overwhelming weight of authority supports such a tax on two chief grounds: First, where a tax is imposed upon all property without regard to benefits received, it is a tax and not a special assessment, regardless of its purpose; and, second, where a general tax is levied to meet delinquencies in assessments for local improvements, there is no necessity for notice and hearing. The basic principle was clearly stated in a decision of this court: "Where

* * * the burden is imposed upon all of the property in the district, real and personal, according to its value and not upon the basis of special benefit, it is clear that the Legislature regarded the burden as a general tax, and not as a special assessment. This is so, even though the tax be imposed for the purpose of constructing a public improvement which may confer greater benefits on one class of persons or property than on another." Anaheim Sugar Company v. County of Orange, 181 Cal. 212, 216, 183 P. 809, 811. In People v. Whyler, 41 Cal. 351, 354, the court said: "The funds to pay for the grading of a street, may be raised by taxes levied upon all the property of a town, should the law so direct; but the tax does not become an assessment, because the latter is the mode usually adopted to raise the funds for that purpose. There is no sufficient reason for holding that the charge is not, what the Legislature declared it to be—a tax." See, also, Williams v. Corcoran, 46 Cal. 553; Sinton v. Ashbury, 41 Cal. 525; Cowart v. Union Paving Co., 216 Cal. 375, 14 P.(2d) 764, 83 A. L. R. 1185.

[11, 12] In other jurisdictions the precise question has been presented, namely, whether a municipality may constitutionally levy a general tax to meet delinquencies in special assessments for local improvements; and it has been uniformly decided in the affirmative. In Wicks v. Salt Lake City, 60 Utah, 265, 208 P. 538, the statute provided for improvement bonds payable out of special assessments against the property benefited, but provided also for a general tax to create a *guaranty fund*, to meet bond payments whenever the money derived from assessments proved insufficient. It was objected that the general taxing power could not be used to guarantee special improvement bonds without submitting the question to a vote. The court upheld the statute, saying (208 P. 538, 540): "The city had the undoubted right, if it chose so to do, to provide for the lighting of the street in question and cast the burden thereof on the taxpayers of the entire municipality. It was not under the necessity of creating a special improvement district at all. It was not incumbent upon the city to impose the burden exclusively upon the owners of the abutting property. How then can it be consistently contended that the city is without power, especially when authorized by the Legislature, to provide a special guaranty fund for the payment of the bonds in question, and interest, in the remote contingency that the necessary funds cannot be obtained from assessments made upon the abutting property?" The same question and the same answer are found in Comfort v. City of Tacoma, 142 Wash. 249, 252 P. 929, 930: "It is next urged that to tax appellants' property, which receives no special benefit, to guarantee a payment of bonds issued against other property, is contrary to law, because the whole theory of local assessments is one of special benefits to the property assessed. But this is not a special assessment. The city has the right to initiate local improvements and to pay the whole cost thereof out of general taxes. This tax is imposed on all alike, and is general in its application." To the same effect are numerous other decisions. See State v. Board of Commissioners, 124 Ohio St. 174, 177 N. E. 271; Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 70 A. L. R. 166; Klemm v. Davenport, 100 Fla. 627, 129 So. 904, 70 A. L. R. 156; and cases collected in note, 70 A. L. R. 176. These decisions establish the principle that, where public improvements of the character under consideration could be made by the use of ordinary funds derived from general taxation, without notice and hearing as to individual benefits resulting therefrom, deficiencies in any fund raised by local assessments may likewise be met by general taxation. It should be noted, also, that the method employed by our statute is in effect an *advancement* of funds, which the city may normally be expected to recover upon resale of the lands secured at the delinquent sales. See Pasadena v. McAllaster, supra; Municipal Improvement Company v. Thompson, 201 Cal. 629, 258 P. 955.

[13, 14] We come now to the final problem, that of interpretation of sections 11, 12 and 16 of the statute, and the relation each bears to the others. It is first contended by respondents that there is no mandatory duty to levy taxes under section 12, since the city may, at its election, proceed to foreclose under section 11 (c). The answer to this is found in the statute itself, which expressly declares the provision for foreclosure to be a cumulative remedy. It is different in character and procedure, and is slower, more expensive, and less efficient than the tax sale. While it may perhaps be resorted to either before or after a tax sale, the commencement of foreclosure proceedings cannot, under the act, be deemed an excuse for nonperformance of any duty under sections 12 and 16, to levy taxes to pay for property purchased. Under section 12, the city, through the agency of the state, becomes the real purchaser of the property at the sale. It thereupon becomes the duty of the city, as such purchaser, to pay the amount of the assessment into the redemption fund; and, if it has no funds with which to do so, then the taxing provisions are applicable. We find no merit in this point.

[15] The other point is more serious, and, indeed, it presents a most perplexing question. Section 12 provides that, when there are no available funds in the city treasury

with which to pay for property purchased at the delinquent sale, the tax collector shall make demand upon the city council that a "suitable amount" be included in the next tax levy to provide funds with which to make such payment. Section 16, subdivision (a), states that the city council must, upon demand by the tax collector as provided in section 12, levy a "special tax" for the purpose of paying for lands "purchased or to be purchased" at such tax sales, but "not to exceed for each local improvement ten cents on each one hundred dollars of assessable property." The question is whether section 16 (a) limits section 12, so that the maximum, which might be levied each year for the purposes stated, would be 10 cents on each $100 of assessable property. To this question we have not found, in the briefs of the parties and of amici curiæ, a completely satisfactory answer. The precise purpose of section 16 (a), and its relation to section 12, cannot be ascertained from a mere reading of the two sections, but must be arrived at by construction, reconciling the two, if this is possible. Our study of the act, with this in mind, leads us to the conclusion that section 16 (a) cannot reasonably be considered a limitation on section 12. It it were so considered, the act would thereby in its essential features be rendered inoperative, for the act makes it the duty of the city to purchase the lands and pay the assessments, by a tax levy, and section 16 (a) would limit the tax levy to a sum which might frequently be less than that required. It should be further noticed that section 16 (a) does not state that the 10-cent special tax shall provide the *only* fund for payment of the delinquent assessments; and section 12 permits payment out of available funds in the *treasury*, after transfer of such funds into the bond redemption fund. Hence respondents' view leads to this illogical result: If there are sufficient moneys in the treasury, previously raised by taxation, the whole of the assessment may be paid out of said moneys; but, if the treasury is depleted, only a 10-cent levy can be made to raise money for such payment. In other words, the payment in full of the delinquent assessments, a duty imposed upon the city by the express terms of section 12, is dependent upon the fortuitous circumstance that money is in the treasury and "available" at the time of purchase. We cannot ascribe to the Legislature the intention that the enforcement of the obligation of these bonds should be so uncertain. Section 16 (a) must, in our opinion, be considered as providing an additional means of collecting limited sums in situations, e. g., where the city, anticipating the *future* purchase of lands at a delinquent sale, might deem it wise to levy and collect the limited special tax to prepare a fund with which to meet, in part, the duty under section 12; or where, even though the lands have already been purchased and money is available in the treasury for payment, such money is designed for other uses, and the special tax permits the raising of the sum in whole or in part, without disturbing the funds in the treasury. In view of these possible explanations of section 16 (a), and of the further fact that it does not in terms limit the express provisions of section 12, we conclude that such a limitation cannot be implied.

It follows that, if the allegations of the petition are true, a mandatory duty rested upon respondents to levy and collect a sufficient tax to meet the delinquent assessments, and that petitioner is entitled to the relief sought. The judgment is therefore reversed, with directions to the lower court to overrule the demurrer and proceed to a trial of the issues, if any, raised by the answer to the petition.

We concur: WASTE, C. J.; PRESTON, J.; IRA F. THOMPSON, J.; SEAWELL, J.; CURTIS, J.

VITIMIN MILLING CORPORATION v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9142.

District Court of Appeal, Second District, Division 1, California.

Oct. 26, 1933.

1. Judgment ⚿570(4).

Statute authorizing another trial in event of mistrial which prevents rendition of verdict by jury did not authorize retrial where at time jury was discharged no undecided question remained whereon verdict could be rendered (Code Civ. Proc. § 616).

2. Judgment ⚿271.

Clerk's entry of statement in minutes ordering mistrial as to all defendants when jury returned to courtroom in absence of judge and was discharged *held* without force as order of court.

3. Judgment ⚿271.

Clerk making minute entry in absence of judge that defendant's motion for instructed verdict was granted acted within scope of his official duties where such motion had been granted by court.

4. New trial ⚿4.

Trial court in same action, and after having rendered its decision, cannot without regard to such decision direct new trial and proceed with retrial as against party whose motion for directed verdict has been granted, unless proceeding has form or effect of grant of new trial (Code Civ. Proc. § 616).

5. Judgment ⚿197.

Judgment based on order granting motion for instructed verdict was valid, though jury had not returned verdict directed.

On petition for rehearing.

Petition denied.

Prior opinion, 25 P.(2d) 469.

Fitzpatrick & Dickey, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Fred M. Cross, Deputy Co. Counsel, and Mathes & Sheppard, all of Los Angeles, for respondents.

PER CURIAM.

[1] By counsel for respondents it is suggested that this court in its decision has apparently overlooked section 616, Code of Civil Procedure, which reads as follows: "In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct." We think that, when considered in the light of its purpose, said section applies only to a case where, at the time when the jury is discharged or prevented from giving a verdict, there remains some undecided issue which could be submitted for decision by the jury. But in this case, at the time when the jury was discharged or dismissed in the manner described in this court's decision, there did not exist any undecided question or issue upon which a verdict could have been rendered. It is true that, if the ordinary procedure had been followed through, a directed verdict would have been returned. But, as we have pointed out, such return of verdict would have been merely a ministerial act in obedience to the court's order; the judicial process having been completed by the order granting the motion for a directed verdict.

[2, 3] Further, it is suggested "that the jury returned to the courtroom in the absence of the judge and was discharged, the minutes showing that a mistrial was ordered as to all defendants." We are of the opinion that, since the judge was absent, and since therefore there was no order declaring a mistrial, the entry of such statement in the minutes by the clerk was entirely without force or validity as an order of court. In this respect such entry differs from that part of said minute entry which states that "motion of defendant Vitimin Milling Corporation, a corporation, for an instructed verdict is granted," in this, that the said motion actually had been granted by the court at a time when both sides had rested after presentation of the evidence. In making a minute entry of that ruling, the clerk was acting within the scope of the proper duties of his office.

[4, 5] It is contended by respondents that the effect of the decision rendered herein is that there is no finality to an order declaring a mistrial and discharging a jury; and that such result can only be contemplated with genuine alarm. But, if we are correct in the view to which we now adhere, that there was no order declaring a mistrial, then it cannot be that the decision will have any such disastrous effect. The remaining point which seems to require further attention is to the effect that a plea of res judicata between the parties does not divest the trial court of jurisdiction, and that a writ of prohibition will not issue to stay the proceedings therein. In support of this proposition respondents rely upon Baird v. Superior Court, 204 Cal. 408, 412, 268 P. 640. We may well agree that, where a former judgment is pleaded in bar or as an estoppel on some issue, the matters involved in such plea are for the determination of the trial court, "and whether correct-

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 33 P.2d 1016.

ly or incorrectly determined, it is nevertheless the exercise of jurisdiction over the subject-matter and the parties." But the question presented by the record herein is not precisely a question arising upon a plea of res judicata. The question here is whether in the same action or proceeding, and after having rendered its decision and judgment, the trial court has power to proceed without regard to such decision, and to direct a new trial of the case. We are of the opinion that, in the absence of any proceeding having the form or effect of a motion for a new trial and an order granting a new trial, the court may not thus proceed with a retrial of the action as against a party whose motion for directed verdict has been granted, and where to all intents and purposes the trial and decision of the action in respect to petitioner has been completely closed, with a resulting judgment based upon the order for a directed verdict. We are further of the opinion that, upon the record outlined in the decision heretofore made, the judgment based upon the order granting the motion for an instructed verdict was a valid judgment.

The petition for rehearing is denied.

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135 Cal.App. 116

SKOUSEN v. HERZ et al.

Civ. 612.

District Court of Appeal, Fourth District, California.

Nov. 6, 1933.

1. Contracts ⚷147(2).

Intention of parties to written contract must be ascertained from writing alone, if possible, and not from their subsequent actions.

2. Contracts ⚷170(1).

Where meaning of written contract is doubtful, practical construction thereof by parties may be considered.

3. Appeal and error ⚷1010(1).

Finding of trial court, if there is evidence in record to support finding, is conclusive.

4. Highways ⚷113(4).

Under subcontract for construction work on state highway, subcontractor *held* not required to excavate along center of highway for selected materials as foundation for crushed rock, gravel, or hard surface, and to shape and finish shoulders and gutters.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Roy Skousen against George Herz and others, doing business under the firm name and style of George Herz & Company, a partnership, and another. From a judgment in favor of the plaintiff, the defendants other than the defendant Colton National Bank appeal.

Judgment affirmed.

William Guthrie, of San Bernardino, for appellants.

Duckworth & Harrison, of San Bernardino, for respondent.

MARKS, Justice.

This action was brought by the respondent against appellants to recover money alleged to be due for labor performed under the terms of a subcontract which provided for the doing of portions of the work of construction of a section of the state highway between Black Butte and a point one and one-half miles west of Hopkins Wells in Riverside county. The Colton National Bank was joined as defendant under an allegation that it claimed some interest in the results of the controversy. Judgment was rendered in favor of respondent in the sum of $2,575.29, and costs, and the Citizens' National Bank of Colton, successor of the Colton National Bank, for $4,700.21, which has been paid, leaving only the judgment in favor of respondent involved here.

The complaint contained six causes of action, and the answer of appellants nine counterclaims. Only one of each is considered in the briefs. The fourth cause of action of the complaint alleges that respondent performed extra work in preparing the roadbed for what was called "select materials," which extra work was of the reasonable value of $3,744. The trial court found this sum to be its reasonable value but did not include the amount in the judgment. The counterclaim in question alleged that respondent abandoned his contract before its completion and that appellants were compelled to expend the sum of $2,352.94 in completing the work. The trial court found against this allegation.

Appellants had a contract with the department of public works, division of highways of the state of California, to do all of the work of grading and paving the road in question. Their subcontract with respondent made in November, 1928, is very brief and its very brevity is the seeming cause of this action. The sole description of the work to be performed by respondent is there set out as follows: "Whereas, the party of the first part (appellants) desires to sublet a portion of the work provided to be done in and by said contract to the party of the second part (respondent); now, therefore, it is agreed by and between the parties hereto as follows, to-wit: That the said party of the second part agrees to do all of the work provided for in and by said contract of said party of the first part with the State of California, designated therein as Items No. 1 and 2."

In the "Standard Specifications" used for the work, we find this definition of the word "contract": "The written agreement covering the performance of the work and the furnishing of labor and materials in the construction of the work. The Contract shall include the Notice to Contractors, the Proposal, Plans, Specifications, Special Provisions and Contract Bonds; also any and all Supplemental Agreements amending or extending the work contemplated and which may be required to complete the work in a substantial and acceptable manner." Taking this broad definition of the contract, we find the following explanation of "Items No. 1 and 2" in the "Notice to Contractors": "Item 1. 139,000 cubic yards roadway embankment. Item 2. 550,000 station yards overhaul." In the "Proposal" these items are set forth as follows: "Item 1—Approximate Quantity—139,000 cubic yards roadway embankment at twenty-nine cents per cubic yard—Unit Price—$.29—Total—$40,310.00. Item 2.—Approximate Quantity—550,000 station yards overhaul at one-half cent per station yard—Unit Price—$.005—Total—$2,750.00." This is exactly repeated in the "contract," by which word we now mean the instrument that was executed by appellants and the department of public works, division of highways.

[1-4] There is no controversy here over the amount fixed and allowed by the trial court for "station yards overhaul." Item No. 2. We are only concerned with that work which was included within Item No. 1. The contract, and subcontract, of themselves furnish no complete description of the work to be included under "Item No. 1." Appellants contend that "Item No. 1" included the excavating of a rectangular depression twenty feet in width and between six and twelve inches in depth along the center of the entire roadway to receive "Imported Selected Materials" which were to furnish a foundation for the crushed rock or gravel or hard surface, and the shaping and finishing of the shoulders and gutters. Respondent contends that "Item No. 1" did not include either.

If we are to find any satisfactory description of the work which was to have been done by respondent under Item No. 1, we must look to the "General Specifications" for it. Under the heading "Embankment," we find nineteen paragraphs describing its construction. The only assistance we find there is the following: "Where immediate paving is contemplated, or whenever provided for in the special provisions, embankments shall be carried up in layers as above described, and in addition each layer shall be watered sufficiently to dampen the material. It shall then be thoroughly rolled with a roller complying with the requirements of article (y) of this section, and the surface of each layer shall be uniformly compacted before the next layer of embankment is placed thereon. Upon the completion of the embankment, preliminary to making subgrade, it shall be watered thoroughly by use of pipe-lines and hose." Under "Subgrade" is the following: "(a) Description.—The subgrade will be considered as that portion of the highway upon which surfacing or paving is to be placed. Before the surfacing or paving is placed, a subgrade shall be constructed, conforming to the grades and cross-sections shown on the plans and in accordance with these specifications. The finished subgrade shall be true to cross-section, hard, uniform, smooth and must support without perceptible indentation, the wheels of heavily loaded trucks, except where the soil is too sandy. (b) When the surface of the grade is finished to a flat cross-section, and is rolled smooth and compact, it will be considered as ready for the Engineer's subgrade stakes. * * * (g) Payment.—The cost of furnishing all labor, materials, tools, implements and equipment and of doing all work incidental to shaping the subgrade shall be considered as included in the price paid for macadam or crushed gravel or stone surfacing and no additional allowance will be made therefor." Under the heading "Standard Road Surfacing, Crushed Gravel or Stone," the following appears: "(h) Payment.—The price paid per ton or per cubic yard for crushed gravel or stone surfacing shall include preparing the subgrade, furnishing, hauling and placing the crushed gravel or stone and all incidental work." Under the heading "Shoulders" is the following: "(b) Payment.—The cost of furnishing all labor, materials, tools, implements, and equipment and doing all work incidental to constructing and shaping the shoulders shall be considered as included in the price paid for grading and no additional allowance will be made therefor."

In the "Special Provisions" for the construction of the road there is a detailed drawing of a cross-section of the road. A straight line passes through what is marked "Imported Selected Materials" and is called "Flat Section for Rough Grading." At a distance representing eighteen inches above is another straight line marked "Finished Grade." Of course, the cross-section shows the shoulders and gutters finished to grade with the completed excavation for the "Imported Selected Materials."

In the same specification the following appears: "Where sandy subgrade is encountered, a blanket of selected subgrade material shall be spread on the grade as shown on the following typical cross-sections and to such a height that it will compact to finished subgrade elevation. * * * Selected subgrade material will be measured in excavation at the pit and will be paid for at the price per cubic yard for imported selected material, which price shall include full compensation for excavating, loading, hauling, depositing and shaping the material and all incidental work connected therewith."

In an attempt to enlighten the trial court on the meaning of Item No. 1 as applied to this case, appellants produced R. L. Young, an inspection engineer for the state highway department, as a witness in their behalf. Mr. Young had assisted in the preparations of the estimates, plans, and specifications, and later had inspected the work. He testified that respondent had moved 139,241 cubic yards of material under the provisions of Item No. 1. He cited sections of the general specifications under headings such as "Grading," other than those from which we have quoted, as throwing light on the question at issue. His evidence tends to support the contention of appellants, though our study of it leaves us with the opinion that it is far from conclusive.

Had the trial court found that Item No. 1 included the finishing of the shoulders and gutters by respondent but did not impose upon him the duty of excavating and shaping the center of the roadway to receive the imported selected materials, such a finding would have had evidentiary support. This would have resulted in an increase in the amount recovered by respondent.

The trial court found that the parties had placed a practical construction on the contract during the progress of the work, whereby appellants were required to complete the shoulders and gutters, and respondent was obligated to prepare the excavation for the selected imported materials. While the evidence is sharply conflicting on this issue, there is material and competent evidence to support this finding.

The circumstances under which parties may put a practical construction upon a contract are clearly set forth in the following authority cited by appellants (6 Cal. Jur. 304): "The intention of the parties is to be ascertained from the writing alone, if possible, and not from the subsequent actions of one of them. However, it is well recognized that the terms of a contract may be manifested by conduct when not stated in words. And where the meaning is doubtful, the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention. The law recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. 'Contemporaneous exposition is in general the best.' Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. It is to be assumed that they best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by them contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. They are, it has been said, far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have arisen, and one of them seeks a construction at variance with the practical construction they have placed upon it. But, in construing acts or expressions as constituting interpretation by the parties of a written contract at variance with the ordinary import of its terms, it is a cardinal rule that it ought to appear with reasonable certainty that they were acts of both parties, done with knowledge, and in view of a purpose at least consistent with that to which they are later sought to be applied. The parties, in all fairness, should be bound by the construction placed by themselves upon their agreement. The legal effect of their conduct is a question for the court. It is only in relation to contracts that are uncertain, or of doubtful construction on their face, that conduct is to be looked to in aid of construction. Where the terms are plain and certain, the court will be guided by the language used and construe the intention of the parties to have been in accordance with their agreement. Where its terms are clear and explicit, the meaning not doubtful, and there is no latent ambiguity, a contract cannot be varied by subsequent conduct of the parties showing their understanding that a right under it was several and not joint, or by surrounding circumstances. The parties must be deemed bound by the contract, regardless of the results produced."

We are of the opinion that the facts of the instant case show that the terms of the contract in question are sufficiently uncertain, and the meaning of its terms so doubtful, that the parties might put a practical construction upon it. There being evidence in the record to support this finding of the trial court, we are bound by it on appeal.

It should be again observed that had the trial court taken the other permissible view of the case, namely, that appellants should have recovered their costs of shaping and finishing the shoulders and gutters, and that respondent should have had included in the judgment his cost of making and shaping the excavation for the imported selected materials, the result would have been an increase in the judgment against appellants. Respondent is not here complaining of this.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

135 Cal.App. 1

PEOPLE v. LUCE.

Cr. 2433.

District Court of Appeal, Second District, Division 2, California.

Nov. 1, 1933.

1. Criminal law ⚿419, 420(10).

Defendant's testimony that he had been with third party at time of commission of offense charged and had heard him state that he had shot a man, *held* properly excluded as hearsay.

2. Criminal law ⚿338(1).

Evidence which does not tend to disprove established facts cannot avail party offering it.

3. Criminal law ⚿419, 420(1).

Evidence which does not derive its force solely from credit to be given to witness himself, but rests also in part on veracity and competency of some other person, is inadmissible.

4. Criminal law ⚿660.

Error could not be predicated on rulings on evidence as comments on evidence where court's language was not assigned as misconduct during trial.

5. Criminal law ⚿1160.

Where trial court on motion for new trial approved jury's finding, appellate court cannot disturb finding and trial court's action unless there was no evidence to support conviction.

6. Criminal law ⚿1144(10).

Where jury were admonished to disregard remarks between counsel, it could not be presumed, in absence of showing, that remarks were prejudicial or that they were considered by jury.

7. Criminal law ⚿808½.

Instruction on flight given in language of statute *held* sufficient (Pen. Code, § 1127c).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

John W. Luce was convicted of an offense, and he appeals.

Affirmed.

Keith R. Jensen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

CRAIG, Justice.

Upon three charges of felony arising from a single transaction, a jury found the defendant guilty. He appealed from the judgments entered accordingly, and from an order denying his motion for a new trial.

[1-3] The defendant was positively identified by the complaining witness, who testified that the defendant inflicted wounds upon his person by striking him, demanding that he open the safe, and finally shot him, and fled. Other witnesses identified the defendant as having ridden with them from that vicinity immediately following the attack. A revolver and a sweater which he had discarded were recovered and also were identified. During direct examination of the defendant by his counsel and in an effort to establish an alibi, objections by the people to offered testimony that he had been with a third party at the time of the commission of the offense and had heard him state that he had "shot a man" were sustained. This was hearsay and the ruling was correct. That evidence which does not tend to disprove established facts cannot avail the party offering it, and that "evidence 'which does not derive its force solely from the credit to be given to the witness himself, but rests, also, in part, on the veracity and competency of some other person' (1 Greenleaf Ev. par. 99; 1 Phil. Ev. 169), is as self-evident as any truism," is a familiar rule. People v. Smith, 55 Cal. App. 324, 203 P. 816, 818. Other cases may be cited to the same rule: People v. Raber, 168 Cal. 316, 143 P. 317; People v. Mendez, 193 Cal. 39, 223 P. 65; People v. Flood, 41 Cal. App. 373, 182 P. 766; People v. Bailey, 66 Cal. App. 1, 225 P. 752.

[4] Error is assigned to reasons expressed for rulings upon evidence offered which are termed comments upon the evidence. It is not attempted to be construed as an improper ground for such rulings, nor was the language of the trial court here designated as misconduct, so assigned during the trial. The contention is untenable. People v. Eley, 121 Cal. App. 53, 8 P.(2d) 885; People v. Moreno, 111 Cal. App. 52, 295 P. 50; People v. Jenkins, 118 Cal. App. 115, 4 P.(2d) 799.

[5] Identification of the defendant as to stature and apparel was positive, but it is contended that the evidence was insufficient in this respect. The trial court having on a motion for a new trial approved the finding of

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

the jury "on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction." People v. Farrington, 213 Cal. 459, 2 P.(2d) 814, 815.

[6] During a controversy between counsel as to the diligence exercised in attempting to locate the said third person named by the defendant, and the possibility of his real or mythical existence, exceptions to remarks of the district attorney are said to require especial attention. However, the jury were admonished to disregard all such remarks of both counsel, and it cannot be presumed in the absence of some showing that they were prejudicial nor that they were considered by the jury. People v. Burkhart, 211 Cal. 726, 297 P. 11; People v. Cotton, 117 Cal. App. 469, 4 P.(2d) 247.

[7] An instruction on the question of flight was given in the language of section 1127c of the Penal Code, which is contended to have been erroneous. This instruction has been held sufficient for the purpose mentioned. People v. Blake (Cal. App.) 18 P.(2d) 399.

The judgments and order denying a new trial are affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

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135 Cal.App. 112

AVIS et al. v. REBHAN.

Civ. 542.

District Court of Appeal, Fourth District, California.

Nov. 6, 1933.

1. **Appeal and error** ⚿1212(1).

Construction placed on general order of reversal of judgment for one of two defendants by both counsel and court, to effect that sole issue to be determined at second trial for brokers' commission was effect of instrument signed by vendor and purchaser, *held* binding.

2. **Brokers** ⚿58.

Real estate brokers who obtained purported purchaser who signed option contract and contract to purchase which was unenforceable *held* not entitled to commission for procuring purchaser.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by W. M. Avis and F. W. Wehn, copartners doing business under the firm name and style of Avis & Wehn, against J. G. Rebhan. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Allard, Stead & Whyte, of Pomona, for appellants.

W. E. Byrne and Frank T. Bates, both of San Bernardino, for respondent.

MARKS, Justice.

This is an action by real estate brokers to recover a commission from respondent and Nellie I. Rebhan, his wife. A first trial resulted in a judgment in favor of the defendants, which was affirmed on appeal as to Mrs. Rebhan and reversed as to her husband. The reason for the reversal may be found in the following quotation: "A different situation is presented by the instrument signed by defendant J. G. Rebhan and Mrs. Wagner on August 17th at the ranch. This instrument contains the elements necessary to constitute a binding contract for the sale and purchase of the property. The terms are clearly stated and the property sufficiently described. Manual delivery of the document to either party was not necessary. * * * The pleadings and the findings are silent on the question of the delivery of this instrument. No evidence was offered to show who retained possession of the instrument after it was signed; nor was evidence offered to show whether the parties left it with any one with the understanding that it was binding and in effect. A new trial will be necessary to enable the trial court to make findings on the question presented by the agreement of August 17th, upon the evidence to be presented and upon such amended pleadings, if any, as the parties may care to file in accordance with the views herein expressed. If it should be found that Mr. Rebhan and Mrs. Wagner signed the instrument of August 17th, with the understanding that it was in effect as a binding agreement, it would follow as a matter of law that plaintiffs are entitled to their commission under the theory that they procured a purchaser who was accepted by defendant J. G. Rebhan and who entered into a valid contract with him." Avis v. Rebhan, 92 Cal. App. 178, 267 P. 898, 900.

[1] Amended pleadings were filed putting in issue the instrument dated August 17, 1923, which is quoted at length in the former opinion of the District Court of Appeal, and will not be repeated here. The case proceeded to the second trial upon the express understanding of both counsel and the trial court that the sole issue to be determined was the effect of this instrument. It is urged here for the first time that, as the order of reversal of the

judgment for J. G. Rebhan was general in its terms, the cause was reversed in its entirety in so far as J. G. Rebhan is concerned. In view of the stipulation of counsel to the contrary at the time of the second trial, and the acceptance of this stipulation by the trial court, we have concluded that no other construction should be placed on the order of reversal of the judgment for J. G. Rebhan on the former appeal than that put upon it at the time of the second trial.

It appears from the evidence of the appellant W. M. Avis that the instrument in question was written by him in the presence of J. G. Rebhan and Jennie L. Wagner, the purported purchaser, while in the road near respondent's property; that Mrs. Wagner gave him a draft for $500; that he took the instrument and the draft to his office in Pomona and cashed the draft on the next day; that he took the instrument and the money to the bank in Ontario, where the document of October 20, mentioned in the former opinion, was prepared and signed.

Respondent and Mrs. Wagner were both positive in their testimony that the instrument of August 17, 1923, was intended to serve as evidence that Mrs. Wagner had paid the $500 and to give her an option to enter into a formal contract of purchase of the property, and that it was not intended as a binding contract whereby either party could compel the other to buy or sell the property. The trial court found in accordance with this testimony.

These facts bring the case within the rule announced in Massie v. Chatom, 163 Cal. 772, 127 P. 56. There it appears that the following contract had been executed: "San Francisco, Dec. 23rd, 1904. It is hereby agreed that the Chatom ranch in Stanislaus Co., consisting of about eight thousand acres, is this day sold to George J. G. Marsily and Louis Bartlett for the sum of twelve and 50/100 dollars ($12.50) per acre and the further sum of one thousand dollars, payable $10,000 when the title to said property has been found to be good and merchantable, thirty thousand dollars July first, 1905, balance in two annual payments of equal size, due respectively July 1, 1906, and July 1, 1907. Seller to assume the commission of J. P. Massie. [Signed] A. Chatom. George J. G. Marsily. Louis Bartlett. J. P. Massie." The plaintiff brought suit to recover a commission for the sale of the property. In affirming a judgment against him, the Supreme Court said: "Appellant insists that the contract of December 23d, and the contract of December 24th, each and both were valid, enforceable contracts of purchase, as well as valid, enforceable contracts of sale, and that, therefore, he had performed all of his duties and was not obliged to wait for his compensation until the actual consummation of the sale. The premises being granted, the conclusion is irresistible. But the difficulty is that the findings of the court are wholly against him. Conceding that in its terms the contract of December 23d, is sufficiently explicit as a contract of purchase and sale under such authorities as Preble v. Abrahams, 88 Cal. 245, 22 Am. St. Rep. 301, 26 P. 99, and King-Keystone Oil Co. v. San Francisco Brick Co., 148 Cal. 87, 82 P. 849, the answer to this is that by the testimony of all the parties to it it was not intended to be a contract of sale, but a mere memorandum of price, to be used in future negotiations. To this the vendor upon the one hand and the vendees upon the other are in full accord. The result, therefore, is that if the contract in terms is more than such a memorandum, it is the result of the mutual mistake of the parties, and neither could in honesty have gone before a court to enforce it according to its terms. It would have at once been subject to reformation because of the mutual mistake. And in this case these facts were susceptible of proof by parol, since the mistake was mutual, and also because the rule excluding parol evidence which tends to vary or contradict a written contract applies only in actions between parties thereto or their privies. Marsily was in no sense a party to this contract. Code Civ. Proc. 1856; Dunn v. Price, 112 Cal. 46, 44 P. 354; Bickerdike v. State, 144 Cal. 681, 78 P. 270. With far less force does the argument of appellant apply to the option contract of December 24th. From its terms this was a unilateral contract of sale. It was a mere option to Bartlett and Marsily to purchase within a limited time upon agreed terms, without attempting in any way to bind them to make the purchase."

[2] In the instant case, in view of the testimony of both respondent and Mrs. Wagner that the instrument of August 17, 1923, was only intended to serve as a receipt for the $500 and an option, and the holding in Avis v. Rebhan, 92 Cal. App. 178, 267 P. 898, that the subsequent instruments signed by the parties were not enforceable, neither could maintain an action against the other to compel the sale or purchase of the property. Under these circumstances, the agent could not recover his commission. Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am. St. Rep. 87.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

135 Cal.App. 21

GOODE v. WILLS et al.

Civ. 8082.

District Court of Appeal, Second District, Division 2, California.

Nov. 3, 1933.

1. Negligence 🔑134(1).

In action by dancer against dancing teacher for injuries sustained while taking lesson, evidence sustained verdict for plaintiff.

2. Negligence 🔑105.

Dancing pupil did not assume risk of instructor's negligence in taking an acrobatic dancing lesson.

3. Damages 🔑131(2).

$6,000 for injuries to professional dancer earning over $300 per week, consisting of fracture of both right ankle bones requiring seven months' treatment and causing medical bills of $750, *held* not excessive.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Cynthia Goode against Walter Wills, doing business under the fictitious firm name and style of Walter Wills' Studio of Stage Dancing & Theatrical Employment Agency, and another. Judgment for plaintiff, and defendant appeals.

Affirmed.

O'Melveny, Tuller & Myers and J. R. Girling, all of Los Angeles, for appellant.

Ernest R. Orfila and John Henderson Pelletier, both of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

The plaintiff, a professional dancer, brought an action against defendant Wills, a dancing teacher, for damages sustained by her while taking a dancing lesson from defendant. The cause was tried by the court sitting without a jury and resulted in a judgment against defendant in the sum of $6,000 and costs. Defendant appeals from the judgment on the ground that the amount thereof is excessive, claiming that the plaintiff assumed the risk of a hazardous act; that defendant was not negligent; and that plaintiff was negligent, and was guilty of contributory negligence.

The evidence shows that the plaintiff is a native of England and spent several years educating herself as a professional stage dancer and for some time past has teamed with her sister in Europe. Something like a year before she met with the accident she was dancing in Paris and the south of France at the watering resorts earning from three to four hundred dollars net per week. She came to this country on a visit to her relatives and intended returning to Europe, but has been delayed on account of the accident. While here she went to Mr. Wills, defendant and appellant, for lessons in acrobatic and tap dancing, as she had never learned these branches of the art. She had taken five or six lessons and had been instructed in doing acts known as a "cartwheel." She had also been instructed in doing an act known as a "front-over." The lessons were had in a large room and on large mats or pads. Just before the happening under consideration here, plaintiff and another pupil had been under the direction of defendant's assistant and had been limbering and stretching and turning cartwheels. Mr. Wills entered and took respondent under his care with the cartwheel. In performing this act the instructor stands at the right for a right turn just far enough away to steady the pupil as she comes over. In performing the front-over the teacher stands directly in front of the pupil. The teacher either directs a front turn or directs the pupil to assume the position proper for such an act. This position is hands on the floor in front, with the left leg lifted. The act is finished by the pupil bending the right knee and with a spring turning the body over and lighting on the feet immediately in front of the instructor. The instructor catches her at the waist to steady her or catches her otherwise to keep her from falling as the need presents itself. It is agreed by all witnesses that several cartwheels had been turned by respondent for appellant, and the evidence seems to show that the teacher then took another pupil through some cartwheels. Immediately thereafter respondent was directed to step upon the mat and another act was started. This ended like a front-over, but as she was finishing this maneuver she fell, only partially supported by appellant. She gave an outcry of pain and was immediately taken to a hospital, where it was found that two bones of her right ankle had been broken.

The crux of the case lies in just what took place immediately before and during this act that ended so unfortunately.

[1] Several witnesses, including the appellant, say that the teacher was in position for a cartwheel. The other pupil so testifies but also testifies that respondent took the "stance" for a front-over. The testimony of respondent is not read the same by both parties. In appellant's reply brief is found this statement: "The plaintiff contends that defendant directed her to perform a front-over and then stood in his customary position to aid a pupil in the execution of a cartwheel." Practically the same statement is made in the opening brief. We can find no testimony to support these statements, but on the con-

trary we find quite the reverse. When in cross-examination of respondent counsel was attempting to illustrate the relative positions of the parties on a blackboard, the following took place:

"Q. Would this roughly illustrate the position of Mr. Wills? A. No, it would not. He was in front of me."

And later: "Q. In other words, he was in the same position he had previously been standing for you, while you were doing your cartwheels? A. He was nearer.

"Q. But south of you? A. Yes.

"Q. At that time you were facing sideways, to the east? A. I was facing Mr. Wills.

"Q. You turned around, and changed your position? A. Yes, I changed my position entirely.

"Q. What caused you to do that? A. He gave me instructions to put my hands on the floor, and I put my hands on the floor, and I was facing him, with my legs in the air, and I turned over.

"Q. What did he tell you at that time? A. He did not say anything while I was doing the trick. He gave me instructions for the trick, before I started it.

"Q. Did he tell you to do a bend-over or a front-over? A. He told me to put my hands on the floor, and my legs straight in the air and bend over.

"Q. He told you that? A. He told me that."

The testimony of appellant is essentially inconsistent with this testimony of respondent and is to the effect that he was in position for her to cartwheel and that she changed from doing a cartwheel to a front-over in the midst of the act.

It is testified by respondent's sister and her husband that appellant came to their place soon after the accident with respondent's clothes and told them of the accident. We quote from the brother-in-law's testimony:

"A. He said she had broken her ankle. I said 'Come in.' And as he came in the front door my wife came in the room and he sat down and I said 'How did it happen?' And he said 'Miss Goode slipped and broke her ankle.' I said, 'Good Lord, man, I have been in the theatrical business for seventeen years, and there is no excuse for anyone slipping and breaking an ankle. You were her instructor and should have caught her.' And he said 'Yes' and went all to pieces. Q. What else? A. He said for me not to worry—I asked him where she was, and he said, 'She is down at the Dickey & Cass Hospital' and for me not to worry, that he would see that she was reimbursed for her loss of time, and also her doctors' bills. That he was thoroughly covered by insurance. * * * He said, 'I guess you are right. I should have caught her. But don't worry about it. I will do the right thing by her.'"

We quote from the sister's testimony: "He said that my sister had met with an accident and had broken her ankle, that he had let her fall, but he said 'Don't worry, I will do the right thing. I am insured and will take care of the doctor's bills and see what I can do while she is unemployed'—I am trying to think of the exact words—he said he would reimburse her and try to get her so much a week while she was laid up."

It would seem that we have referred to and have recited sufficient of the testimony to demonstrate that a conflict of substantial testimony was before the trial court and that such conflict squarely presents the well-known rule that appellate tribunals will not disturb findings in such circumstances. We have carefully examined the cases cited in appellant's reply brief under the heading "The Mere Statement of the Plaintiff or General Statements of Uninformed Witnesses Does Not Create Such a Conflict." But we are not confronted with a mere statement or general statement here. Both appellant and respondent have given direct, material, and vital evidence. Certainly appellant's very able counsel do not mean to argue to us that the respondent's testimony should be characterized as a general statement and appellant's testimony as to the same event should be given a different and higher characterization.

[2] Appellant contends that the business was hazardous and that respondent assumed all risk. However, we do not think this case presents a set of facts justifying the conclusion that the acts being taught were hazardous to the degree that all risk, including negligence of the teacher himself, was assumed by the pupil. Certainly no cases cited support that premise. The trial court necessarily assumed the duty of determining whether or not there was negligence, and whether or not there was contributory negligence. The substantial evidence of either side presented at most a conflict. We cannot disturb the finding in that circumstance.

[3] Is the award of $6,000 so high that an appellate court will reverse the judgment? The case of Sawyer v. Nelson, 115 Cal. App. 490, 1 P.(2d) 1068, 1070, quotes with approval the following from Hale v. San Bernardino Valley Traction Co., 156 Cal. 713, 106 P. 83: "If a motion for a new trial upon this ground [excessive award] is denied by the trial court, we cannot reverse the judgment unless the amount thereof is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury [or the court where tried without a jury].'" With this in mind, we shall sketch the evidence. A toe dancer whose earnings amount to $300 and up per week has

both right ankle bones broken on December 1st. She is in bed six week. At the trial her doctor testifies on or about May 20th of the next year that she will require six weeks or more treatment before she is normal. Her bills for hospital and treatment aggregate $750. It would not appear that the sum allowed will fully compensate respondent.

The judgment is affirmed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

CALLAHAN v. HAHNEMANN HOSPITAL et al.*

Civ. 8813.

District Court of Appeal, First District, Division 2, California.

Nov. 3, 1933.

Hearing Granted by Supreme Court Dec. 30, 1933.

1. **Physicians and surgeons 🔑18(9).**

In action for malpractice against surgeons based on subcutaneous injection of saline solution containing glucose after operation for ruptured appendix when plaintiff was suffering from peritonitis, causing sloughing of tissues, evidence of surgeon's negligence *held* insufficient for jury.

2. **Physicians and surgeons 🔑14(1).**

Physician is required to possess only ordinary skill in profession and to use best judgment in exercising that skill.

3. **Physicians and surgeons 🔑14(2).**

Where medical experts differ on treatment in particular case, physician is not liable for malpractice if acting within reasonable limits of either opinion.

4. **Evidence 🔑574.**

In action for malpractice against surgeons, testimony of expert witnesses as to best treatment under particular circumstances is conclusive as against testimony of lay witnesses.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Josephine N. S. Callahan against the Hahnemann Hospital and others. A nonsuit was granted as to the defendant A. Walter, and a verdict was returned in favor of the defendants Hahnemann Hospital and C. J. Burnham. From a judgment in favor of the plaintiff and against the defendants Thomas H. McGavack and James W. Ward, they appeal.

Judgment reversed, with directions.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Garton D. Keyston, Grove J. Fink, and M. Mitchell Bourquin, all of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sought to recover damages for alleged malpractice. The defendants were the Hahnemann Hospital, at which plaintiff was treated; C. J. Burnham, now Dr. Burnham, who was then an externe at the hospital and who administered to plaintiff certain injections; A. Walter, a nurse who assisted Mr. Burnham; and Drs. Thomas H. McGavack and James W. Ward, the doctors in charge of the treatment of plaintiff. A nonsuit was granted as to the defendant A. Walter, and the jury returned a verdict in favor of the defendant hospital and the defendant Burnham. From a judgment on the verdict in favor of plaintiff and against the defendants Dr. McGavack and Dr. Ward, said defendants appeal.

The main questions involved on this appeal relate to the sufficiency of the evidence to sustain the verdict and judgment. We shall therefore proceed to set forth the evidence in some detail. In doing so we are mindful of the general rules controlling the action of appellate courts where the claim is made that the evidence is insufficient, but, before testing the sufficiency of the evidence offered on behalf of plaintiff, we believe it proper under the circumstances before us to set forth some of the evidence of the attending physicians who were the only experts who saw plaintiff at or near the time of the treatment.

Plaintiff's claims arise out of the treatment given her following an operation necessitated by a ruptured appendix. The results of the operation appear to have been entirely satisfactory, and it is apparently conceded that said operation was skillfully performed. The subsequent treatment complained of consisted of the subcutaneous injection of a saline solution containing glucose.

Plaintiff was a woman approximately 65 years of age. As early as 1890 she had experienced trouble with her appendix, but, after being taken to a hospital, she had jumped off the operating table. In July, 1928, the condition of her appendix became acute, and she consulted Dr. McGavack. With plaintiff's consent, Dr. Ward, a surgeon of 49 years' experience and a specialist who had performed some 4,000 abdominal operations, was called into consultation. The doctors recommended immediate operation, and plaintiff was taken

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 35 P.2d 536.

to the hospital. All preparations for the operation were made, but plaintiff changed her mind and left the hospital in an ambulance against the advice of the doctors. Her condition finally became very critical, and she again consulted the doctors, and agreed to undergo the necessary operation. On July 27, 1928, she was rushed to Hahnemann Hospital in an ambulance, and was operated upon without delay. The anesthetic was administered by Dr. McGavack, while the operative work was performed by Dr. Ward with the assistance of Dr. Cookingham. The operation revealed that the appendix had ruptured and that plaintiff was in the last throes of peritonitis.

Before describing the treatment which followed, we will quote some of the testimony relating to plaintiff's condition before and immediately after the operation. Dr. McGavack testified:

"A. We found conditions again worse, evidently with an appendix that had already ruptured, as her pain had become general through the entire abdomen, and she ceased to breathe with the abdominal muscles at all, and her temperature was somewhere around 102 and 102½, her pulse was much weaker, and at times intermittent, in contrast to what it had been on July 19th. She was beginning to show the type of face that we find with peritonitis, which is a pinched drawn expression, more or less of shock and fear, with cold extremities, and at that time some failing of the extremities in the hands and feet. Needless to say, at this time hospitalization seemed imperative, and every measure was attempted which might help her, even though she refused hospitalization. I might add that another feature, of course, was the onset by this time of marked dehydration, inasmuch as from July 19th until July 24th she had taken practically no fluid, and what fluid had been taken had been vomited, so that we were dealing with a very much dehydrated and toxic individual.

"Q. Dehydrated means what, Doctor? A. Decreased water in the tissues; removal of necessary fluids from the tissues. Those that are necessary for proper circulation.

"Q. And that she was very toxic means what? A. That she was very toxic means somewhat the picture I described, that she was absorbing poisons through an area in her abdomen, which was affecting her whole system, paralyzing the circulation, and paralyzing almost every function of the body.

"Q. And if that condition is not changed what is the ultimate result? A. The ultimate result could only be one thing.

"Q. What is that? A. Death."

Dr. Ward testified as to her condition at the hospital just before the operation as follows:

"A. Very bad; she had gone from bad to worse; she was in the throes of general peritonitis; the abdomen was distended and very tender; she was mentally dull and the lips blue and the fingernails blue and the nose pinched; the temperature was about 102 or 103—I don't exactly recall; the pulse accelerated and intermittent—only a certain number of beats coming through to the wrist. In all, a very bad picture.

"Q. You mean that the chance to save life seemed slim? A. Very slim. It was with a good deal of courage that I undertook to do for her, but I wanted to save her if I could.

"Q. You had a fear that she would die on the table? A. A very great fear."

Plaintiff's condition immediately after the operation was described by Dr. McGavack as follows:

"A. When she returned from the surgery her condition was even more critical, owing to the necessary shock of an operative procedure. She returned to her room with cold extremities, blue cyanosed extremities; her heart beats were much more weakened than before; her pulse was very rapid, running from 140 to 150 at the heart, and at the pulse the circulation was so weak the patient would not come through to the pulse, the wrist, and it was possibly only about 30 or 40 beats each minute. The pinched and drawn toxic expression of the face was present, and all the tissues were dehydrated. In other words, she was suffering from the shock of an operation, plus the most toxic type of absorption from the appendix that had been ruptured at least eight days.

"Q. Was she dying? A. Yes."

Dr. Cookingham gave the following answers to questions relating to plaintiff's condition at that time:

"Q. What opinion did you have—did you have following the operation—of the chances for the lady to live or die? A. That she would not recover.

"Q. You thought she would die? A. I did."

Dr. Ward stated that during all of his experience with cases involving abdominal surgery he had never encountered a worse case than plaintiff's in which the patient had recovered.

Following the operation, the doctors were confronted with the problem of sustaining the life of the patient. Dr. McGavack, Dr. Ward, and Dr. Cookingham held a consultation, and formed the judgment that it was essential to inject a saline solution containing 10 per cent. glucose in order to save plaintiff's life. The soundness of their judgment in this regard is not questioned. It further appears that the use of such solutions containing up to 50 per cent. glucose is a recognized and approved method of treatment. Having arrived at the above-mentioned conclusion, the three doctors then discussed the question of the method of injecting the necessary fluid and nourishment. It appears that there are two recognized and approved methods of making such injections: First, into the veins, which is called the intravenous method; and, second, under the skin, which is called the subcutaneous method. There is a third method referred to in the testimony as the "Murphy Drip," but it appears that this method is merely used as an auxiliary of the two principal methods of injection above mentioned. It further appears that such solutions containing a high percentage of glucose are not ordinarily injected by the subcutaneous method because of the likelihood of the sloughing of the tissue at the places were the injections are made. The doctors concluded, however, that, due to the toxic condition of plaintiff, the intravenous method could not be used as plaintiff's circulation was failing, and such injections would overload "the already poisoned heart." They therefore ordered the injections containing 10 per cent. glucose to be given subcutaneously. Pursuant to the doctors' directions, the injections were given subcutaneously in plaintiff's thighs by the externe at the hospital. Plaintiff's life was saved, but there was a sloughing of the tissues at the places where the injections were made. This action was brought to recover for the alleged damage sustained by reason of such sloughing.

We will repeat here some of the testimony of the attending physicians. A portion of the testimony of Dr. McGavack was as follows:

"Q. Now, Doctor, how did you determine upon the 10 per cent. solution of glucose in 2 per cent. saline? Will you tell us how and why that conclusion was reached? A. Yes, surely. Here was a patient who was extremely toxic; here was a patient who needed fluid extremely badly; here was a patient who had a failing—almost completely failing circulation. It was necessary to give this patient nourishment. It was necessary to give this patient fluid. It was impossible to give this patient nourishment or fluid through the most readily accessible channel, that is, the veins. Within 24 seconds anything going into the veins has gone entirely through your body, It was absolutely out of the question to give it by this route, because the circulation was failing, and as I say, almost stopped. Had we done so we would have given this patient a quart or more of fluid for a failing, weakened practically moribund heart, to pass through the circulation.

"Q. Moribund means what? A. Dying. It was necessary that both nourishment and fluid go in. The next most readily accessible means of absorption is by giving the fluids under the skin, and consequently we resorted to this route. We utilized the strength of the solution, as mentioned, because we wanted her to have the maximum amount we could possibly put into this particular area at one time. This was followed by the third most readily accessible method of giving fluid, and that was the Murphy Drip, or the fluid per rectum.

"Q. Now, Doctor, at the time that you prescribed the 10 per cent. solution for the hypodermoclysis, did you know at that time the possibility that it might cause sores? A. Yes.

"Q. And knowing that it might cause sores on her leg why did you do it? A. We would much rather have a chance of having our patients live than have them die with clear legs.

"Q. In other words, it was a case of saving her life? A. It certainly was.

"Q. And before you actually did it did you take consultation with Dr. Ward? A. I did.

"Q. And did he share your view? A. He did.

"Q. If the situation had not been so critical would you have used 10 per cent.? A. Probably not.

"Q. Probably not. But it was because of the crisis? A. That is right."

Dr. Cookingham testified:

"Q. * * * From the condition that you found there, would you say that she was toxic? A. Very.

"Q. What does that mean? A. Poisoned by absorptions.

"Q. And if, under this condition, some outside material had been put in the blood stream —say glucose intravenously—what effect would it have? A. It would have overloaded the already poisoned heart and possibly have resulted seriously.

"Q. It has been testified in this case there was a prescription of ten per cent. of glucose—1,000 centimeters—and two per cent. of saline, given subcutaneously. As a medical man, in your judgment, was that good medical practice? A. It was."

Dr. Ward testified:

"A. The situation was one of sustaining the patient's vitality, which was very low, and she had but a single thread to hang on. Her toxemia was very great, and it was thought if we could assist her over twenty-four hours that vitality might return, and we concluded to not give any stimulation through the veins because of her weakened heart and because of the very small collapsed veins that could be seen, and she was rather stout and the tissues flabby, and she was so thoroughly dehydrated—lost so much blood by not having received or regained any that she did receive—it was thought best to use the hypodermoclysis method which is the installation of saline beneath the skin. It was accordingly decided we should give her as much glucose as her body could burn up, the intention being to sustain and overcome the toxemia by supplying her blood stream with glucose, for glucose had helped, and she needed as much help as possible, and a ten-per-cent. solution was decided on—at least we knew it was a little more than the average, yet we thought that the emergency of the hour moved us to do that.

"Q. Did you accomplish the purpose and save her life by the treatment? A. Yes. The possible injuries to the legs were so infinitesimal compared with the great fact of saving her life, that it was a matter of simple practice to do that.

"Q. You knew at the time that the ten per cent. solution was given that there might be a sloughing of the legs and scars afterwards? A. Yes. It very often occurs when we use a simple saline, and sometimes it follows a simple hypodermic syringe.

"Q. Having in mind the condition that confronted you at the time, and having in mind the practice of medicine in San Francisco, in your opinion was the treatment administered in accord with good medical practice in San Francisco at that time? A. Yes. And it saved her life.

"Q. And that was what you were after? A. Absolutely."

We may mention the fact that not only the defendant doctors but other medical men were called by defendants to establish the fact that the procedure adopted by the defendant doctors in the situation which confronted them was in accordance with recognized and approved medical practice. Among those called were Dr. W. B. Coffey, surgeon of 43 years' experience, and the chief surgeon for the Southern Pacific Company and other companies, with 600 doctors working under his direction. He testified that under the conditions it certainly would be good medical practice to inject subcutaneously a solution containing 10 per cent. glucose and would be wrong not to do it. He testified further:

"A. I frequently give it in the Southern Pacific Hospital. I have given 25 per cent. in one case. I took a desperate chance, but took it and saved the life.

"Q. What else did it do? A. It was absorbed in this case. We do not get a breaking down in all cases. It depends on the individual and the sensitiveness of the skin. That varies. We do not know it will break down. If it does we are not a bit alarmed about it, as long as we save the life."

Dr. Leo Eloessor, a surgeon of 25 years' experience, and professor of clinical surgery at Stanford University, testified that the defendant doctors followed the recognized medical practice under the circumstances.

The sloughing of tissue referred to in the testimony occurred shortly after the injections were administered. Plaintiff nevertheless wrote a letter to Dr. Ward about one month later which read in part as follows: "Dear Loved Doctor Ward:—I owe my life to your skill. This will remain with me to the end. * * * Affectionately and Ever Yours with Deepest Gratitude, N. C. Callahan."

This action was commenced in 1929 against all of the defendants mentioned above. In support of her claims against the defendants, plaintiff produced but one medical witness, Dr. Nathan S. Housman, who first saw plaintiff in February, 1929. Dr. Housman had practiced surgery since 1921, but the testimony does not show that he had ever performed an operation in abdominal surgery or treated a case comparable to plaintiff's. Dr. Housman was on the stand on three separate occasions during the course of the trial. On the first occasion he testified that when he first saw plaintiff her limbs showed a loss of tissue and scars at the two points on her thighs. In answer to a hypothetical question he gave his opinion that this was caused by "something wrong with your solution"; that "there was too high a content of glucose in the solution." At the close of plaintiff's testimony a motion for nonsuit was argued on behalf of the defendant hospital and its attendants upon the ground that the testimony merely showed that they had carried out the instructions of the defendant doctors. Plaintiff asked and was granted leave to recall Dr. Housman. He then testified that it was recognized by the medical profession in this locality that 5 per cent. glucose in such solutions was the high safe limit for use subcutaneously because of the possibility of sloughing of the tissue. He further testified that in his opinion the percentage used in the present case "was well over 10 per cent. I would imagine around 20 and maybe 50 per cent. was used in the leg." When asked how he determined this he said, "In some cases 5 per cent. up to 10 per cent. have been given subcutaneously and it is a marked reaction without sloughing. That is why I determined that." He further stated: "There are other things that might come into this thing along with it. I did not prepare the solution or the needles. If you have a dirty needle you may get an infection causing a sloughing." A reading of the testimony of this witness on that occasion shows that it was mainly directed at the defendants other than the defendant doctors in an attempt to prove that the sloughing was caused by the injection of a solution with a higher content of glucose than that prescribed by the doctors or that it was possibly caused by the use of a dirty needle. This witness was again recalled after the defendant doctors' motion for nonsuit had been denied and after defendants had presented their testimony. He was asked: "Doctor, would there be any benefit to be expected from giving a person, if that person was in extreme shock and dehydrated, would there be any benefit to be expected in giving that person more than 5 per cent. glucose under the skin?" He answered in the negative. He was further asked: "If a person was actually in dire need of food, would there be anything surrounding such an extreme condition which would prohibit giving that glucose in the veins?" He again answered in the negative. It will be noted that the first question embodied only the elements of shock and dehydration, while the second question embodied only the element of need of food. Neither question covered the condition of plaintiff at the time the injections were prescribed when she was suffering, not only from shock, dehydration, and need of food, but was in a dying condition with failing circulation and toxemia resulting from the peritonitis.

[1] The main question before us is whether the evidence was sufficient to sustain the verdict against the defendant doctors. Appellants contend that it was not, and in our opinion this contention must be sustained. The evidence with respect to respondent's condition has been set forth above. There is no evidence to show that the diagnosis made by the attending physicians was not entirely correct. The paramount duty of the doctors under the circumstances was to endeavor to save the life of the patient. There is no evidence to challenge the judgment of the doctors in determining that an injection of a solution containing 10 per cent. glucose was essential to accomplish that purpose. There is no evidence to show that in the condition in which they found respondent a 10 per cent. solution could have been injected in the veins without defeating that purpose. In other words, it does not appear that respondent's life could have been saved by any method of treatment other than the one prescribed by the defendant doctors. Under these circumstances, it certainly was not malpractice to save the patient's life, even though this was accomplished by the subcutaneous injection of a solution containing a higher percentage of glucose than is ordinarily so injected, and even though sloughing resulted at the points of injection. While appellants make the further claim that the testimony of Dr. Housman is self-destructive and inherently improbable, we deem it unnecessary to comment thereon for, even when taken at its full face value, we believe it is insufficient to sustain the verdict.

[2] Numerous authorities have been cited in the briefs of the parties to this appeal. It appears from these and other authorities that there are three main classes of cases in which malpractice has been charged: First, those charging unskillfulness in diagnosis; second, those charging unskillfulness in the selection of a method of treatment; and, third, those charging unskillfulness in some act or omission on the part of the physician in administering the treatment. We are concerned on this appeal only with a charge of unskillfulness on the part of appellants in the selection of the method of treatment. It is a matter of common knowledge that such selection is a matter of judgment and opinion upon which the most skillful members of the medical profession will often honestly differ. It has therefore been stated that "a physician is required to possess only ordinary skill in his profession and to use his best judgment in the exercise of that skill, and, if he complies with these requirements, he is not liable for the nonsuccess of his treatment." Linn v. Piersol, 37 Cal. App. 171, 173, 173 P. 763, 764. This rule, with certain limitations, has been quite generally followed in cases involving the charge of unskillfulness in the selection of a method of treatment. 48 Cor. Jur. 1127, 1128 and cases cited; Dahl v. Wagner, 87 Wash. 492, 151 P. 1079; Dishman v. Northern Pac. Beneficial Ass'n, 96 Wash. 182, 164 P. 943; Loudon v. Scott, 58 Mont. 645, 194 P. 488, 12 A. L. R. 1487; Luka v. Lowrie, 171 Mich. 122, 136 N. W. 1106, 41 L. R. A. (N. S.) 290; Staloch v. Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. (N. S.) 712; Delahunt v. Finton, 244 Mich. 226, 221 N. W. 168; see, also, Markart v. Zeimer, 67 Cal. App. 363, 371, 227 P. 683.

[3] There is no suggestion that appellants did not possess the requisite skill nor that they did not exercise their best judgment. It is urged by respondent, however, that in the selection of the method of treatment they were required to keep within "recognized and approved methods." This may be conceded, but we have already pointed out that there is no evidence to show that they did not keep within recognized and approved methods under the extraordinary conditions which confronted them. The evidence offered by respondent was not related to the condition in which appellants found respondent at the time the subcutaneous injection was prescribed, and no witness for respondent stated what was the recognized or approved method for the treatment of that condition. But, even assuming, for the purpose of this discussion, that Dr. Housman had testified that in his opinion there was but one recognized and approved method for the treatment of such condition, which method was other than the one followed, we still believe that the evidence was insufficient. In the opinion of several other medical experts whose testimony stands unimpeached, the method selected by appellants was the recognized and approved method of treatment for such condition. In other words, if Dr. Housman's opinion may be said to be in conflict with the opinions of the several medical experts called by appellants, the case presented was one showing that the medical experts were at variance in their opinions as to the method of treatment which should have been employed. Under these circumstances, we are of the opinion that appellants could not be held liable if they acted within "the reasonable limit of either opin-

ion." Dahl v. Wagner, supra, 87 Wash. 492, 151 P. 1079, at page 1080. As was said in the last-mentioned case: "It has been the uniform holding of this court that where doctors of equal skill and learning, being in no way impeached or discredited, disagree in opinion upon a given state of facts, the courts cannot hold a defendant in a malpractice suit to the theory of the one to the exclusion of the other. * * * It is enough if the treatment employed 'have the approval of at least a respectable minority of the medical profession who recognized it as a proper method of treatment.'" In such cases it must be held that a method of treatment so recognized and approved is a "recognized and approved method," and that charge of malpractice may not be predicated merely upon the selection of such method. To hold otherwise would mean that the medical profession would be confined in their selection of methods to the use of those methods, if any, which have the universal approval of all the members of the profession, and that new or different methods, having the recognition and approval of a minority, including many of the most able practitioners, could never be employed without the risk of a charge of malpractice resulting therefrom. The progress of the medical profession should not be obstructed by placing such an unreasonable limitation upon their selection of methods of treatment.

[4] Counsel for respondent claims that there is a conflict in the evidence relating to respondent's condition at the time in question. The only evidence referred to is that of lay witnesses. We find no material conflict in this evidence, but, in any event, the testimony of the expert witnesses was conclusive on this subject. Johnson v. Clarke, 98 Cal. App. 358, 276 P. 1052. Respondent makes the further point that Dr. Housman testified that there was no condition of a patient which would justify the subcutaneous injection of a solution containing more than 5 per cent. glucose. We have above indicated that Dr. Housman's testimony was general in its nature and was not related to the condition of the patient at the time in question. He did not dispute the conclusion of appellants that an injection of a solution containing 10 per cent. glucose was essential to save respondent's life, nor did he dispute the conclusion of appellants that the intravenous injection of such a solution in a patient in respondent's condition would have endangered her life. It is therefore apparent that his testimony was inadequate to show what was the recognized and approved method to be selected for the treatment of respondent's condition or to show that appellants had in any manner violated any duty owing to respondent.

Appellants raise numerous other points relating to the pleadings, the amount of damages awarded, the rulings on instructions, and other rulings of the trial court. The conclusions which we reached make it unnecessary to discuss these questions. When the cause was submitted to the jury, the trial court should have directed a verdict in favor of appellants, and we believe that the trial court should now be directed to enter judgment in their favor.

The judgment is reversed, with directions to the trial court to enter judgment in favor of appellants.

We concur: **NOURSE, P. J.; DOOLING, Justice pro tem.**

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135 Cal.App. 169

PEOPLE v. ZABRISKI et al.

Cr. 2445.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1933.

1. Automobiles 🔑355(10).

Possession of stolen car with another before collision, attempted escape, and possessors' denial of knowing each other supported verdict of guilty (St. 1923, p. 564, § 146, as amended by St. 1931, p. 2133, § 60).

2. Criminal law 🔑351(10).

False statements intended to conceal connection with criminal acts tend to show consciousness of guilt.

3. Criminal law 🔑508(9).

Where evidence tended to show that accused and another took or drove automobile without owner's consent, testimony of accused's companion that he alone stole car *held* not conclusive, in view of previous denials (St. 1923, p. 564, § 146, as amended by St. 1931, p. 2133, § 60).

4. Automobiles 🔑355(10).

Conflict in state's evidence concerning ownership of automobile taken or driven without owner's consent *held* nonprejudicial, where evidence clearly showed accused did not own such automobile (St. 1923, p. 564, § 146, as amended by St. 1931, p. 2133, § 60).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Anthony Miklauschutz and another were convicted of driving or taking automobile without owner's consent, and named defendant appeals.

Affirmed.

Theo. Gottsdanker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

ARCHIBALD, Justice pro tem.

Defendants were jointly charged by information with grand theft, in count I thereof, and a violation of section 146 of the California Vehicle Act (as amended by St. 1931, p. 2133, § 60), in count II. Both counts involved the taking of an automobile alleged to belong to one Julius Sloto. Zabriski pleaded guilty to count II, and Miklauschutz was tried before a jury which returned verdicts of not guilty as to count I and guilty as to count II. From the judgment entered on such verdict of guilty, defendant Miklauschutz has appealed.

It is urged: (1) That the evidence does not support the verdict; (2) that a material variance exists between the allegations of ownership of the automobile taken and the proof.

[1, 2] 1. The evidence shows that the automobile in question was taken from the driveway of its owner, in which it was parked some time after 8 p. m. of May 2, 1933; that at about 6 a. m. of the next morning the witness Morgan saw the same car being driven at a reckless and excessive speed; that the machine swerved and crashed into two cars parked at the side of the street, and that immediately afterwards Zabriski got out of the car and began to run, followed by appellant about half a minute later. Morgan followed and caught appellant, throwing him to the ground, where they struggled together until two officers arrived and took the latter into custody. Zabriski was later found and arrested. Morgan told the officers that appellant had "hit a couple of automobiles," to which appellant replied, "It ain't so, I never done anything; I haven't even been in or near a car." The witness Wallior testified that he heard the crash and immediately went to the spot; that Zabriski got out one side of the car and started to go across the street "at a fast gait," and that "it took him (appellant) a few seconds to slide over under the steering wheel and get out," at which time appellant "started to cross the street, too"; that he asked where they were going and appellant replied that "they were just leaving." The witness then, according to his testimony, informed the men that "they could not go; they wrecked some cars and had to stay there," to which appellant replied that he was not in the car and did not know Zabriski. The latter also denied being in the wreck. Thereupon Wallior called to a man near by to "call a policeman," and when he looked around both defendants "must have run, because * * * they were both gone up the street, up the block."

The testimony of appellant is to the effect that he met Zabriski at about 2 p. m. of the day the car was taken, and that they were around drinking together the rest of the afternoon and evening; that while on the way home Zabriski said he would get a car, and that he left appellant sitting on a curb and was gone a little while, coming back with the car; that he was under the influence of liquor and supposed Zabriski had borrowed the machine. The arresting officers testified that both men had been drinking but were not drunk; that Zabriski told them he did not get the car, was not in it, had never seen it before, and did not know appellant. While one of the officers was interrogating Zabriski, appellant, according to the testimony of the officer, who was in the front seat of the officers' car, turned around and "told Zabriski not to talk to us; that after he had been in as much trouble as he (appellant) had been he learned not to talk to the police."

While the possession of stolen property alone is not sufficient to raise an inference of guilt, such possession, under the circumstances shown here, coupled with the denials of both parties that they knew each other or had been in the car, and their flight from the car sufficiently justified the conclusion of guilt reached by the jury. False statements intended to conceal connection with criminal acts tend to show consciousness of guilt (People v. Cole, 141 Cal. 88, 74 P. 547), as also does flight (People v. Hall, 199 Cal. 451, 249 P. 859).

[3] Appellant urges that the testimony of Zabriski that he alone stole the car should have controlled the conclusion of the jury. Such testimony but made a conflict which it was the function of the jury to determine, and, in view of Zabriski's previous denial of such fact and the other evidence in the case, the jurors evidently placed little reliance thereon.

[4] 2. One of the arresting officers testified that the certificate of registration in the stolen car was "to the Seaside Oil Company, I think, of Ventura." The positive testimony of Mr. Sloto was that he was the owner of the car. Regardless, however, of the question of ownership, it was sufficient to show, as the evidence in this case does, that appellant was not the owner (People v. Larrabee, 113 Cal. App. 745, 299 P. 85), and there certainly is nothing in the variance mentioned which could in any way have prejudiced him.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

135 Cal.App. 41

HERZIG v. BOARD OF MEDICAL EXAMINERS OF STATE OF CALIFORNIA et al.

Civ. 7798.

District Court of Appeal, Second District, Division 1, California.

Nov. 6, 1933.

Rehearing Denied Dec. 5, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. Mandamus 🔑187(9).

On petition for writ of mandate to compel board of medical examiners to issue reciprocity license to physician, admitting in evidence minutes of board, admissible for certain purposes, but containing irrelevant matters, *held* not prejudicial error (Gen. Laws 1931, Act 4807).

2. Physicians and surgeons 🔑5(2).

Broad discretion is vested in board of medical examiners in matter of granting reciprocity licenses without examination (Gen. Laws 1931, Act 4807, § 13).

3. Physicians and surgeons 🔑5(2).

Refusal to grant reciprocity license to physician, licensed to practice in Nevada with which California had reciprocity contract, and a graduate of two United States medical schools, not approved by board of medical examiners, and foreign school, approved by board, but which physician had attended for one year, *held* not abuse of discretion (Gen. Laws 1931, Act 4807, §§ 9, 10, 13).

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Petition by Maximilian L. Herzig for a writ of mandate to compel the Board of Medical Examiners of the State of California, P. T. Phillips and others, members of the board, to issue to petitioner a license to practice medicine and surgery in the state of California. From a judgment denying the petition and from an order denying motion for new trial, petitioner appeals.

Appeal from order denying motion for new trial dismissed. Judgment affirmed.

M. L. Herzig, in pro. per.

Richard M. Lyman, Jr., and Otto J. Emme, both of Los Angeles, for respondents.

YORK, Justice.

This is an appeal from a judgment denying petition for a writ of mandate to compel respondents to issue to petitioner a license to practice medicine and surgery in the state of California. It appears from the record that petitioner, under date of September 26, 1929, made application for a so-called reciprocity license to practice medicine in California, and that, under date of October 2, 1929, he filed an amended application for such license, which showed that he had spent six years in the study of medicine and surgery, to wit, from September, 1909, to and including July, 1913, at the National Medical University of Chicago, Ill.; from October, 1916, to February 3, 1919, at the St. Louis College of Physicians and Surgeons; and from the fall of 1924 to the fall of 1925 at the Royal University of Naples, Italy; that he received the degree of doctor of medicine from each school; that his application for reciprocity license in California is based upon a license to practice medicine in Nevada, dated November 10, 1925, which was issued after written examination held in the state of Nevada on November 2, 1925; and that, in addition, petitioner holds licenses to practice medicine in the states of Washington and Texas.

It also appears that the respondent board of medical examiners refused to issue said reciprocity license owing to the fact that on February 18, 1924, it had refused recognition to credentials of any nature from the National Medical University of Chicago, and on the same day had disapproved the St. Louis College of Physicians and Surgeons. It was further shown that a reciprocity contract had been entered into between the respondent board and the board of medical examiners of the state of Nevada under the terms of which each state was allowed to require satisfactory proof of a course of instruction in a school recognized or approved by each board, upon applications for reciprocity licenses based upon a certificate issued by the other contracting state.

Appellant contends upon this appeal that the court erred and abused its discretion in entering any judgment in denial of the writ of mandate; that the decision and judgment are against the evidence; that the court erred in the admission of evidence and in excluding evidence offered by appellant; that the findings were contrary to the issue, the admitted pleadings, the evidence, and the law; that the court erred in refusing to vacate the judgment and in refusing to grant a new trial; that the court and respondent board erred and abused their discretion in denying a reciprocity certificate contrary to the provisions of the Medical Practice Act.

There was no prejudicial error in any of the rulings complained of, and the evidence clearly shows that petitioner was unable to comply with the requirements of the Medical Practice Act, § 13, as amended June 15, 1929 (St. 1929, p. 1701, Deering's Gen. Laws, 1931 Ed., Act 4807, at pages 2350, 2360), and section 9, of which (as amended by St. 1929, p. 620) requires an applicant to file "a diploma or diplomas issued by some legally chartered school or schools approved by the board, the requirements of which school or schools shall have been at the time of granting such diploma or diplomas in no degree less than those required under this act." Under the circumstances, we are of the opinion that there was no abuse of discretion either on the part of the board of medical examiners in refusing to issue the certificate or on the part of the trial judge in refusing to grant the petition for writ of mandate. The evidence shows that appellant is not entitled to have the board of medical examiners issue to him a license to practice without first passing the required examination.

The appeal from the order denying motion for a new trial is dismissed. The judgment appealed from is affirmed.

CONREY, Presiding Justice (concurring).

[1] I concur in the judgment. Several of the specifications of error in admission of evidence and exclusion of evidence offered are entirely without merit. Such errors as did occur were not so far prejudicial as to affect the merits of the case. For example, the minutes of the board which were admitted in evidence contain some matters not relevant to the issue. But they were minutes which were admissible for the purpose of showing the action of the board upon appellant's application, together with the record of whatever the board had before it at the time when it made the order refusing to issue the certificate demanded by appellant. The court appears to have received all evidence necessary to a full and fair presentation of the case.

The required conditions for the issuance of a reciprocity certificate to practice medicine and surgery as existing on the 21st day of October, 1929, when appellant's application was denied by respondent board, are found in section 13 of the State Medical Practice Act, as amended June 15, 1929 (St. 1929, p. 1701, Deering's Gen. Laws, 1931 Ed., Act 4807, at p. 2360 et seq.). The section provides for the issuance of what are called reciprocity certificates, to licensees of other states, where the prescribed reciprocity agreements have been made, and where the conditions authorizing the issuance of such reciprocity certificates in this state have been found to exist. There is a reciprocity agreement between the state of California and the state of Nevada. Under the agreement and the law applicable thereto, the board of medical examiners is authorized to make independent investigation of the educational qualifications of the applicant. In presenting an application supported by certificate from another state, the applicant must furnish satisfactory evidence that the requirements of the board which issued the certificate thus presented were not at the time such certificate was issued in any degree or particular less than those required for the issuance of a certificate in the state of California. Otherwise, the applicant will not be entitled to practice in this state without examination. Among other things, it is provided that the requirements from the college from which such applicant may have graduated, and the requirements of the board from which the offered certificate was issued, "shall not have been at the time such certificate was issued, in any degree or particular less than those which were required for the issuance of a similar certificate to practice a system or mode of treating the sick or afflicted in the state of California at the date of the issuance of such certificate."

[2, 3] It will thus be seen that a broad discretion is vested in the board of medical examiners of the state of California in the matter of granting reciprocity certificates, particularly where such certificates are to be accepted without direct examination of the applicant as to his qualifications. The application of the petitioner (appellant here) was accompanied by evidence that he had obtained a diploma showing graduation from the National Medical University of Chicago in the year 1913, and from the St. Louis College of Physicians and Surgeons in the year 1919. But the record shows that on the 18th day of February, 1924, orders were made by the board of medical examiners of the state of California, refusing recognition to each of those institutions. Some evidence was introduced to show that certain reciprocity certificates to holders of diplomas from those institutions were granted by respondent board after February 18, 1924. In most of those instances, if not all, evidence was introduced to show that these exceptions were justified by the particular circumstances of those cases; as for instance, when it appeared that a diploma was issued in 1892, whereas the resolution refusing recognition was by its terms effective only as against certificates issued in 1907 and thereafter. I think that these particular instances were not sufficient to overcome the effect of the formal resolutions adopted and maintained in force by respondents.

But it further appears that appellant had obtained and presented with his application a diploma showing graduation from the Royal University of Naples, Italy, in the year 1925, and that a diploma from this institution would have been acceptable to respondents as a sufficient credential, except for the fact that petitioner had attended that institution for only one year, and that the board was not satisfied with the basis upon which such advanced standing had been obtained. In this respect the action of the board was based upon evidence from which it concluded that far the greater part of the applicant's training, and the credentials evidencing such training, were received from institutions which were not approved, and were not entitled to credit in estimating the qualifications of the applicant. In this respect the decision of the board appears to be justified by section 10 of the Medical Practice Act (as amended by St. 1929, p. 623, Deering's Gen. Laws, 1931 Ed., Act 4807), which provides that applicants for any form of certificate shall file satisfactory evidence of having pursued, in any legally chartered school or schools approved by the board, a course of instruction covering a total of at least four thousand hours and including stated minimum requirements. From the evidence presented the board inferred, and it seems very properly inferred, that the applicant has not complied with this requirement.

For the foregoing reasons I have reached the conclusion that the judgment should be affirmed.

I concur: HOUSER, J.

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135 Cal.App. 60

RAVANO et al. v. SAYRE et al. (BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N, Intervener).

SAYRE et al. v. RAVANO et al.

Civ. 4604, 4605.

District Court of Appeal, Third District, California.

Nov. 6, 1933.

1. Mortgages 🔑369(7).

In actions to set aside trustee's sale under trust deed, evidence sustained finding that no extension of time on note secured by trust deed was granted.

2. Mortgages 🔑335.

Neglect of holder of trust deed to enforce payment on note according to terms was not extension of time, and did not prevent sale under trust deed.

3. Mortgages 🔑369(7).

In actions to set aside trustee's sale under trust deed, evidence sustained finding that trust deed holders were not guilty of fraud or oppression.

4. Mortgages 🔑369(7).

Vendors under trust deed *held* not entitled to accounting, where items of account were within knowledge of vendors, and issue of accounting was not raised by pleadings.

5. Mortgages 🔑319(3).

In action to set aside trustee's sale under trust deed, evidence failed to show continuing ability and offer to pay debt by vendors such as would extinguish debt (Civ. Code, § 1500).

Appeals from Superior Court, Madera County; Stanley Murray, Judge.

Actions by Luigi Ravano, also called Louis Ravano, and others against Etta M. Sayre, a widow, and others, in which the Bank of America National Trust & Savings Association intervened, and by Etta M. Sayre and others against Luigi Ravano and others. From adverse judgments, plaintiffs in first action and defendants in second action appeal.

Affirmed.

N. Lindsay South, of Fresno, for appellants.

George W. Mordecai, of Madera, for respondents.

Conley, Conley & Conley, of Fresno, for intervener.

BURROUGHS, Justice pro tem., delivered the opinion of the court.

These two cases were consolidated for the purpose of trial and also for the purposes of appeal. Action No. 4604 was commenced by Luigi Ravano et al. v. Etta M. Sayre et al., to set aside a trustee's sale of real property by virtue of the authority contained in a trust deed given by Ravano et al. to secure a debt to the Sayres. The Bank of America National Trust & Savings Association intervened because of a debt owed to it by the Ravanos.

In action No. 4605, Sayres et al. brought an action in ejectment against the Ravanos et al. to recover possession of the property which is the subject of the deed of trust. The Sayres recovered judgment in both actions. The Ravanos have appealed from the judgments.

Appellants contend that the sale of the real property under the deed of trust was prematurely made, in that the respondents extended the time for the payment of the debt secured by the deed of trust until December, 1930, and the sale was made by the trustee in July, 1930. A jury was impaneled, who, in answer to the only inquiry propounded to them, held that the time had been extended for the payment of the debt, as claimed by the appellants. The court ignored the special verdict of the jury, and made complete findings in both cases, and, among other things, found that the time had not been extended for the payment of the debt.

It seems to be conceded by all parties that the court had a right to ignore the special verdict of the jury, but, it is said by appellants in their brief: "Sayres extended time for payment of notes." They then proceeded to argue that the evidence sustains this contention. We therefore take it that they challenge the sufficiency of the evidence to sustain the finding of the court that the time was not extended.

[1, 2] An examination of the record discloses that the evidence upon this subject is in sharp conflict. Without reciting all of the evidence in detail, it is sufficient to say that Logan Sayre, who, it is claimed, granted the extension of time, testified that he never at any time granted an extension. The court asked him: "Well, did you ever grant him any extension of time?" To which he replied: "No, sir." There does not appear to be anything inherently improbable in the testimony of Sayre, and, without further presentation of the evidence upon this subject, that alone is sufficient to sustain the finding of the trial court that there was no extension of time granted. Neither was the time extended by implication by the conduct of the Sayres. At the time of the sale, under the terms of the trust deed, the entire debt was due, and it is settled that mere neglect of a creditor on a note to enforce payment according to its terms, or the acceptance of payments thereon, does not amount to an extension of time or preclude him from bringing suit to enforce payment. See Meyer v. Zuber, 92 Cal. App. 767–774, 268 P. 954. Further, irrespective of any alleged extension of the maturity of the principal debt, the testimony is without conflict that the Ravanos were in default under the terms of the trust deed because of their failure to pay taxes and assessments on the property and their failure to pay an installment which was due under the terms of a prior mortgage.

[3] It is further contended by the appellants that the Sayres were guilty of fraud and oppression. Upon this subject it is contended that, during the four years between the making of the deed of trust and the sale thereunder, the respondents bought from the Ravanos merchandise; that they used a pumping plant belonging to the latter; that they were going to remit part of the money due them; that in the month of October, 1929, they obtained $2,800 from the Ravanos before it was due, and told them that they would not bother them any more until December, 1930; that they promised to finance the Ravanos on a new loan for $6,000, to be secured by a crop mortgage; that, relying upon the latter promise, the Ravanos proceeded to incur indebtedness in the way of improvements on the land in controversy, and also incurred expense by hiring men to work thereon; that the failure of the Sayres to fulfill their promise of loaning the money compelled the Ravanos to seek the loan elsewhere; that during part of the time the Sayres charged simple interest; and that for the purpose of the sale they charged compound interest on the loan.

The evidence upon the several subjects thus presented is conflicting. However, there is ample evidence to sustain the decision of the court. It appears that the merchandise furnished by appellants was not a consideration for any change in the terms of the deed of trust, and appellants were given credit for such merchandise in the final settlement. The court found that the $2,800 paid in October, 1929, was on account of the indebtedness under the terms of the promissory note, and the amount was due at the time it was paid and credit given therefor. As heretofore shown, the court further found, upon substantial evidence, that the time for the payment of the indebtedness was not extended by the respondents. It also appears from the evidence and from the finding that respondents did agree to finance the appellants to the extent of $6,000, but such sum was to be secured by a crop mortgage which was to be a first lien on the crop for the coming season; that the appellants could not give a mortgage which would constitute a first lien, for the reason that the intervening bank had a mortgage which was a first lien on said crop, and which on its face was in the sum of $3,000, but which, in fact, by advancements made, amounted to the sum of $3,700; that in charging compound interest the respondents were justified by the terms of the notes and also the deed of trust. There was no error in the holding of the trial court that the Sayres were not guilty of fraud and oppression.

[4] It is also contended by appellants that they were entitled to an accounting of the transactions between them and the respondents. The items of the account were clearly within the knowledge of the appellants; in fact, the merchandise furnished by the appellants was peculiarly within their own knowledge. Furthermore, an accounting is not within the issues raised by the pleadings.

It is claimed that the property sold under the deed of trust was purchased by the respondents for a sum in excess of the amount owing. The court found that the amount due on the debt was $18,323.78. The property was bought by the respondents for $17,000. But, if such were a fact, under the terms of the trust deed, any surplus for which the property sold would be held by the trustee for the account of the appellants.

[5] It is also contended that the appellants were ready, willing, and able to pay the correct amount due, and offered to do so. But the evidence does not support this claim. It seems that at one time an offer of $10,000 was made, but at that time there

was more than $13,000 due, and the offer was refused. It also appears that there was one day on which the Ravanos had at their command sufficient money to pay the debt, but no offer was made to pay the same, except that counsel for appellants told counsel for respondents that he had the money and was anxious to pay, but did not want to pay one dime more than was due. No offer to pay was made, no deposit of money was made, and no continuing ability to pay. See section 1500, Civ. Code; Segno v. Segno, 175 Cal. 743, 167 P. 285; Owen v. Herzihoff, 2 Cal. App. 622, 84 P. 274. Therefore the point is not well taken.

We are of the opinion that the judgment of the trial court is correct in each case, and should be affirmed. It is so ordered.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

134 Cal.App. 675

PEOPLE v. ROLAND.

Cr. 2385.

District Court of Appeal, Second District, Division 1, California.

Oct. 26, 1933.

Hearing Denied by Supreme Court Nov. 24, 1933.

1. Statutes 🔑225.

Statute defining offense of theft of property, and statute defining word "property," are in pari materia, and should be construed together (Pen. Code, § 7, subd. 10, and § 484).

2. Statutes 🔑225.

Statutes relating to same general subject-matter are in pari materia and must be construed together.

3. Statutes 🔑231.

Provisions contained in four different Codes should be construed together as single statutory enactment.

4. Embezzlement 🔑26.

Allegations of information and evidence showing larceny of real estate by embezzlement thereof *held* to authorize conviction of grand theft (Pen. Code, §§ 6, 484, 504, and § 7, subd. 10).

5. Criminal law 🔑112(4).

Where acts alleged to constitute grand theft by embezzlement were committed in different counties, venue was in either (Pen. Code, § 781).

6. Embezzlement 🔑47.

In prosecution for grand theft based on embezzlement of real estate, whether defendant openly and avowedly, and under claim of title preferred in good faith, appropriated property, *held* question for jury (Pen. Code, §§ 484, 511).

> Pen. Code, § 511, provides that upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable.

7. Criminal law 🔑1159(2).

Determination of jury on question of fact, based upon substantial evidence, is conclusive upon appellate court.

8. Criminal law 🔑982.

Overruling defendant's oral application to file written application for probation *held* not error, where oral application embodied request for new trial which had been denied.

9. False pretenses 🔑52.

In prosecution for grand theft based on embezzlement of real estate, instructions on theory that defendant might be convicted of theft based on obtaining property through false or fraudulent representations or pretense *held* properly refused under evidence (Pen. Code, § 484).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

John Gilford Vernon Roland was convicted of grand theft and petty theft, and he appeals.

Judgments, and order denying motion for new trial, affirmed.

Orbison & Irwin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Under separate counts of an information filed against him, defendant was convicted of the crimes respectively of grand theft and petty theft. From the ensuing judgments, and from an order by which his motion for a new trial was denied, defendant has appealed to this court.

The essential facts connected with the offenses of which defendant was convicted are substantially as follows: Acting as a real estate agent, defendant effected an exchange of certain property which was owned by a Mr. and Mrs. Spencer. In such exchange, the property received by the latter was a bungalow court which was encumbered by a mortgage. In addition to the bungalow court, Mr. and Mrs. Spencer also were the owners of a small house and two lots. After the exchange was made, for a time defendant acted as agent for the Spencers in renting the bungalow court and collecting the rents due therefrom, etc.—although by reason of his assertion that the expenses in operating the bungalow court exceeded the receipts derived from the collection of its rents, the Spencers never received any income from such source. Several weeks after the Spencers became the owners of the bungalow court, they became alarmed over the threatened attempt by a former wife of Mr. Spencer to secure the payment to her of certain alimony which she claimed Mr. Spencer owed to her; and thereupon, at the suggestion of defendant, a deed was made by the Spencers to him of the bungalow court and the house and two lots. At the same time defendant gave back to the Spencers a "blank" deed covering the same properties. Shortly thereafter, the Spencers removed from the city of Los Angeles, which up to that time had been the place of their residence, to the city of San Francisco; and after having been in the latter city for a period of about two months, during which time Mr. Spencer wrote two different letters to defendant by each of which he inquired concerning money which the former assumed had been collected by defendant on account of rents for the bungalow court, but received no reply. However, at about the expiration of said two months the Spencers received a telegram from defendant worded as follows: "Please meet me Monday or Tuesday at Southern Hotel in Bakersfield. Bring deed to lot and court deal. Very important. Wire me back at once when we can expect to be in Bakersfield. I will meet you there whenever you say. Important. Wire 1529½ West 7th Street." As a result of such telegram, a meeting between Mrs. Spencer and defendant took place at Bakersfield in Kern county. In the course of the conversation which occurred at that time and place between defendant and Mrs. Spencer, defendant stated (quoting Mrs. Spencer's testimony), as follows:

"A. When Mr. Roland came in he said there was trouble down in Los Angeles, the former Mrs. Spencer was causing trouble; he said they had put an attachment on the court and he had to give his deposition in court the next day to show what he had given us for that property in Los Angeles, and he said he had been asked what he had given us and he said offhand—this is his words, Roland's words—

"Q. Tell us, proceed. A. Georgia acres, so he said, Mr. Roland said, 'I have some valuable land in Georgia that I will deed over to you temporarily' because Mr. Roland said it would be perjury and he would be liable to be sent to San Quentin if he did not show what he had given us for this property, so, I didn't know what else to do and I handed him over the deeds. * * * I gave Mr. Roland the blank deeds. * * * And in the meantime he went out; * * * When he returned * * * he gave me 220 acres in Georgia. * * *"

In the Bakersfield conversation defendant also stated that he had a prospective exchange of the bungalow court for certain property located in Oakland. According to the testimony given by defendant at that time, he showed Mrs. Spencer "the deed to the Georgia land," and explained to her "about what part of the state it was located"; that after she had agreed to take the land, "I (defendant) told Mrs. Spencer I would like to have a new deed made on the Georgia land, it would take me some few minutes to get that deed prepared. I left Mrs. Spencer in her room at the Southern Hotel and went out and found a notary. * * * I brought the deed notarized and signed on the Georgia land, before a notary. * * * I presented the deed to Mrs. Spencer in return for the deed—the names in blank—that I had signed over to blank, on the bungalow property and the Banning avenue property. * * *"

It should be noted that the "blank" deed which Mrs. Spencer returned to defendant at the Bakersfield meeting between the parties covered the bungalow court property only. "Probably a week or so" thereafter Mr. Spencer again wrote a letter to defendant, "asked him about the income of the place, of the courts, and what he had done with the money and why we (Mr. and Mrs. Spencer) had not got some of it." Approximately one month after the Bakersfield meeting took place, defendant sent a telegram from Los Angeles to the Spencers at San Francisco by which he requested that the latter telephone to him. As a result of a telephonic conversation which was thus initiated pursuant to defendant's request, the Spencers sent "the papers" to the house and two lots to a brother of Mrs. Spencer, who lived in Los Angeles, who, at their request, delivered "the papers" to defendant; at which time, in substance, defendant told the brother of Mrs. Spencer that an attachment had been levied on the property in question and he had to "clear up the title"; also, that a deal was pending on some Oakland property, and that defendant had given the Spencers a deed to the Georgia property "as a temporary proposition" until defendant could get the Oakland exchange consummated. During the ensuing several months, one conversation succeeded another between defendant and the Spencers regarding the reason why defendant never had remitted any money to the Spencers on account of rents collected by defendant for the bungalow court, as well as regarding the proposed exchange of the bungalow court for the Oakland property—for the failure of each of which matters defendant assigned various reasons, until finally the Spencers demanded of defendant the return by him to the Spencers of the deeds, etc., to the two properties in question. In response thereto defendant first stated that he would comply with the demand "on receipt of the Georgia land"; but later "he said he would not. He said he had given Georgia land for it and he intended to keep it. I (Mr. Spencer) asked him why, and he said the deal had been already made, that he was the owner of the property and had notified the tenants to that effect, and he refused to give it up at any price."

No question is raised by either of the parties to this appeal relative to the legality of either the conveyance of the property by defendant to the Spencers by means of a "blank" deed, or of its assumed reconveyance by the Spencers to defendant by virtue of the return of the "blank" deed by the former to the latter.

[1-4] On the trial of the action, the conviction of defendant of any offense included in either count of the information was restricted to the crime of embezzlement of real property; and, in substance, the first point urged by appellant as a sufficient reason for a reversal of the judgment and the order in question is that by no provision of the statutes of this state may a conviction of the crime of grand theft be sustained where the gist of the accusation and the evidence show a larceny of real estate by embezzlement thereof.

By section 503 of the Penal Code, "embezzlement" is defined as "the fraudulent appropriation of property by a person to whom it has been entrusted"; and by the language expressed in section 484 of the Penal Code, by means of which the crime of "theft" is defined, to all practical intents and purposes the language of section 503 is carried into the latter statute. The history of the statute, generally recognized by the term "embezzlement," clearly indicates that originally it was not included within the crime of theft, but that the prevalence of the commission of acts which now constitute the offense required a special statute to remedy a frequent evil; and that at no time, or by no authority, was it applied or deemed applicable to the misappropriation of anything other than personal property. At once, therefore, it may be conceded that by the common law when the subject-matter of the alleged misappropriation was that of real property by a person to whom it had been entrusted, the criminal offense, if any, could not be that of embezzlement; and in consonance with well-established law, it is just as apparent that, in the absence of statutory provision by which such an offense is defined or denounced, the crime of embezzlement either of personal or of real property may not lawfully be charged. Pen. Code, § 6; 7 Cal. Jur. 841, and authorities there cited; People v. Whipple, 100 Cal. App. 261, 279 P. 1008.

In support of his contention that in this state a misappropriation of real property by a person to whom it has been entrusted cannot form a legal basis for a prosecution for the crime of embezzlement, appellant principally relies upon the authority contained in two cases decided respectively by the Supreme Court and by the District Court of Appeal of this state, to wit: People v. Cummings, 114 Cal. 437, 46 P. 284, and People v. Folcey, 78 Cal. App. 62, 247 P. 916. Neither of such cases was founded upon an alleged embezzlement of real property, but each of them rested upon the alleged misappropriation of real property by means of false pretense. For at least the reason that at the present time the crime of obtaining money or property, "whether real or personal," by the use of "any false or fraudulent representation or pretense" is denounced by the provisions of a statute (section 532, Pen. Code). separate and distinct from the statute which relates to the crime of embezzlement, the decision in neither of the cited cases is particularly applicable to the situation here presented. Furthermore, by the declared rule in the case of People v. Rabe, 202 Cal. 409, 261 P. 303, the principle of law stated in the cases to which reference has been had is overruled and a conclusion of law with relation to the fraudulent appropriation of real property by means of false pretense, contrary to that for which appellant contends, is positively announced. However, since the latter decision is rested upon the express provisions of section 532 of the Penal Code, as amended since the decision in People v. Cummings, 114 Cal. 437, 46 P. 284, was rendered, the reasoning in the case of People v. Rabe is not particularly apt as applied to statutes which are controlling in the instant case. See, also, People v. Maddux, 102 Cal. App. 169, 282 P. 996. But in addition to the authorities cited by appellant, the case of Manning v. State, 175 Ga. 875, 166 S. E. 658, holds that under the provisions of a statute "penalizing fraudulent conversion of money *or 'any other article or thing of value,'*" a charge of embezzlement of real property cannot be successfully maintained.

On the other hand, authorities in each of several other jurisdictions wherein a statute therein was either similarly phrased, or even of stronger import than that in force in the state of Georgia, and on which the last-cited case is based, hold that prosecution for obtaining real property by false pretenses or representations (as distinguished from embezzlement) may properly be maintained. In other words, that by a proper construction of the statute, by no felonious act amounting to theft may one be despoiled of his property, whether real or personal, without incurring the prescribed penalty. See Morse v. State, 9 Ga. App. 424, 71 S. E. 699; State v. Eno, 131 Iowa, 619, 109 N. W. 119, 9 Ann. Cas. 856; State v. Blake, 36 Utah, 605, 105 P. 910; State v. Toney, 81 Ohio St. 130, 90 N. E. 142, 18 Ann. Cas. 395. The point is that although in defining theft, the statute may not expressly denounce particular varieties of felonious acts which may result in defrauding one of real property, nevertheless, without such particularization, the language of the statute may be so broad or general in its nature that real property may be the subject of the offense. But from an additional standpoint, it may appear that the language of the statute itself which relates to the crime of embezzlement as a variety of theft was intended to include both real and personal property. As far as section 484 of the Penal Code purports in its essentials to define the crime of theft, it is as follows: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money or property or obtains the labor or service of another, is guilty of theft. * * *"

On even a casual inspection of its language, it will be observed that by the term of the statute the crime of theft may be committed in each of several different, general ways, and as to each of which the subject of the offense is specified; that is to say, by the first specification, the stealing of "*personal* property" is denounced; by the second, the "fraudulent appropriation of *property*" is the subject of consideration; and by the third, the obtaining of "*real* or *personal* property" by false pretense is condemned. Were it not for the fact that at least as far as the definition of the variety of theft known as embezzlement is concerned, the provision now found in section 484 of the Penal Code relating to such crime is but a paraphrase of the original embezzlement statute (section 503, Pen. Code), by which such crime is defined, together with the principle of law announced or indicated in People v. Cummings, 114 Cal. 437, 46 P. 284, it might satisfactorily appear that in section 484 of the Penal Code, by the use of the word "personal" as it related to ordinary acts of theft, and by the use of the words "real or personal" as they might affect the obtaining of property by false pretense, the employment of the broader term "*property*" in connection with the misappropriation by a person of anything which had been intrusted to him, would indicate the intention to include any and every kind or description of interest or estate which persons are qualified to possess. But considering the announced principle of law in the case of People v. Carter (Cal. App.) 21 P.(2d) 129, 130, that "the prime intention of the Legislature in enacting the statute of 1927 [amending section 484 of the Penal Code in 1927 (Stats. 1927, p. 1046)] was to consolidate into a statement of one criminal offense, consisting of each of several complete parts thereafter to be known as theft, the various criminal offenses theretofore known and recognized by the names of larceny, embezzlement, and obtaining money or property by false pretense," —the application of the suggestion that by the references in section 484 of the Penal Code to the several different kinds of property which were made the subject of the respective varieties of theft, the assumed intention on the part of the Legislature was to increase or to broaden the significance to be attached to the word "property," as used in the original embezzlement statute (section 503, Pen. Code) is much weakened, if not made entirely negligible in effect. Then, too, the re-enactment of the statute in practically its original language, after the announcement of the decision in People v. Cummings, 114 Cal. 437, 46 P. 284, might seem to indicate the intention to adhere to and to accept as final and conclusive the construction of the statute placed thereon by the decision of the court in that case. However, it appears that another statute has a direct, important and positive bearing upon the situation. Subdivision 10 of section 7 of the Penal Code provides that "the word 'property' includes both real and personal property"; and although that statute was part and parcel of the penal laws of this state at the time when the decision in People v. Cummings, 114 Cal. 437, 46 P. 284, was rendered, it nowhere appears that in reaching its conclusion therein the provision to which attention has been directed was given consideration by the court. More than that, an examination of all the briefs presented by the respective parties to the appeal therein fails to disclose the fact of the existence of such a statute. That the two statutes here under consideration are in pari materia, and consequently that in construing one the provisions of the other are material cannot be questioned. In 23 California Jurisprudence, p. 785, where many authorities are cited in its support, the rule is thus stated: "In accordance with the principle that a statute is construed in connection with and as a part of the body of legislation upon the general subject, it is a settled rule that all statutes which relate to the same general subject-matter—briefly called statutes in pari materia—must be read and construed together, as one act, each referring to and supplementing the other, though they were passed at different times."

It is also a rule of construction of the statutes of this state that each of the provisions contained in the four codes should be construed with relation to all the other provisions thereof; in other words, that the entire body of the law should be regarded as a single statutory provision, and therefore within the rule that all parts of a statute should be construed together. 23 Cal. Jur. 601 et seq.; also 791 et seq., and authorities there cited.

If then, to the embezzlement portion of section 484 of the Penal Code, subdivision 10 of section 7 thereof be added, the necessary conclusion must be that real property may be the subject of embezzlement; and such is the conclusion of this court.

[5] Appellant's further contention that "the venue of the offenses as alleged in both counts of the information did not lie in Los Angeles county as alleged but in the county of Kern," is successfully met and overcome by the application to the facts of the provisions of section 781 of the Penal Code to the effect that "when a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

[6, 7] Under the provisions of section 511 of the Penal Code, appellant urges the point that his conviction was "contrary to law." That part of the statute which is suggested as being here applicable is as follows: "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable."

Manifestly, the question of whether the facts adduced in evidence were such that it might be concluded that "openly and avowedly, and under a claim of title preferred in good faith," defendant appropriated the real property of the Spencers was one for the jury; and its determination with reference thereto, based upon substantial evidence, is conclusive upon this court. People v. Rose, 71 Cal. App. 550, 556, 236 P. 158; People v. Ephraim, 77 Cal. App. 29, 245 P. 769; People v. Hughes, 79 Cal. App. 697, 250 P. 869; People v. Ailanjian, 114 Cal. App. 260, 266, 299 P. 813. See, also, People v. Stafford, 81 Cal. App. 159, 253 P. 183, People v. Tambara, 192 Cal. 236, 219 P. 745.

The record herein reveals the fact that, at the request of defendant, the jury was instructed in the exact words of such statute. In addition thereto and as a part of said instruction, the jury was instructed that: "If you find that property was appropriated, it is for you also to determine whether or not such appropriation was made openly and avowedly, and if so, whether the claim of title was preferred in good faith. If you have a reasonable doubt concerning any element in the case, such doubt must be restored [resolved] in favor of defendant."

It follows that, in regard to the point under consideration, defendant has no just cause for complaint.

[8] Appellant also complains that prejudicial error was committed by the trial court by its order wherein "the court overruled appellant's oral application to file written application for probation."

In that connection, the record herein shows that on the occasion when the question of whether defendant would be permitted to file an application for probation was under consideration considerable friction, or at least inharmony, existed between defendant and his counsel who then represented him; that although in behalf of defendant his counsel made such oral application to the trial court, defendant could not be induced or persuaded to do so. To the contrary, he persisted in refusing to make application for probation, but urgently insisted that he should be granted a new trial. The conduct of the trial judge was marked by patience and kindly consideration for defendant and his rights and privileges in the premises; and the final disposition of the question then before the trial court apparently resulted from the obstinate refusal of defendant to consider any situation other than such as might embrace an order by which he would be granted a new trial. Since the motion for new trial already had been regularly heard by the trial court and by it denied, no alternative other than the pro forma denial of the request to file an application for probation was available. As far as this court may discern from an examination of the record herein, the claims by appellant regarding the alleged arbitrariness of the trial court in the matter are wholly unfounded in fact; from which it follows that defendant's contention cannot prevail.

Since all other points presented by appellant for the consideration of this court are either expressly or impliedly covered by those already given consideration herein, it becomes unnecessary to devote further or special attention to them.

[9] On the part of respondent, it is requested that in accordance with the provisions of section 1252 of the Penal Code, this court "consider and pass upon" certain rulings made by the trial court by which each of several instructions offered by the People to be given to the jury was refused. All of such instructions apparently were offered on the theory that should the jury conclude that defendant was not guilty of embezzlement, still he might be lawfully convicted under the provisions of section 484 of the Penal Code which relate to the commission of theft from a person by obtaining from him "money, labor, or real or personal property" by means of "false or fraudulent representation or pretense." But as hereinbefore may have been noted, on the trial of the action, by order of the trial judge, the prosecution was limited

and restricted to the introduction of evidence by which the crime of embezzlement only might be established. Nor was evidence either received by the court, or offered by the prosecution, sufficient to support a judgment on the ground proposed to be covered by the instructions in question. Without going into details, it may suffice to indicate that in the opinion of this court such evidence as was received failed in several required essentials to show the commission of the crime known as obtaining money or property by false pretenses. In such latter situation, the action of the trial court in refusing to give such instructions or any of them to the jury was entirely proper.

The judgments and the order by which the motion for a new trial was denied are, and each of them is, affirmed.

We concur: CONREY, P. J.; YORK, J.

134 Cal.App. 736

PEOPLE v. SANTOS.

Cr. 1749.

District Court of Appeal, First District, Division 2, California.

Oct. 31, 1933.

Rehearing Denied Nov. 15, 1933.

Hearing Denied by Supreme Court Nov. 27, 1933.

1. Criminal law 🔑1130(5).

Where mere claim of error, unaccompanied by argument or citation of authority, is made, court need not search record to determine whether prejudicial error occurred.

2. Criminal law 🔑655(5).

Where accused's counsel in murder prosecution repeatedly propounded same questions, despite court's direction to pass to other matters, and disrupted orderly progress of trial by persisting in frivolous objections, court's admonishing counsel not to ask certain questions and citing him to show cause at conclusion of trial why he should not be punished for contempt *held* not error.

3. Criminal law 🔑576(4).

Where accused's counsel consented to two continuances and subsequently twice failed to appear for setting of case for trial, motion to dismiss prosecution for murder because accused was not brought to trial within 60 days after indictment was properly denied (Pen. Code, § 1382).

4. Criminal law 🔑438.

Photograph of deceased in murder prosecution was not inadmissible merely because it was shocking.

5. Criminal law 🔑642.

Order for interpreter *held* not abuse of discretion, though witness could read, write, and speak some English.

6. Criminal law 🔑642, 1152(1).

Whether interpreter shall be called rests in discretion of trial court whose ruling will not be disturbed except for abuse of discretion.

7. Homicide 🔑166(9).

Where friendship of accused with girl over whom deceased was killed was admitted, exclusion of details such as pictures taken, gifts exchanged, letters written, places visited, and things done together, *held* not error.

8. Criminal law 🔑508(1).

Statute prohibiting conviction on uncorroborated testimony of accomplice does not deal with admissibility of evidence but merely with sufficiency of evidence to sustain conviction (Pen. Code, § 1111).

9. Criminal law 🔑404(3).

Knife used in homicide *held* sufficiently identified by accomplice and admissions of accused (Pen. Code, § 1111).

10. Homicide 🔑174(2).

Evidence concerning pools of blood at scene of killing *held* admissible where only rational inference was that blood came from deceased.

11. Criminal law 🔑530.

Typewritten confession signed by accused *held* properly admitted in murder case though not in exact words of accused in answering questions put to him.

12. Criminal law 🔑1170(3).

Alleged error in exclusion of testimony when first offered in murder prosecution *held* cured by subsequent admission of it.

13. Criminal law 🔑656(6).

In murder prosecution, where accused had difficulty in understanding that on examination concerning confession he was to testify not to his version of facts but to what he had told officers, court's interrogatory whether accused was telling whole "yarn" again or was testifying to what he told officers *held* not prejudicial.

While word "yarn" is sometimes used with implication of untruth or exaggeration, it does not necessarily convey that meaning, since it is synonymous with "story."

[Ed. Note.—For other definitions of "Story" and "Yarn," see Words & Phrases.]

14. Criminal law ⚷720(1).
Knife used in killing and picture of deceased, having been admitted, *held* properly referred to in closing argument, notwithstanding no mention was made of them in opening argument or in argument for accused.

15. Criminal law ⚷808½.
In murder prosecution, court in instructions concerning self-defense and justifiable homicide is not limited to mere reading of sections of Penal Code relating to such matters (Pen. Code, §§ 197, 198).

16. Homicide ⚷307(2).
Evidence justified submission of first and second degree murder and manslaughter to jury.

17. Criminal law ⚷1129(2).
Where refused instruction was not set forth in brief and assignment of error was unsupported by argument, assignment was insufficient.

18. Criminal law ⚷814(3).
Where there is no testimony to which proposed instruction is applicable, refusal to give it is not error.

19. Criminal law ⚷1129(3).
Mere assertion that accused's affidavits in support of motion for new trial were not answered, requires no examination of record to determine whether court erred in denying motion for new trial.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Nick Santos was convicted of murder in the second degree, and he appeals.

Affirmed.

See, also, 25 P.(2d) 235.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant and another Filipino named Vicente Fajardo were jointly indicted for the murder of Karl T. Eyman. The deceased was a soldier serving at Letterman Hospital at the Presidio in San Francisco. There was a severance of the trials of the two defendants. The defendant Nick Santos was tried first and found guilty of murder of the second degree. He was sentenced to the state prison for the term prescribed by law. Said defendant appeals from the judgment of conviction and the order denying his motion for a new trial.

On the evening of December 25, 1932, the deceased was found lying on O'Farrell street between Pierce and Steiner streets in San Francisco. He was unconscious when the police arrived and he died in the ambulance while en route to the hospital. The autopsy showed that deceased had several "stab wounds" about his body, two of which were inflicted in his back. One wound about three inches deep was inflicted on the right side of the neck, where one of the large arteries was severed. In the opinion of the autopsy surgeon, deceased died of exsanguination due particularly to this last-mentioned wound.

At trial of the defendant Santos, the prosecution called Fajardo as a witness. The uncontradicted testimony, including the admission of the defendant Santos, showed that Santos had wielded the knife which had inflicted the wounds upon the deceased. It appears that defendant and the deceased had been rivals seeking the affections of a young woman named Enriquita Valenzuela. According to defendant, he had met the deceased a month or more before December 25, 1932, when he found the deceased waiting in front of the girl's home. Each told the other, "It is my girl." The girl soon arrived and the deceased spoke to her on the street out of the hearing of the defendant. The deceased and the girl then went into her house. The defendant followed and told the girl, "You are a nice girl to treat me that way" and then went home leaving the deceased with her. Defendant and the deceased did not meet again until Christmas night shortly before the stabbing took place. The previous night the defendant had taken the girl to a dance at the Filipino club. He testified that he made an engagement at that time to take her to a show on Christmas night. The girl testified that no such engagement had been made, but that defendant appeared at her home about 6 p. m. on Christmas night and then invited her to go to the theater. She told him she could not go. He left and returned about 7:30 p. m. He did not ring the bell, but was hiding in a nearby doorway when seen by the girl. The deceased was present in the girl's house at the time. The girl opened the door and asked defendant what he was doing, to which he replied, "Never mind, I am waiting for someone." Defendant, with one hand in his pocket, forced his way in and asked, "Who you got in there?" She replied, "You know who I got in here, it is my fiancé." Defendant proceeded into the house without invitation and the girl called to the deceased that "someone was coming, to look out." The deceased grabbed defendant by the hand and put him out of the house, saying, "Didn't I tell you not to bother this girl?" Defendant proceeded to the Filipino club, met Fajardo, and asked him to go "for a little trouble down at a girl friend's house." Fajardo went with the defendant and the two waited for about five minutes on the sidewalk near the house. When the deceased left the house and was crossing O'Farrell street, defendant called him back, saying, "Young man, come here." A conversation ensued, during which defendant struck the deceased. In the fight which followed, defendant was knocked down in the middle of O'Farrell street. Deceased then started toward Fajardo, but Fajardo pushed him away and ran across the street. There was no blood on the deceased at that time. Defendant was again on his feet and the fight with the deceased was resumed. Seeing blood on the face of the deceased, Fajardo called to defendant to leave. The deceased shouted, "Help, help," while defendant and Fajardo ran from the scene.

Some hours later defendant was apprehended in bed at his home. Shortly thereafter he was questioned and signed a statement in the nature of a confession. In this statement he said in part, "I dropped to my hands and knees and took a knife from my upper right vest pocket with my left hand, this was a knife with a spring blade and I opened it and struck Karl T. Eyman with it a number of times." Nothing was said in the statement about self-defense nor was anything said therein about any threats on the part of the deceased. A newspaper reporter talked to defendant at the hall of justice when defendant's statement was taken. The reporter testified, "I asked the defendant if he had stabbed Mr. Eyman and he said yes, I said: 'That is rather a serious crime.' I said, 'Why did you do it?' And he said: 'Well, he stole my girl.'" Upon the trial, defendant claimed that the killing was done in self-defense. He took the stand as a witness and in reply to practically every question directly relating to the encounter with the deceased, he employed the term "self-defense" in his answer. The uncontradicted testimony shows, however, that although the scene of the killing was in a thickly-populated portion of the city, defendant made no outcry or other appeal for help at any time during the fight. The uncontradicted testimony further shows that he did not attempt to get away at any time before stabbing the deceased and that his flight immediately followed the stabbing.

[1] On this appeal appellant has listed forty-three specifications of error. Some of these are argued at length, but with respect to many of said specifications appellant has merely stated his claim of error without argument or citation of authority. By way of example appellant states, "The court erred in refusing to instruct the jury as requested by defendant, Cl. Tr. 24, L. 12-17." It has been frequently held that when a bald claim of error is made, unaccompanied by argument or citation of authority, the appellate courts are not required to assume the burden of examining the record and of searching the authorities in order to ascertain whether error was committed and, if so, whether such error was prejudicial. People v. McLean, 135 Cal. 306, 309, 67 P. 770; Gray v. Walker, 157 Cal. 381, 386, 108 P. 278; People v. Titus, 85 Cal. App. 413, 418, 259 P. 465; People v. Schlosser, 99 Cal. App. 593, 278 P. 898; People v. Bryant, 101 Cal. App. 84, 281 P. 404. But despite the fact that such burden does not rest upon this court, the entire record has been read to ascertain whether any of the numerous specifications of error would warrant a reversal herein. A review of the record leads to the conclusion that no prejudicial error was committed and that the judgment and order denying a new trial should be affirmed. We do not feel obliged, however, to discuss in this opinion those contentions which counsel for appellant has not considered of sufficient importance to warrant argument in his brief.

[2] Before proceeding to a consideration of the contentions which are sufficiently argued in appellant's brief to merit discussion here, it is appropriate to state that the record reveals that throughout the trial the patience of the trial court was sorely tried by the conduct of counsel for appellant. Counsel was continually interposing frivolous objections, unnecessarily interrupting the witnesses, opposing counsel and the court, and otherwise delaying and interfering with the orderly presentation of the cause. The cross-examination of the witnesses for the prosecution was unduly prolonged by propounding the same questions over and over again, by going far beyond the legitimate scope of cross-examination, and by insisting upon delving into wholly irrelevant matters. Counsel was admonished on numerous occasions to discontinue particular lines of examination and to pass to some other subject, but on practically all of these occasions counsel proceeded in defiance of the admonition and asked further questions, which were substantially the same as those to which objections had been repeatedly sustained. Similar conduct followed during the examination of the defendant's witnesses. During the argument, counsel for appellant interrupted the district attorney so frequently that the trial court finally suggested that it be understood for the purposes of the record that counsel for appellant was objecting to "everything the district attorney says." This was agreed to with the further stipulation that counsel for appellant should have an assignment of misconduct as to everything and that it might be understood that he was requesting the court "in each instance" to instruct the jury to disregard each statement made by the district attorney. The interruptions nevertheless continued. The foregoing summary of the conduct of appellant's counsel is set forth, as appellant contends

that the trial court erred in admonishing counsel not to ask certain questions and in finally citing counsel to appear at the conclusion of the trial to show cause why he should not be punished for contempt. This contention is wholly without merit. The action of the trial court was entirely justified by the conduct of counsel, to which reference has been made. Under the circumstances disclosed by the record there would have been no error even if the trial court had gone further and actually adjudged counsel in contempt while the jury was present. People v. Johnson (Cal. Sup.) 25 P.(2d) 408; People v. Beitzel, 207 Cal. 73, 276 P. 1006.

[3] Appellant claims error in the refusal of the trial court to dismiss the prosecution under section 1382 of the Penal Code. This section provides for dismissal "unless good cause to the contrary is shown" when the "defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment." In the present case the indictment was found on January 19, 1933, and the trial began on May 11, 1933. The record shows, however, that defendant was arraigned on February 24th and the trial was then set for March 6th. Subsequently "by the consent of respective counsel" the trial was continued to March 20th. On that date it was "continued to be set" to March 25th "with the consent of the respective counsel." It will be noted that this last-mentioned date was more than 60 days after the finding of the indictment. On March 25th counsel for appellant failed to appear and the trial court continued the setting of the trial to March 27th. Counsel again failed to appear on March 27th and at that time the trial was set for April 27th. On April 27th counsel for appellant appeared and moved for a dismissal "for lack of trial within sixty days." The motion was denied and the cause was set for trial for May 11th, on which date the trial began. It is thus apparent that counsel for appellant expressly consented to continuances on two occasions and thereafter failed to appear on two subsequent occasions. His consent to the continuances was equivalent to a postponement upon his application. Ray v. Superior Court, 208 Cal. 357, 281 P. 391; People v. Benc, 130 Cal. 159, 62 P. 404; People v. Peter, 20 Cal. App. 151, 128 P. 415. The failure of counsel for appellant to appear on the subsequent occasions certainly constituted good cause for further continuances. The motion was therefore properly denied on April 27th. It may be noted that the cause was tried within a reasonable time thereafter and that it does not appear from the record that counsel for appellant was ready and willing to proceed to trial at any time before the cause was actually tried.

[4] Appellant also claims that the trial court erred in admitting a photograph of the deceased soldier. The photograph is not made a part of the record on this appeal. It may have been shocking in its nature as indicated by appellant on the oral argument, but this would not make it inadmissible. People v. Burkhart, 211 Cal. 726, 297 P. 11; People v. Gomez, 209 Cal. 296, 286 P. 998.

[5, 6] The further claim is made that the trial court erred when it ordered an interpreter for the witness Enriquita Valenzuela. It is stated that said witness testified in English before the grand jury, wrote letters in English, and on the trial volunteered certain answers in English. The record on appeal discloses neither the testimony of the witness before the grand jury nor any letters written by the witness. It does appear that on the trial the witness answered certain simple questions without the aid of the interpreter by saying, "Yes" or "Si." But even assuming that the witness could read, write, and speak some English, it does not appear that the trial court abused its discretion in ordering an interpreter. The propriety of calling an interpreter is a question addressed to the discretion of the trial court and its action will not be disturbed unless it clearly appears that such discretion has been abused. People v. Lecang, 213 Cal. 65, 1 P.(2d) 7; 8 Cal. Jur. 225. There are authorities indicating that it may be an abuse of discretion to refuse to call an interpreter under some circumstances, but our attention has not been called to any case in which it has been held to be an abuse of discretion to call a properly qualified interpreter.

[7] Appellant also contends that the trial court erred in "refusing a full or free cross-examination of the witness Enriquita Valenzuela." On the cross-examination of this witness, counsel attempted to go far afield. He evidently appreciated the fact that some of his questions were not within the recognized bounds of cross-examination as he stated to the court that he would subsequently call her as his own witness, which he did. An examination of the testimony of this witness shows that counsel was permitted to ask such questions as he desired on all relevant matters and was even permitted to pursue several irrelevant matters. The general complaint made is that counsel was not permitted to show the friendly relationship existing between appellant and the witness "so as to remove from the jury all idea that the defendant came back to the girl's house malignantly to waylay and murder the deceased." For this purpose he attempted to go into all the details of the relationship between the two over a long period of time. He offered in evidence pictures taken of them together, presents which had been giv-

en by one to the other, and letters written by the witness to appellant. He also desired to show the places they had gone together and what they had done. We find no error in the rulings of the court excluding such details both on the cross-examination of the witness and on her direct examination when called by appellant. The girl admitted that they were friendly and that she had been out to dances with appellant, the last occasion being on the night before Christmas. Furthermore, we cannot see how the exclusion of such evidence could be prejudicial to appellant. The friendliness of the two being admitted, a showing of a closer relationship between them would only tend to show motive for the killing of the deceased rather than lack of motive.

[8, 9] It is also claimed that the trial court erred in admitting the knife in evidence, the exhibit being a spring knife found in appellant's room after he was arrested. It is argued that the identification of this knife was insufficient in law as it was identified only by the "accomplice Fajardo." We assume that appellant has in mind the provision of section 1111 of the Penal Code. Said section merely prohibits a conviction "upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." Said section does not deal with the admissibility of evidence, but merely with the sufficiency of the entire evidence to sustain a conviction. Even assuming that Fajardo's testimony identifying the knife was uncorroborated, it was, nevertheless, admissible. It appears from the record, however, that this portion of Fajardo's testimony identifying the knife was corroborated by the admissions of appellant.

[10] Appellant further claims that the trial court erred in admitting the evidence of officer McGinn regarding the pools of blood on the street. There is no merit in this claim. Such evidence served to show the conditions found to exist at the scene of the crime and was properly admitted. It is stated that there was "nothing to show it was the blood of deceased Karl Eyman." There was no direct evidence to so show, but there was ample evidence from which it might have been inferred. In fact, such was the only rational conclusion which could have been drawn from the evidence introduced.

[11] It is also urged that the trial court erred in admitting the statement of the appellant. The statement referred to was the confession made by appellant shortly after his arrest. This statement was reduced to typewritten form by an officer and was thereafter signed by appellant. Appellant's claim seems to be based upon the ground that the typewritten statement was not in the exact words used by the appellant in answering the questions put to him during the questioning. It appears, however, that appellant read over the typewritten statement and then signed it. Even if the typewritten statement was not in the exact words originally employed by appellant in his answers to the questions, he adopted the language of the typewritten statement as his own by affixing his signature thereto and such statement was admissible. People v. Costello, 87 Cal. App. 313, 262 P. 75; People v. Stevens, 78 Cal. App. 395, 248 P. 696; State v. Morris, 83 Or. 429, 163 P. 567; Commonwealth v. Coy, 157 Mass. 200, 32 N. E. 4. In State v. Morris, supra, the court said at page 571 of 163 P.: "The confession was reduced to narrative form at the defendant's dictation, and was read over and signed by him. It is not inadmissible because it fails to be a verbatim statement of his. * * * By signing it and adopting its language, he makes it his own."

[12] Appellant also objects to the rulings of the trial court "in respect to the questioning of the witness Bennie Sandiego." This witness claimed that he heard appellant arranging to take the girl to a show. The witness kept insisting that the engagement was made for December 26th. Counsel for appellant attempted by repeated questioning to have him change his testimony to show that the engagement was made for December 25th. This witness finally testified, "No, the 25th, the 25th, Christmas day. It is the 25th." Whereupon the trial court said, "The 25th, alright." This clarified the situation as far as this witness' testimony was concerned, and the error, if any, in sustaining objections to previous objections regarding this date could not be prejudicial to appellant.

[13] The further contention is made that the trial court erred in asking a certain question of appellant while he was on the witness stand. This particular question was asked near the end of the direct examination of appellant. Appellant had been questioned at length regarding all the facts and also regarding his confession. As to the confession he said, "Well, some of it is my words." Counsel then proceeded to read each question and answer to appellant asking him if he had given the answer appearing in the typewritten statement when questioned by officers. In reply appellant denied having made some of the answers and he apparently volunteered a great deal of testimony regarding the facts surrounding the fight. Both counsel and the court attempted on several occasions to make it clear to the witness that he was being interrogated regarding his statement to the officers and not regarding his version of the facts. Near the end of the prolonged examination and

after a question and answer which did not clearly indicate what the witness was testifying to, the trial court asked, "What are you doing now? Are you telling us the whole yarn again, or what you told the police officer?" Counsel took exception to this remark of the court and he now assigns it as error. Objection is made to the use of the word "yarn." This word is synonymous with the word "story" (Webster's New International Dictionary), which latter word had been used by the appellant himself. At one point in this line of examination the trial court asked, "What did you say to the officers about that?" Appellant replied, "You want me to tell my story?" While the word "yarn" is sometimes used with the implication of untruth or exaggeration, it does not necessarily convey that meaning. In the present case it is perfectly clear that the trial court was merely making another attempt to clarify the testimony of appellant by determining whether he was testifying in regard to the story of the fight as previously related by him as a witness or whether he was testifying as to the statement which he had made to the police.

[14] It is further contended that the trial court erred in permitting the prosecution to use the picture of the deceased in the closing argument to the jury. We have heretofore expressed the view that said picture was admissible in evidence. Having been admitted, it was entirely proper to make use of the picture at any stage of the argument. Even though the picture may not have been referred to in the opening argument or in the argument on behalf of appellant as claimed, it could still be properly used in the closing argument. We know of no such rigid limitation upon the use of exhibits as is contended for by appellant and he cites no authority to sustain his position. A similar claim of error is made with respect to the use of the knife in the closing argument to the jury, but the knife was likewise admitted in evidence and its use at any time during the argument was entirely proper.

[15] Appellant also contends that the trial court erred in the instructions given on the law of self-defense and justifiable homicide. The trial court very fully and fairly instructed the jury on these subjects. The instructions are quite lengthy and we do not deem it necessary to quote them here. One of the instructions complained of was given in People v. Orosco, 73 Cal. App. 580, 239 P. 82. It is set forth and approved in the last paragraph on page 599 of the opinion in that case in 73 Cal. App., 239 P. 82, 90. The remaining instructions complained of find ample support in People v. Emerson, 130 Cal. 562, 62 P. 1069, People v. Campbell, 30 Cal. 312, and ePople v. Shimonaka, 16 Cal. App. 117, 116 P. 327. Appellant cites no authority to support his claim of error in the instructions given. He seems to be of the opinion that it was error for the trial court to do more than read to the jury sections 197 and 198 of the Penal Code, but the authorities cited clearly indicate that it is entirely proper for the trial court to instruct the jury more fully on these subjects.

[16] It is further claimed that the trial court erred in giving any instructions relating to first or second degree murder. Appellant argues that the evidence was insufficient to justify his conviction of any crime greater than manslaughter. In our opinion the prosecution presented ample evidence from which the jury might have inferred all the necessary elements of either the first or second degree murder. Appellant, on the other hand, presented evidence which tended to show that the killing was justifiable or at least to show that no greater crime than manslaughter had been committed. It was for the jury to determine the testimony to be believed and to determine the nature of the crime committed under appropriate instructions from the trial court. There was therefore no error in giving the instructions relating to first and second degree murder as well as those relating to manslaughter.

[17, 18] Appellant also claims error in the refusal to give a certain requested instruction. Like many other assignments of error relating to the instructions, this proposed instruction is not set forth in the brief nor does the appellant favor the court with any argument. He merely quotes a short statement from People v. Fowler, 178 Cal. 657, 174 P. 892, and another from People v. Hecker, 109 Cal. 451, 42 P. 307, 30 L. R. A. 403. Such an assignment of error is likewise insufficient to merit consideration by this court. People v. Chutnacut, 141 Cal. 682, 75 P. 340; People v. Wademan, 38 Cal. App. 116, 175 P. 791; People v. Ross, 60 Cal. App. 163, 212 P. 627. We have nevertheless examined the proposed instruction which related generally to the incompetency of certain types of statements of an accomplice. Even if it be conceded that said instruction was correct as an abstract statement of the law, it does not follow that the trial court erred in refusing to give it. Appellant has not pointed to any testimony to which this instruction might have applied and our search of the record has not revealed any such testimony. Where there is no testimony in the record to which a proposed instruction may apply, the refusal to give it does not constitute error.

[19] With respect to the refusal of the trial court to grant his motion for a new trial, appellant merely states, "The affidavits filed by defendant were never answered by counteraffidavits or any showing at all. For each of the errors committed by the court upon the trial, the court should have granted a new trial." In People v. Goodrich, 41 Cal. App. 38, the court said at page 41, 181 P. 805, 807, "In view of such a general reference to the affidavits, we would be justified in passing the matter by without investigation." We have examined these affidavits, however, and find nothing therein to indicate that the trial court abused its discretion in denying the motion. The alleged "errors committed by the court upon the trial" have already been considered.

We have discussed all of the assignments of error which are sufficiently presented in appellant's brief and some which are insufficiently presented therein. As above stated, a reading of the entire record fails to disclose any error prejudicial to the rights of appellant.

The judgment and order denying the motion for new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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135 Cal.App. 46

GARLINGHOUSE v. MERKLE et al.

Civ. 9174.

District Court of Appeal, Second District, Division 1, California.

Nov. 6, 1933.

Appeal and error 🔑1010(1).

On motion to dismiss appeal or affirm judgment for plaintiff in automobile collision case, where only question was that of contributory negligence and evidence most favorable to plaintiff justified finding of no contributory negligence, judgment would be affirmed.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Vera S. Garlinghouse against Frank Merkle, Jr., and another. From the judgment, defendants appeal, and plaintiff moves to dismiss the appeal or affirm judgment.

Judgment affirmed.

Kidd, Schell & Delamer, of Los Angeles, for appellants.

Russell H. Pray, of Long Beach, for respondent.

CONREY, Presiding Justice.

This is a motion presented under rule V, section 3, to dismiss appeal or affirm judgment.

Plaintiff brought this action to recover damages incurred by reason of the negligence of defendant Mrs. Frank Merkle, Jr., in the operation of an automobile, whereby said automobile collided with an automobile driven by the plaintiff, with resulting injury to the plaintiff.

The sole ground of appeal is that the evidence without conflict establishes the fact that plaintiff's contributory negligence was a proximate cause of the accident and injury. Appellants in their brief give us a statement which they say is the evidence given by the respondent and her witnesses, without regard to any contradictory evidence on behalf of appellants or their witnesses. It is contended by appellant that the evidence, as shown by the statement thus made of the evidence most favorable to respondent, is sufficient to establish contributory negligence as a matter of law. With this contention we are not able to agree. From the evidence presented we are satisfied that the court was justified in finding as a fact that plaintiff was not guilty of contributory negligence in the said transaction.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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135 Cal.App. 4

SISLEY v. COLE (two cases).

Civ. 8041.

District Court of Appeal, Second District, Division 2, California.

Nov. 2, 1933.

1. New trial 🔑71.

On motion for new trial, trial court may weigh conflicting evidence and decide where preponderance lies.

2. New trial 🔑71.

Granting plaintiffs new trial after verdict for defendant in suit for injuries to child struck by automobile, wherein evidence was conflicting, *held* not abuse of trial court's discretion.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Suit by Danny Sisley, an infant, by H. L. Sisley, his guardian ad litem, and another, against Gordon Cole. Verdict for defendant. From an order granting plaintiffs' motion for a new trial, defendant appeals.

Affirmed.

Griffith & Thornburgh, of Santa Barbara, for appellant.

ARCHIBALD, Justice pro tem.

On the morning of July 6, 1930, plaintiff H. L. Sisley and his family, including his five year old son, the plaintiff Danny Sisley who was injured in the accident which gave rise to this suit, left Alhambra with the family of Charles T. Allen, which included his wife, Belle Allen, and his son Norman, each family traveling in their respective automobiles. At about 10:30 or 11 o'clock they stopped for lunch in the shade of some trees on the northerly side of the boulevard in the city of Santa Barbara, but not in a residence or business zone where limited speed regulations prevailed. Both cars were parked parallel with and from eight to ten inches from the northerly curb, the Sisley car in front and the Allen car from six to eight feet behind it. After lunch Mrs. Allen was standing in front of the Sisley car, holding Danny, who was sitting on the radiator. She put him down on the pavement and he immediately walked around to the side door of the Sisley car on the street or left side thereof. As she watched the boy, who was holding to a string which fastened some luggage to the car, she "heard a slight collision, like the scraping of two cars," whereupon she "looked up quick, and just then this car [defendant's] looked as if it was coming right at me," and "I jumped back and turned half way around when the car went by." Defendant's car was "right opposite" the Sisley car when Mrs. Allen first observed it, and out in the street "about a foot and a half." "It was zigzagging, going back and forward; * * * it looked as if it was going to cut right in front of Mr. Sisley's car." She did not see the car strike Danny, but next saw him as "he rolled out from under" defendant's car after it passed her, "10 or 12, maybe 15 feet from the north curb."

The mother of Danny testified that she saw the boy walk around to the side of the car after he was placed on the pavement by Mrs. Allen, and that she then walked back to the right side of the car, where she was heating milk for the baby, and that as she "reached down to pick up the bottle I heard a slight collision. Q. What did that sound like? A. I thought somebody had hit the back of one of the cars, my first impression, it sounded like metal hitting, like a scrape; * * * and I looked across the hood and I saw Mrs. Allen. She jumped back. I saw this [defendant's] car go on, and about 30 feet more I saw this child roll out from the back of the car. * * * I did not at the time realize it was my little boy." Mr. Allen also testified to hearing a noise "like a collision, scraping noise," and that just as he raised up he "saw the car coming right in front of Mr. Sisley's car, * * * from a foot and a half to two feet" away from it; that the sound he heard "came from the rear" of his car; that when he examined his car later at the hospital the "left rear bumper was badly bent, and my fender on the left side was badly scraped," and that such condition did not exist when he washed the car the night before; that he took the injured boy in his car to the hospital; that "there was no car within 8 or 10 feet" of his car while he was at the hospital; that his car was there parked in the "private driveway" of the hospital, and that no car entered such driveway while he was there. His son Norman Allen gave similar testimony relative to the "small collision" in the direction of the "rear of our Oakland," and as to seeing defendant's car go past the Sisley car and his mother stepping back as he looked up, and also as to the condition of the Allen car before and after the accident.

The evidence of the defense is in direct conflict with that of plaintiff, and in effect is that defendant was passing the two cars and upon seeing a man turned toward the center of the street; that when opposite the Allen car he heard a woman scream and glanced in that direction; that when he looked back he saw Danny about two feet in front of him and apparently walking across the street; that he turned to the right to avoid hitting the boy, but that his left headlight struck him, denting the lower half of the rim and splitting the glass "about three ways"; that at no time did he go closer to the two cars than five feet, and that his car did not show that it had come in contact with any other object, either on the front or the right fenders.

The jury returned a verdict for defendant. The court granted plaintiff's motion for a new trial, and from such order defendant has appealed.

Appellant contends that there is no conflict in the evidence, and that the court abused the discretion vested in it in making the order appealed from.

[1, 2] We cannot agree that there is no conflict in the evidence. Plaintiff's evidence places defendant's car within a foot and one-half or two feet of the Sisley car, and Danny was standing on the exposed side of the car when last seen by the witnesses and immediately preceding the slight collision and scraping sound which they testified they heard and which seemed to come from the rear of the Allen car. Immediately thereafter defendant's car passed the Sisley car, where Danny Sisley was standing, and after it passed the latter rolled out from under defendant's car, the rear right wheel passing over his leg. The court might well have concluded that there was a collision with the Allen car which alarmed the child, causing him to run into the street to escape the oncoming machine, with the resulting accident.

On a motion for new trial the trial court may weigh conflicting evidence and decide where the preponderance lies. The jury in the first instance was charged with that duty and decided in favor of the defendant. The court then weighed such evidence and determined that its weight was on the side of the plaintiff. "If there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict * * * is against the weight of the evidence, and that there should be a new trial." Gordon v. Roberts, 162 Cal. 506, 509, 123 P. 288, 289. The evidence in this case being conflicting, in our opinion, we are bound by the decision of the trial court, even though we might conclude from the record that the weight of the evidence lay more in favor of the verdict rendered by the jury.

Order affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

135 Cal.App. 166

In re NORRISH'S ESTATE.

RANAGAN v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 9327.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1933.

1. Wills 🔑695(2).

Where literal construction of clause in codicil would deprive residuary legatee of any benefit under will, case *held* proper one for declaration of residuary legatee's rights and construction of such clause (Code Civ. Proc. § 1060).

2. Wills 🔑565(1).

Under facts, clause in codicil bequeathing to testatrix' friend "anything I have bought while in the house & any of my clothing & she wishes & personal property," *held* construable only as bequeathing clothing and household effects legatee desired other than articles specifically bequeathed to others.

> Facts disclosed that, in original will, testatrix gave to children of deceased brother all residue and remainder of estate after payment of funeral expenses and debts; that if words "personal property" in the quoted clause of the codicil were given literal construction, residuary legatees could not share since estate consisted entirely of personal property, and that other legatee in codicil, to whom deceased bequeathed certain personal belongings, would likewise be unable to receive anything; that codicil contained no words of express revocation as to original will; and that codicil was in handwriting of testatrix and testatrix was 85 years old at time of its execution.

3. Wills 🔑476.

Codicil will not be construed to disturb will further than necessary to give codicil effect (Probate Code, §§ 102, 103).

4. Wills 🔑452.

Where any doubt exists as to testator's intention and will is capable of two interpretations, construction preferring testator's natural heirs to strangers should be adopted.

5. Wills 🔑488.

Where testatrix' intention in making codicil could be readily arrived at from reading will and codicil, evidence as to making of codicil *held* properly excluded.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

In the matter of the estate of Carrie J. Norrish, deceased, in which the Bank of America National Trust & Savings Association was appointed as executor, and in which Algernon S. Coe, as alleged beneficiary under the will, filed a petition for interpretation of that part of the codicil making a bequest to Ednah Ranagan, legatee. From a judgment construing the bequest, legatee appeals.

Affirmed.

C. Roy Smith, of Long Beach, for appellant.

Spaulding & Driscoll, of Los Angeles (Edwin U. Driscoll, of Los Angeles, of counsel), for petitioner.

ARCHBALD, Justice pro tem.

The testatrix, Carrie J. Norrish, a resident of Long Beach, died on or about May 25, 1932, leaving a witnessed will dated November 9, 1925, which gave to the children of her deceased brother, Alfred B. Coe, all the residue and remainder of her estate after payment of funeral expense and debts, and also a codicil thereto, executed April 27, 1931, entirely in her own handwriting and on three separate sheets of paper. In addition to a bequest of certain personal belongings to decedent's friend, Mrs. Elizabeth Knowles, the codicil contained the following provision: "To my kind friend Mrs. Ranagan I want given any thing I have bought while in the house & any of my clothing & she wishes & personal property." The will and codicil were admitted to probate June 27, 1932, and letters testamentary were issued the same day to Bank of

America National Trust & Savings Association, named in the will as executor. On November 13, 1932, Algernon S. Coe, alleging himself to be a beneficiary under said last will and testament, filed a petition for an interpretation of that part of the codicil making a bequest to Mrs. Ranagan, alleging that such bequest was vague and uncertain as to what such bequest and the personal property mentioned consisted of, and that a controversy had arisen as to the proper interpretation thereof. On December 15, 1932, judgment was rendered by the superior court construing said bequest to read as follows: "There is bequeathed to Mrs. Ednah Ranagan such articles of clothing and household effects as said Ednah Ranagan desires, other than articles therein specifically bequeathed to other parties." Deeming herself aggrieved by such judgment, Ednah Ranagan has appealed therefrom.

Appellant contends (1) that the words "personal property" have a well-defined meaning and cannot be restricted to articles of clothing and household effects, and apparently that they are intended to cover all property in the estate that could be designated "personal property"; (2) that if there is any ambiguity the court can only determine the true intention of the testatrix after taking evidence concerning the making of such codicil.

[1] It would seem from the record before us that the petitioner Algernon S. Coe is one of the children of decedent's deceased brother, Alfred B. Coe, and entitled to share in the residue of the estate as provided in the original will. It also appears that the entire estate is personal property, of the estimated value of $5,908.60, producing a probable annual income of $236.35. If, therefore, appellant's contention is correct as to the construction to be placed on the words "personal property," there would be no rest, residue, or remainder in which Coe could share, and it would seem to be a proper case in which a declaration of his rights under the will, and a construction of the clause of the codicil affecting such rights, may be made under section 1060, Code of Civil Procedure.

[2-4] 1. In our opinion no such construction as claimed can be gathered from a reading of the codicil. If such is the correct construction to be given, the bequest to Mrs. Knowles in the same writing could have no effect, as such bequest consists entirely of personal property. The children of the deceased brother mentioned in the will would take nothing, as we have said, and the effect of such bequest would be a revocation of the bequest in the original will. No words of express revocation exist in the bequest to appellant in the codicil. "It is a rule of construction that dispositions made by a will are not to be disturbed by a codicil further than is absolutely necessary in order to give that codicil effect, and a clear disposition made by a will is not revoked by a doubtful expression or inconsistent disposition in the codicil." Estate of Dominici, 151 Cal. 181, 189, 90 P. 448, 452. The words of a will are to receive an interpretation which will give some effect to every expression rather than one which will render any of the expressions inoperative. Section 102, Probate Code. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole. Section 103, Probate Code. Where a construction is claimed which would exclude natural heirs in favor of a stranger, and there is any doubt in the intention of the testator, it is "the well-settled rule that, where a will is capable of two interpretations, the one should be adopted which prefers those of the blood of the testator to strangers." In re Edie, 117 App. Div. 310, 102 N. Y. S. 424, 426.

With such rules of interpretation in mind we fail to see how any other construction than that announced by the trial court could be suggested. The record shows that the testatrix was 79 years of age at the time the will was executed and about 85 at the time of the execution of the codicil. The language used shows that the codicil was written by an aged person. Taking the two instruments together, there would seem to be no doubt but that it was the intention of the testatrix to limit the meaning of "personal property," as used in the bequest to Mrs. Ranagan, to any personal property of the character specifically mentioned that she might desire.

[5] 2. There seems to be no room for evidence, in view of the fact that the intention of the testatrix can be arrived at so readily from a reading of the instruments themselves.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

134 Cal.App. 723

PEOPLE v. FOWARD.

Cr. 2397.

District Court of Appeal, Second District
Division 2, California.
Oct. 30, 1933.

1. Criminal law ⚷619.

Separate informations against different defendants cannot be consolidated, though charges relate to same circumstances, where neither refers to other (Pen. Code, §§ 954, 1098).

2. Criminal law ⚷620(2).

In determining parties' rights respecting joint or separate trials under separate informations against different defendants, trial court is bound by contents of information and cannot look beyond its averments (Pen. Code, §§ 954, 1098).

3. Criminal law ⚷1186(4).

Trial court's unlawful consolidation of trials under separate informations against different defendants is not mere error curable under Constitution (Const. art. 6, § 4½; Pen. Code, §§ 954, 1098).

4. Criminal law ⚷1159(3).

All intendments must be resolved on appeal in favor of verdicts of jury, whose conclusions on conflicting evidence cannot be held without substantial support.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Leroy Foward was convicted of robbery, and he appeals.

Reversed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

CRAIG, Justice.

Upon an information consisting of two counts each charging the crime of robbery verdicts of conviction were returned, a motion for a new trial was interposed, which was denied, and the defendant appealed from said ruling and from the judgments.

[1-3] The appellant and one Henry Wooden were tried together upon separate informations filed by the district attorney. The appellant was charged in separate counts in one information with having robbed two men by force and fear, which information was numbered 51009. Thereafter Wooden was charged in separate counts of an information numbered 51381 with the crimes of robbery and assault with a deadly weapon, respectively. Over the strenuous objections of Foward, both were tried before the same jury at the same time and upon the same evidence. We are assisted by the citation of no authority other than the sections of the Code in either brief as to the propriety or error in such procedure. It is contended by the appellant that having been charged by different informations with different offenses separate trials were a matter of right; and on behalf of the people it is insisted that sections 954 and 1098 of the Penal Code expressly authorize their consolidation.

By the section first mentioned it is provided, in part, that an indictment, information, or complaint may charge two or more different offenses *connected together in their commission* under separate counts, and that if two or more indictments or informations are filed *in such cases* the court may order them consolidated, or may in the interest of justice and for good cause shown order that the different offenses or counts be tried separately. By the section last mentioned it is provided that when two or more defendants are *jointly charged* with any public offense, they must be tried jointly, unless the court order separate trial. In the instant case there was neither a charge of assault with a deadly weapon, nor a charge of any offense against the defendant and Wooden jointly. It is asserted by the appellant and not denied by the people that he was not charged with any offense in the Wooden information.

There is nothing in the language of either section authorizing the consolidation of separate informations against separate and distinct defendants. Where, as here, neither information refers in any way to the other, there can be no consolidation, regardless of evidence produced during the trial indicating that the charges relate to the same set of circumstances. This is so because in determining the rights of the parties relative to joint or separate trials in such cases, the trial court is bound by the contents of the information or indictment and cannot look beyond its averments. The matter is jurisdictional. In case the trial court, as it did here, disregards the defendant's rights and unlawfully consolidates trials, it is not mere error which can be cured by the application of the provisions of section 4½ of article 6 of the Constitution. All of the above legal propositions are decided in People v. O'Connor, 81 Cal. App. 506, 254 P. 630, which authority is determinative of this appeal.

[4] The only remaining grounds assigned for a reversal require a review of the evidence. All intendments must be resolved in

favor of the verdicts of the jury, and upon conflicting evidence before them it cannot be said that their conclusions were without substantial support.

The judgments and orders denying a new trial are reversed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

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135 Cal.App. 47

ISAACS et al. v. JONES et al.

Civ. 9139.

District Court of Appeal, Second District, Division 1, California.

Nov. 6, 1933.

Dismissal and nonsuit ⚷81(2).

Superior court, on statutory grounds, *held* to have jurisdiction to vacate and set aside order dismissing action (Code Civ. Proc. § 473).

Appeal from Superior Court, Los Angeles County; Wm. Frederickson, Judge.

Action by Charles Isaacs and another against H. M. Jones and others. From an order setting aside an order dismissing the action, the defendant named appeals.

Order affirmed.

William M. Morse, Jr., and Charles S. Wagner, both of Los Angeles, for appellant.

Arthur T. Stollmack and Samuel V. Goldfarb, both of Los Angeles, for respondents.

CONREY, Presiding Justice.

This is a motion presented under rule V, section 3, by the respondents to dismiss the appeal or affirm the judgment upon the ground that the appeal is taken for delay only, and on the ground that the question on which the decision depends is so insubstantial as not to need further argument.

The appeal is from an order setting aside an order of dismissal of the action. The dismissal had been granted on written request filed by plaintiffs' attorney at the time when the case was about to be called for trial. The motion to set aside the dismissal was made as a motion for relief under section 473, Code of Civil Procedure, it being claimed that the judgment of dismissal had been entered by mistake, inadvertence, and excusable neglect of plaintiffs' counsel.

The sole ground of appeal as shown by appellant's statement in his brief, of the question involved, is that upon the facts stated the court was without jurisdiction to vacate and set aside the order of dismissal of the action.

Answering the sole question of law presented by counsel, we are of the opinion that the court had jurisdiction to determine the motion and make the order from which the appeal has been taken. We are not called upon to pass upon the sufficiency of the evidence of mistake, inadvertence, or excusable neglect which induced the court to make the order setting aside the dismissal of the action. It was an order which the court had power to grant upon the stated grounds thereof. Code Civ. Proc. § 473; Palace Hardware Co. v. Smith, 134 Cal. 381, 385, 66 P. 474.

The order is affirmed.

We concur: HOUSER, J.; YORK, J.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

219 Cal. 405

SCHNEIDER et al. v. TITLE GUARANTEE & TRUST CO. et al.

L. A. 14445.

Supreme Court of California.

Nov. 15, 1933.

Appeal and error 🔑787.

Appeal must be dismissed where no proceedings had been instituted to prepare record on appeal and time therefor had expired.

In Bank.

Appeal from Superior Court, Los Angeles County.

Action by Florence Schneider and another against Title Guarantee & Trust Company and others. From an adverse judgment, plaintiffs appeal. On defendants' motion to dismiss appeal.

Appeal dismissed.

A. Feldman, of Los Angeles, for appellants.

John B. Yakey and Walker R. Flint, both of Los Angeles, for respondents.

PER CURIAM.

Motion to dismiss appeal for failure to file transcript within time. The judgment in this action for declaratory relief, accounting, and injunction was entered June 2, 1933. A motion to vacate the judgment and for a new trial was denied July 21, 1933. Written notice of the denial of said motion was served on the same day. Notice of appeal was filed August 19, 1933. The clerk's certificate filed in support of the present motion indicates that proceedings have not been instituted for the preparation of a record to be used upon the appeal. The time having expired therefor, the appeal must be, and it is hereby, dismissed. Rule V; Union Trust Co. v. Novotny, 125 Cal. App. 417, 418, 13 P.(2d) 974.

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134 Cal.App. 240

ROY v. PACIFIC GAS & ELECTRIC CO.

Civ. 4834(3).

Supreme Court of California.

Nov. 17, 1933.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

On rehearing.

Prior opinion, 25 P.(2d) 251.

Robert H. Schwab, of Sacramento, for appellant.

Thomas J. Straub and W. H. Spaulding, both of San Francisco, and W. U. Goodman and Joseph M. Raines, both of Fairfield, for respondent.

PER CURIAM.

In denying the petition for a hearing in this court, we are not to be understood as approving that portion of the opinion of the District Court of Appeal relating to the applicability of the doctrine of res ipsa loquitur in determining the sufficiency of the pleading.

The petition for hearing is denied.

LEWIS v. SHELL OIL CO.*

Sac. 4779.

Supreme Court of California.

Nov. 16, 1933.

Rehearing Granted Dec. 14, 1933.

1. Sales 🔑**174.**

Under five-year contract requiring filling station operator to buy 75 per cent. of oil and 100 per cent. of gasoline from seller, buyer buying only 40 per cent. of oil from seller for over four years, and then placing order to make up for shortage, could not recover for seller's refusal to sell gasoline.

2. Contracts 🔑**171(1).**

Whether contract is severable is question of interpretation, depending on parties' intent.

3. Sales 🔑**62.**

Contract, requiring buyer to buy certain percentages of his oil and gasoline from seller, was not severable so as to permit buyer not buying required percentage of oil to recover for seller's refusal to sell gasoline.

Contract provided for lease by oil company, seller, of exclusive advertising privileges on signs on top of buyer's building at certain monthly rental, and that buyer, filling station operator, agreed to purchase petroleum products from oil company for sale and dispensing through certain equipment, and that oil company should secure not less than 100 per cent. of total volume of gasoline business and not less than 75 per cent. of total volume of lubricating oil sold by buyer during life of agreement, and that differential on gasoline should be not less than 3 cents per gallon.

4. Contracts 🔑**171(1).**

Buyer not buying percentage of oil from seller required by contract could not recover from seller agreed rental for advertising privileges on buyer's building; contract not being severable.

In Bank.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by R. Lewis, doing business under the firm name and style of the Yosemite Garage, against the Shell Oil Company, formerly called the Shell Company of California. From a judgment for plaintiff, defendant appeals.

Reversed.

Prior opinion, 16 P.(2d) 744.

McCutchen, Olney, Mannon & Greene, F. F. Thomas, Jr., and William E. Wright, all of San Francisco, for appellant.

Barcroft & Barcroft and John J. Coghlan, all of Madera, for respondent.

IRA F. THOMPSON, Justice.

This litigation revolves around a contract, between the parties, in the following words:

"This agreement, made and entered into this 22nd day of March, 1927, by and between R. Lewis of the City of Madera, County of Madera, State of California, and Shell Company of California, a California Corporation.

"That for the term, at the rental and upon the conditions, covenants and agreements hereinafter expressed and subject thereto and in consideration of One ($1.00) Dollar to said R. Lewis in hand paid, receipt of which is hereby acknowledged, said R. Lewis hereby agrees that the Shell Company of California shall lease the exclusive advertising privileges on the signs on top of building, and certain panels on south side of said building of said R. Lewis for a period of five (5) years from completion of said work or during the life of this agreement.

"In consideration of the Shell Company of California leasing the exclusive advertising privileges for which they agree to pay a sum of Fifty ($50) Dollars per month for a period of five years from March 22nd, 1927, to March 22, 1932 said R. Lewis hereby agrees to purchase petroleum products from the Shell Company of California for sale and dispensing through the following units of equipment: One Wayne visible Curb pump, Cut 711, Serial 72349; One Bowser buggy, serial C. 17554; 2 Lub-oil containers. In event of said R. Lewis' removal from his present location, or sale of lease under which he holds premises, he shall have the right to carry on under this agreement at his new place of business, under the same terms and conditions herein provided, over a period of even and consecutive dates during which time the advertising privileges are hereby leased.

"It is further agreed that the Shell Company of California are to secure not less than the sum of 100 per cent of the total volume of gasoline business sold and not less than 75 per cent of the total volume of lubricating oil by said R. Lewis during the life of this agreement. Differential, on gasoline, not less than three (3) cents per gallon, during the life of this agreement."

On July 31, 1930, the defendant company refused to sell Lewis any further supply of gasoline. This action was commenced to recover damages for the company's refusal in this regard. The defense, by way of demurrer, and subsequently by answer, amounts to the same contentions as are now advanced on this appeal by it from the judgment entered on a verdict of the jury in plaintiff's favor.

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*For subsequent opinion see 29 P.2d 413.

It is asserted by appellant that the agreement is void for uncertainty because there is no basic price established by the agreement from which to determine, by means of the differential, the selling price of gasoline to the respondent, and because no price whatever was agreed upon for lubricating oils. It is also urged that for the entire period of the contract, up to and including the day on which the defendant refused to sell gasoline to the respondent, the latter had violated and breached the agreement by failure to purchase 75 per cent. of his total volume of lubricating oil, but had secured more than 60 per cent. of his requirements from the Pennzoil Oil Company. In truth, the record discloses that he purchased the following percentages per annum from appellant: In 1927, 39 per cent.; in 1928, 39 per cent.; in 1929, 36 per cent.; and in 1930, 40 per cent.

[1] We are not inclined, in this case, to follow counsel through the long arguments and authorities concerning the certainty or uncertainty of the contract, because this uncontradicted fact remains that respondent had consistently purchased more than 60 per cent. of his lubricating oil from another company. His contention is that, after the appellant refused to deliver gasoline, he ordered enough oil to make up the shortage, and that he had the whole term of the contract within which to purchase 75 per cent. of his requirements. With this contention we cannot agree. Assuming, solely for the purpose of argument, that the contract was valid and certain, it is evident that it was the plain intent of the parties that he should purchase from the defendant company 75 per cent. of the oil sold by him in the ordinary course of his business. To test his compliance with this provision, a reasonable length of time and a reasonable run of business would be the standard. But to say that for four years and four months he can make no pretense of complying with the covenant by him to be performed, and yet exact damages from the other party for failure to discharge its obligation, is reducing the situation to an absurdity. The rule of law is so elementary and fundamental, and so in keeping with good conscience and common justice, that we need do no more than refer to Los Angeles Gas & Electric Corp. v. Amalgamated Oil Co., 168 Cal. 140, 142 P. 46, and Sterling v. Gregory, 149 Cal. 117, 85 P. 305.

[2-4] This conclusion is founded upon the proposition that the contract under consideration is entire—which cannot successfully be denied. Whether a contract is severable or entire is a question of interpretation, depending upon the intent of the parties. Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co., 156 Cal. 776, 106 P. 55. The contract in the present case can be properly likened to an agency contract for the sale of appellant's products, both gasoline and lubricating oils. The parties by their writing specified the maximum permissible departure from exclusive representation of appellant by respondent, thereby manifesting their intent that the contract should not be severable, but entire. In other words, the nature of the subject-matter was such and the language of the parties such as to indicate that the purchase by respondent from appellant of 100 per cent. of his gasoline and 75 per cent. of his lubricating oil requirements was essential to the contract. The entirety of the agreement also disposes of respondent's contention that he was entitled to recover by a supplemental complaint filed by him the rental of the advertising space. Not only is it apparent from a reading of the agreement that the roof and panels were leased in consideration of the agreement of respondent to purchase Shell gasoline exclusively and 75 per cent. of Shell lubricating oil, but also it is in evidence that the rental was based upon an estimate of respondent's annual sale of gasoline, calculated upon previous years at the rate of one cent per gallon. The contract being nonseverable, respondent was not entitled to recover after his own persistent failure to comply.

Other points are raised by appellant which we deem unnecessary to discuss.

Judgment reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.

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134 Cal.App. 751

REA et al. v. CHAMBERS et al.

Civ. 9021.

District Court of Appeal, First District, Division 2, California.

Nov. 1, 1933.

1. Mines and minerals ⚷78(3).

Two days' work, done by lessees, in repairing machinery and drilling oil well about 2 feet before stopping because boiler tube burst, did not establish reasonable diligence, required by oil lease, in proceeding with drilling after notice of default.

2. Pleading ⚷263.

Permission to file amended answer, alleging work done by defendants after filing of complaint alleging solely their want of diligence in drilling oil well before commencement of action, *held* properly refused.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Frank L. Rea and others against C. W. Chambers and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

J. A. Chase, of Visalia, for appellants.

Everts, Ewing, Wild & Evets, A. W. Carlson, and L. N. Barber, all of Fresno, for respondents.

STURTEVANT, Justice.

From a judgment declaring the rights of the lessees forfeited, the defendants have appealed.

Some time prior to May 31, 1929, there had been sunk an uncompleted oil test well on the property owned by the plaintiffs. That well was down 2,000 feet. On the date mentioned, the plaintiffs, as lessors, and the defendants, as lessees, entered into a contract for the drilling of a test well. Some time in July, 1929, the defendants commenced the drilling. In March, 1931, the drilling stopped. At that time the well had been sunk to the depth of 2,065 feet. No further work having been done, on the 10th day of November, 1931, pursuant to a clause contained in the lease, the plaintiffs gave notice to the defendants of their default. On November 30th the defendants entered the premises and made some repairs to their apparatus and machinery. The next day, December 1st, they drilled about two feet and stopped. The cause of the stopping was the fact that one of the tubes in the boiler blew out. As to what length of time it would require to repair the boiler and resume work there is no direct evidence in the record. At the time the boiler trouble arose the well was down 2,067 feet. No other work was done prior to March 17, 1932, and on that date this action was commenced.

Among the numerous covenants contained in the lease are the following: "The lessee shall within one month from date hereof commence or cause to be commenced operations for the drilling of a test well * * * and shall prosecute the drilling of same with reasonable diligence until a well is completed * * * or unless mechanical difficulties are encountered. * * * In the event that the lessee fails to perform any obligation or obligations or terms or conditions of this lease by the lessee to be kept and performed, and such failure shall continue for a period of sixty days from and after written notice thereof specifying the nature of such breach or default is given by the lessor to the lessee, then this lease shall forthwith cease and determine and all rights of the lessee in and to the demised premises shall be at an end; and the lessee shall vacate said premises and the lessor may reenter and take possession of the same. * * * Drilling operations as used in this lease is defined to mean placing of material upon premises for the construction of a derrick and other necessary structures for the drilling of an oil well followed diligently by the construction of such derrick and other structures and by the actual operation of drilling in the ground." Among other things, the trial court found: "That the defendants have not, nor has any of them, nor has anyone on their behalf, commenced the drilling of any well on the premises described in the lease set forth in the complaint, nor prosecuted the drilling of any well thereon to a depth of 3000 feet or produced oil or gas in paying quantities at a lesser depth, and have not prosecuted the drilling of any well on the said premises with reasonable diligence; that during the month of March, 1931, the said defendants ceased their drilling operations on the said premises and performed no further work of any kind thereon until the 30th day of November, 1931. That on the 10th day of November, 1931, the plaintiffs served upon the defendants C. W. Chambers and Inland Valley Oil Company, Ltd., a written notice stating that the lessee had failed to perform the obligations and terms and conditions of the said lease by the lessee to be kept and performed, and specified in such notice the nature of such breach or default, that the failure of the said defendants to prosecute the drilling of said well, with reasonable diligence, continued for more than sixty days after the service of said notice and the defendants did not, nor did either of them, nor did anyone else on their behalf, prosecute the drilling of said well with reasonable diligence at any time between the time of the serving of said notice and the commencement of this action."

[1] The defendants attack the findings of fact and conclusions of law. The burden of their attack is that their default did not extend for the full period of sixty days after November 10, 1931. They stress the fact of what they did on November 30th, and December 1st. However, the work that they did on those two days was not enough to support a ruling by this court that the trial court erred in holding that the defendants did not proceed "with reasonable diligence." The fact that the tube of the boiler burst, standing alone without additional evidence, cannot be said as a matter of law to excuse all performance from December 1 to January 10, 1932—the end of the sixty-day period specified in the contract. It will be noted that the contract imposed on the defendants at all times to proceed "with reasonable diligence." The uncontradicted evidence is that nothing was done from March to November 10th. After the service of the notice, the defendants were called upon to commence in good faith and proceed with reasonable diligence. There was evidence that they did not do so.

[2] On the opening of the trial, the defendants asked permission to file an answer in which they alleged the work they had done after the complaint was filed. The trial court refused permission. The defendants now assert such refusal was error. With that assertion we cannot agree. The plaintiffs' complaint rested solely on want of diligence prior to the commencement of the action. The proposed amended answer purported to show diligence after the action was commenced and was not in any respect responsive to the allegations contained in the complaint.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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135 Cal.App. 154

HARRIS & STUNSTON, Inc., Limited, v. YORBA LINDA CITRUS ASS'N.

Civ. 1404.

District Court of Appeal, Fourth District, California.

Nov. 6, 1933.

1. Appeal and error 🔑1010(1).

Trial court's findings and conclusions supported by evidence could not be disturbed on appeal.

2. Mechanics' liens 🔑109.

Where water softeners were sold to plumber who sold and installed them in defendant's building, installation being merely incidental, plumber was "materialman" and not "subcontractor" acting as owner's agent (Code Civ. Proc. § 1183).

[Ed. Note.—For other definitions of "Materialman" and "Subcontractor," see Words & Phrases.]

3. Mechanics' liens 🔑109.

Where plaintiff sold water softeners to materialman who installed them incidentally as part of delivery to building owner, plaintiff *held* not entitled to lien.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Harris & Stunston, Inc., Limited, against Yorba Linda Citrus Association. From the judgment for defendant, plaintiff appeals.

Affirmed.

Harry C. Westover, of Santa Ana, for appellant.

Albert Launer, of Fullerton, Harold A. McCabe, of Santa Ana, and Launer & Thompson, of Fullerton, for respondent.

BARNARD, Presiding Justice.

The plaintiff furnished certain water softeners which were installed in two packing houses belonging to the defendant. Notices of claim of lien for materials furnished were filed followed by two actions for foreclosure of such liens, which actions were consolidated for trial. From a judgment in favor of the defendant, the plaintiff has appealed.

The appellant contends that one W. F. Cruller was a subcontractor employed to do plumbing and similar work on the buildings in question; that he was the statutory agent of the respondent within the meaning of section 1183 of the Code of Civil Procedure; and that it furnished these softeners to Cruller as such agent. It is respondent's contention that Cruller, in furnishing the water softeners, was not a subcontractor but was himself a materialman. The court found that Cruller sold the water softeners to the respondent at an agreed price and installed them upon the property; that the water softeners when sold to the respondent were the property of Cruller; that the respondent paid Cruller in full; that nothing was due to the appellant on account of said water softeners; and that the respondent was not entitled to a lien. It was further found that the appellant, through its authorized agents, induced and requested the respondent to purchase these water softeners from Cruller; that in reliance upon this the respondent in good faith purchased the same from Cruller; and that Cruller acted as a materialman in selling the machines to the respondent. The only question before us is whether the evidence sustains the findings or whether it conclusively appears therefrom that Cruller was a subcontractor and the agent of the respondent in so far as the purchase of the water softeners is concerned.

[1-3] The facts are not disputed and may be summarized as follows: In the early part of 1930, the respondent built one packing house and rebuilt or repaired another. As a part of this work, Cruller had a contract to do the plumbing and heating work in the buildings. The buildings were completed and Cruller's contract was fully performed prior to March 22, 1930, on which date the respondent began to receive and handle fruit. It appears that the Orange county manager for the appellant had been trying to sell some water softeners to the respondent. On or about April 13, 1930, a meeting was held at which there were present, among others, the president and another officer of the respondent, the general manager, and the Orange county manager of the appellant, and a representa-

tive of Cruller. Respondent's president testified that at this meeting the Orange county manager and the general manager of the appellant instructed them to buy the softeners from Cruller as they had done business with him for a good many years. Appellant's Orange county manager testified that at this meeting respondent's president asked him if it would be satisfactory if they purchased these softeners through Cruller and that he replied that it would certainly be satisfactory if they did so. He also testified that the question just referred to may have been worded "from Mr. Cruller" instead of "through Mr. Cruller"; that Cruller placed the order with his company; and that the softeners were billed to Cruller. Another officer of the appellant testified that the bills for the water softeners were made out to Cruller; that they allowed him a 20 per cent. commission in this case; and that they billed him for the net amount only. He further testified that the appellant had filed a claim in the bankruptcy court for the amount of these bills; that it had not yet received any money from that source, but that the referee thought that 10 per cent. of the amount might be paid. Cruller testified that he was in the wholesale plumbing and heating business; that he maintained a store; that, among other things, he handled water softeners; that he sold these softeners to the respondent and installed them; that he bought them from the appellant and sold them to the respondent; that the appellant billed him for them and he billed them to the respondent; that the respondent had paid him in full; that he was later forced into bankruptcy; that he had had similar water softeners on display in his store for seven or ten years before this time; that he had previously bought water softeners from the appellant and sold them to other parties; that this deal was handled in all respects similar to prior transactions except that these softeners were shipped direct to the respondent's place of business instead of being sent to his store and then reshipped; and that in all other cases the appellant had not attempted to collect direct from his customers. It appears that the water softeners were sold by Cruller to the respondent at an agreed price and that an additional amount was paid for their installation. While the latter amount does not appear, the evidence indicates that it was only a fraction of the purchase price.

We think this evidence supports the findings and conclusion of the trial court and that the same may not be disturbed. It seems clear that this case belongs to that class where a finished article is sold, the installation thereof being merely incidental and a part of the delivery. Under such circumstances the trial court correctly held that Cruller was a materialman and not a subcontractor acting as the agent of the owner. Hihn-Hammond Lbr. Co. v. Elsom, 171 Cal. 570, 154 P. 12, Ann. Cas. 1917C, 798; Hinckley v. Field's Biscuit, etc., Co., 91 Cal. 136, 27 P. 594; Bennett v. Davis, 113 Cal. 337, 45 P. 684, 54 Am. St. Rep. 354. Since the appellant merely sold materials to a materialman, it is not entitled to a lien. Wilson v. Hind, 113 Cal. 357, 45 P. 695; Roebling's Sons Co. v. Humboldt, etc., Co., 112 Cal. 288, 44 P. 568; L. W. Blinn Lumber Co. v. American C. P. Co., 51 Cal. App. 479, 197 P. 142.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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134 Cal.App. 763

GRIFFIN v. CITY OF LOS ANGELES.

Civ. 8023.

District Court of Appeal, Second District, Division 2, California.

Nov. 1, 1933.

Hearing Denied by Supreme Court Dec. 29, 1933.

1. Appeal and error ⚷151(5).

Party who prevails at trial has no error during trial of which he may complain, and, if he had, he would not be heard to complain, since he was not injured.

2. Appeal and error ⚷878(1).

Appellee cannot present for review exceptions taken by him unless he shall also have perfected an appeal.

3. Appeal and error ⚷839(1).

On appeal from part of judgment only, appellate court cannot reverse any part of judgment, except part to which appeal is directed.

4. Appeal and error ⚷544(2).

On appeal upon judgment roll alone, no other questions than those appearing on face of judgment roll are reviewable.

5. Rewards ⚷4.

City of Los Angeles *held* not authorized by Constitution or general laws or by its charter to offer reward for apprehension and conviction of murderer, where it was not shown that need for protection of public interests was peculiarly local or that reward was directed toward apprehension of one recognized as menace to local rights (Const. art. 11, §§ 6, 8, 11).

6. Municipal corporations ⚷58.

Powers conferred upon city of Los Angeles in municipal affairs are subject to charter restrictions only, and enumeration therein of powers conferred does not constitute limitations thereon for such purposes (Const. art. 11, §§ 6, 8).

7. Municipal corporations 🔑57, 59.

Municipal corporations have only powers expressly conferred and such as are necessarily incident to those expressly granted or essential to declared objects and purposes of corporation.

8. Constitutional law 🔑56.

Jurisdiction of superior courts is conferred by Constitution and cannot be taken away by any act of Legislature (Const. art. 6, § 5).

9. Rewards 🔑4.

Court could not view omission from present city charter of authority to reward arrests of persons charged with felony as inadvertence or intended revival or continuance of provision in abandoned charter.

10 Municipal corporations 🔑56.

Trial and punishment of offenses defined by laws of state is not "municipal affair" (Const. art. 11, § 8).

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

11. Municipal corporations 🔑56.

"Municipal affairs," as used in constitutional provision respecting municipal corporations' powers, refer to internal business affairs of a municipality (Const. art. 11, § 8).

12. Rewards 🔑4.

Offer of reward by city is unauthorized unless it appears that action is taken for immediate protection of public peace, health, and safety, and in recognition of fact that need for protection of public interest is peculiarly local and that it is directed toward apprehension of one recognized as menace to local rights.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Patrick Griffin against the City of Los Angeles. From a judgment for defendant, plaintiff appeals.

Affirmed.

Spencer Ward, of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Joseph T. Watson, Deputy City Atty., all of Los Angeles, for respondent.

CRAIG, Justice.

In an action against the city of Los Angeles, based upon seven alleged causes of action, general and special demurrers were sustained as to four thereof, and after a trial without a jury upon the first, second, and seventh causes of action, findings and judgment were rendered in favor of the defendant, from which the plaintiff appealed.

The city council of said city, pursuant to the commission of a homicide during the robbery of a bank, enacted an ordinance wherein they recited that "the presence in the City of Los Angeles of the persons, and each of them, who committed the crime hereinabove referred to, is a menace to the public peace and safety, and, therefore this ordinance is urgently required for the immediate preservation of the public peace, health and safety. * * *" By the same enactment it was ordained that, "upon the apprehension and conviction of each or either of said persons now at large who participated in the commission of said crime, the sum of twenty-five hundred dollars ($2,500.00) each, therefor, shall be paid out of the general fund of the city of Los Angeles, to the person or persons causing said apprehension resulting in said conviction. * * *" Following an indictment by the grand jury, and the publication of the foregoing offer, the appellant arrested one of the persons named in said ordinance, who was duly tried, found guilty, and sentenced, and the judgment of conviction was thereafter affirmed upon appeal. In addition to these recited facts, the trial court found in the instant case that "thereafter a claim for said reward was duly presented by the plaintiff to the defendant City of Los Angeles, but the same was denied by the council of said City of Los Angeles." And, as a conclusion of law upon which the judgment was founded, stated: "That the defendant City of Los Angeles was not authorized or empowered by the Constitution or general laws of the state of California or by the charter of said City of Los Angeles to offer a reward for the apprehension and conviction of a murderer."

[1-4] Many intricate questions are presented, but unless the action could in any event have been maintained, and the appeal upon that ground presents the same for consideration, their determination would not avail either party's cause. The respondent urges that said action was based upon a stale demand, and relies upon the following provision of the city charter: Section 376 thereof forbade the commencement of any suit upon a claim for money unless such claim had been presented "within six (6) months after the last item of the account or claim approved." It appeared that said claim was not presented within the prescribed limitation of time. In Farmers' & Merchants' Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795, 796, it was held: "Under provisions of law of this character, it has always been

held in this state that the presentation of a demand, in the manner provided, was a necessary prerequisite to the maintenance of a suit against a public corporation to recover money, and that a complaint containing no such allegation fails to state a cause of action." As indicated by the preceding city charter and by amendment to the present charter which precedes it, it may be conceded, but is not necessary to a decision that we hold, that the word "approved" was intended to require that a claim should have "accrued" within the time mentioned. However, it has been uniformly held that the party who prevails at the trial has no error committed at the trial of which he may complain, and that, if he had, he would not be heard to complain, for the reason that he was not injured thereby. Byxbee v. Dewey, 128 Cal. 322, 60 P. 847. Other cases to the same effect are: Seaward v. Malotte, 15 Cal. 305; Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 P. 876; Estate of Olmsted, 122 Cal. 224, 54 P. 745; Coyle v. Lamb, 123 Cal. 264, 55 P. 901; Globe Grain & M. Co. v. Drenth, 41 Cal. App. 604, 183 P. 285; Meeker v. Cross, 59 Cal. App. 512, 211 P. 229. An appellee will not be permitted to present for review exceptions taken by him unless he shall also have perfected an appeal. Bryan v. Idaho Quartz M. Co., 73 Cal. 249, 14 P. 859; Estate of Olmsted, 122 Cal. 224, 54 P. 745; South San Bernardino L., etc., Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 P. 699; Christopher v. Condogeorge, 128 Cal. 581, 61 P. 174; Benson v. Bunting, 141 Cal. 462, 75 P. 59; Kern Oil Co. v. Crawford, 143 Cal. 298, 76 P. 1111, 3 L. R. A. (N. S.) 993; Garibaldi v. Grillo, 17 Cal. App. 540, 120 P. 425. A defendant not appealing may not attack a finding that the plaintiff made demand before suit on guaranties. Bank of America of Cal. v. Granger, 115 Cal. App. 210, 1 P.(2d) 479. It is also true that, upon an appeal from a part of the judgment only, an appellate court has no jurisdiction to reverse any part of the judgment except the part to which the appeal is directed. Lake v. Superior Court, 187 Cal. 116, 200 P. 1041. And upon an appeal, as here, upon the judgment roll alone no other questions than those appearing on the face of the judgment roll are reviewable. Billesbach v. Larkey, 161 Cal. 649, 120 P. 31; Galvin v. Fannen, 154 Cal. 774, 99 P. 183; Miller & Lux v. Enterprise Canal, etc., Co., 145 Cal. 652, 79 P. 439; Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L. R. A. (N. S.) 844; Batchelder v. Baker, 79 Cal. 266, 21 P. 754; Norton v. Newerf, 45 Cal. App. 10, 187 P. 57. So, in the instant case, we are authorized to consider only grounds assigned by the appellant upon the face of the judgment roll alone.

[5] The principal contention between the parties arises from the diversity of interpretations of the ordinance in question and of the conclusion of the trial court. More than a citation of cases holding that homicide is an offense against the state, and that it is not one of which a municipality may take or authorize cognizance by its constituted municipal authorities, is unnecessary. Popper v. Broderick, 123 Cal. 456, 56 P. 53; Jackson v. Baehr, 138 Cal. 266, 71 P. 167; Hancock v. Board of Education, 140 Cal. 554, 74 P. 44; Robert v. Police Court, 148 Cal. 131, 82 P. 838; Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172. From the foregoing it must follow that the conclusion in itself is sound law, that "the defendant City of Los Angeles was not authorized or empowered by the Constitution or general laws of the state of California or by the charter of said City of Los Angeles to offer a reward for the apprehension and conviction of a murderer." But it cannot be said that in all cases a municipality must be held to be without power to enforce valid subsisting local laws nor to appropriate funds for the preservation of public peace, health, and safety when urgent need arises, merely by a showing of the commission of a heinous offense within its domain as part of the danger to peace and safety underlying such appropriation or attempted enforcement of local laws. As was aptly expressed by the Supreme Court of another state, there is an important distinction between ordinances making such appropriations which look to the protection of the general public from those which provide for preservation of the welfare of the inhabitants of the municipality. People v. Village of Holly, 119 Mich. 637, 78 N. W. 665, 44 L. R. A. 677, 75 Am. St. Rep. 435. In the absence of appropriate authority thus far discovered in this state, the general principles announced in refusing a perpetual restraining order against payment of a reward for the prosecution of arsonists may be quoted from the case last cited: "2 Bac. Abr. 147, supports the doctrine that the power to prevent fires is incidental to all municipalities; while Mr. Dillon says: 'The governing body of a municipal corporation (which has express power to protect the property and promote the welfare of its inhabitants) may, it has been held, offer a reward for the detection of offenders against the general safety of its people, as, for instance, those guilty of the crime of arson within its corporate limits. The contrary doctrine has also been held.' The California supreme court is said to uphold the power, but we are unable to verify it from the citation given. Some of the states deny it. The latest case seems that of City of Winchester v. Redmond, 93 Va. 711, 25 S. E. 1001 [57 Am. St. Rep. 822], where authorities supporting it are collected. Of these some apply to other offenses, the commission of which affects the inhabitants of

the city only in common with those of the state outside of the city. Thus, in Baker v. City of Washington, 7 D. C. 134, it was held that the defendant had no authority to offer a reward for the capture of the slayer of President Lincoln. A similar case, involving a reward for murder, is that of Gale v. Inhabitants of South Berwick, 51 Me. 174. Patton v. Stephens, 14 Bush. [Ky.] 326, applied the same rule to a reward offered for the apprehension of one who, through forgery, had embezzled the city funds. The case of Hanger v. City of Des Moines, 52 Iowa, 193, 2 N. W. 1105 [35 Am. Rep. 266], was another case of reward for the detection of a murderer. Butler v. City of Milwaukee, 15 Wis. 493, was not a case of arson, and seems to be within the principle of the preceding cases. The rewards in all of these cases are open to the criticism that they were not offered to preserve the welfare of the inhabitants of the municipality, as contradistinguished from those of the general public. The case of Murphy v. City of Jacksonville, 18 Fla. 318 [43 Am. Rep. 323], is not in point, because governed by a prohibitive statute, which, in the absence of a 'general welfare clause' (which does not appear), is a sufficient reason for the decision. Crofut v. City of Danbury, 65 Conn. 298, 32 A. 365, is in point, and supports City of Winchester v. Redmond. The danger of conflagration in cities and villages necessitates preventive measures that are not common in sparsely-settled districts, and such municipalities are authorized to expend large sums for apparatus to extinguish them. But these only serve to prevent the spread of fires. A determined incendiary in a city is a menace which cannot be safely disregarded, and may call for more than the ordinary methods to guard against his acts. We think the 'general welfare clause' is sufficiently broad to cover the employment of private detectives, through rewards, in such emergencies. We consider its exercise as 'contravening no provision of the constitution, * * * and made in the exercise of the police power necessary to the safety of the city,' and, we may add, impliedly conferred upon it. See Baumgartner v. Hasty, 100 Ind. 580 [50 Am. Rep. 830]." From the foregoing it would seem to be established law that appropriations by a municipality for immediate preservation of the public peace, health, and safety are not forbidden. At a time when the carrying of concealed weapons was not prohibited by general law, an ordinance of the city and county of San Francisco fixing a penalty therefor was held enforceable, as such a municipal regulation. Ex parte Cheney, 90 Cal. 617, 27 P. 436, 437. It was therein said: "Many police regulations which are demanded by the exigencies of life in a crowded city have reference chiefly to social order, and are directed to the promotion of the comfort and safety of the citizen, as well as to the protection of individual and public property. The mode of using the streets, the manner of conducting business, the times and places at which certain occupations shall be plied, are instances of this class, and the power granted to the city is limited to their regulation. It is with reference to ordinances of this character that it is said by courts they must be reasonable, and not violate those rights of the individual that are superior to the demands of society. There are other police regulations, however, which are intended for the prevention of crime and the preservation of the public peace, and in reference to which the legislative body of the city is vested with a discretion that is not reviewable by the courts. In the exercise of this power, the municipality, in determining the penalty to be imposed for violating its ordinances, is limited only by the terms of its charter, and the reasonableness of the punishment is not to be questioned elsewhere. It is a well-recognized fact that the unrestricted habit of carrying concealed weapons is the source of much crime, and frequently leads to causeless homicides as well as to breaches of the peace that would not otherwise occur. * * * It is to protect the law-abiding citizen, as well as to prevent a breach of the peace or the commission of crime, that the ordinance in question has been passed."

[6-9] As correctly stated by the appellant, the powers conferred upon the city of Los Angeles in municipal affairs are subject to charter restrictions only, and the enumeration therein of powers conferred do not constitute limitations thereon for such purposes. Charter, c. 1, § 2. We find in said charter no restriction upon the power of the city of Los Angeles to reward persons for the arrest and conviction of one charged with the commission of a felony. However, if not permitted, its denial by enactment or futile assumption by enactment could merit no greater significance than its designed omission. Attention is called to the existence of express provision in the original charter, and the omission from the present one, of this power. In distinguishing an instance where a plain inadvertence appeared from that under consideration by the Virginia Supreme Court of Appeals in Johnson v. Barham, 99 Va. 305, 38 S. E. 136, 137, it was said: "The propriety of the insertion of the word in that case is clearly demonstrated in the opinion, which is supported by abundant authority, and in this case we may well believe that the legislature intended to give an appeal to the corporation court; but there is nothing in any other part of the statute which throws any light upon that intention, and we cannot say that the purpose to do so is plainly deducible either from the context or other portions of the act. Suth. St. Const.

§ 261. Nor would the act be rendered incongruous or unintelligible by the omission of the word 'court'; nor would its omission lead to absurd results. It is safer in a case which admits of doubt, where the court finds itself at all involved in conjecture as to what was the legislative intent, that the particular object which may reasonably be supposed to have influenced the legislature in the particular case should fail of consummation than that courts should too readily yield to a supposed necessity, and exercise a power so delicate and so easily abused as that of adding to or taking from the words of the statute. In such a case, as has been said by courts in a different connection, 'to doubt is to be resolved.'" Article 11 of our Constitution in three instances prescribes the limits of municipal charters. Section 6 thereof provides that cities are authorized by charter "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." By section 8 it is provided: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." And in section 11 is granted to any county, city, or township the power to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Section 22 of article 1 provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." And by section 25 of article 4 it is ordained that the Legislature shall not pass local or special laws in any case (thirty-third subsection) "where a general law can be made applicable." It has been held by our Supreme Court that municipal corporations have only the powers expressly conveyed or conferred and such as are necessarily incidents to those expressly granted, or essential to the declared objects and purposes of the corporation. City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965; Whitmore v. Brown, 207 Cal. 473, 279 P. 447. It has been decided that, when the Constitution grants to local authorities the right to make and enforce police regulations "not in conflict with general laws," it is intended that local regulations of every kind may be made and enforced, except where the particular act described by the ordinance is the same act already included within the category of crimes as covered by the general codes or statutes, or the punishment affixed by ordinance for acts of a lesser degree than similar acts described in the statute is in excess of or not in harmony with the punishment designated by the latter. People v. Fages, 32 Cal. App. 37, 162 P. 137. The jurisdiction of superior courts is conferred by the Constitution, and cannot be taken away by any act of the Legislature. City of Tulare v. Hevren, 126 Cal. 226, 58 P. 530. They are required to take jurisdiction "in all criminal cases amounting to a felony." Const. art. 6, § 5. Hence, we cannot say that we are permitted to view the omission from the present city charter of authority to reward arrests of persons charged with felony, as an inadvertence or intended revival or continuance of the preceding provision contained in the abandoned charter.

[10, 11] Reverting to the ordinance in controversy, it remains to determine whether it falls within the foregoing prohibited enactments or, governed by the same rules of construction, it can be said to accomplish the purposes said by the appellant to have been intended. In recognition of the existence of persons within its limits who are a menace to the peace, health, and safety of the inhabitants of said city, it is contended that the object of the ordinance was to rid the community of such dangers and to obtain additional surveillance therefor. It is conceded that "the trial and punishment of offenses defined by the laws of the state is not a municipal affair," and it has been so held. Robert v. Police Court, 148 Cal. 131, 82 P. 838. And it may be conceded that the apprehension and removal from the midst of a community of those who threaten its peace, health, and safety is not a trial and punishment of such persons for felony. But the ordinance, although expressing the need for the exercise of authorized powers, expressly states that the proposed reward is "for the apprehension and conviction of each or either of the two persons now at large, who, on August 22, 1925, participated in the bank hold-up which resulted in the shooting and killing of Patrolman Wylie E. Smith, a police officer of the City of Los Angeles"; and that, "upon the apprehension and conviction of each or either of said persons now at large who participated in the commission of said crime, the sum of twenty-five hundred dollars ($2,500.00) each, therefore, shall be paid. * * *"

"'Municipal affairs,' as those words are used in the organic law, refer to the internal business affairs of a municipality. It was the internal business affairs of municipalities then existing and those of municipalities to be hereafter created that the constitutional amendment was framed to meet." Fragley v. Phelan, 126 Cal. 383, 58 P. 923, 925. The Supreme Court long since held as to fees of jurors in criminal cases that, notwithstanding an inhibition contained in the charter of the city and county of San Francisco, the state statutes controlled, and that the auditor would be compelled to issue a warrant therefor; "that the superior courts are state courts, and criminal cases concern the state, and are state affairs." Jackson v. Baehr, 138 Cal. 266, 71 P. 167, 168. And that "'any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.'" Ex parte Daniels, 183 Cal. 636, 192 P. 442, 444, 21 A. L. R. 1172. "The act of driving a motor vehicle while under the influence of intoxicating liquors is of no immediate or special concern to the city as such. It is of general concern to the inhabitants of a city in common with all other residents of the state. * * * It is not a 'municipal affair.'" Helmer v. Superior Court, 48 Cal. App. 140, 191 P. 1001, 1003. The precise question here presented does not appear to have been determined in this state, but upon the foregoing principles the Supreme Court of Virginia has held adversely to the appellant's contention. After careful examination of authorities relating to the power of a municipality to offer rewards for apprehension and conviction of incendiaries, it was there concluded: "Crime is an offense against the state, and not against the city, town, or county in which it may be committed, as distinguished from the rest of the state. The offense is against the sovereign authority, and not against the individual or particular community. All the people of the state are concerned in the punishment and suppression of crime. And the state, whose prerogative it is to punish crime, has made adequate provision for the vindication of the public justice. When a crime has been committed, it is her law, and not that of the corporation, that is broken. She has prescribed penalties for the various species of crime, and enacted laws for the arrest, trial, and punishment of criminals. They are arrested by her officers, and tried by her judiciary under her laws. The state constantly makes use of officers of the corporation in the discharge of its governmental functions, and requires them to perform within the corporate limits duties not strictly or properly local or municipal in their nature. In the performance of such duties, they exercise state powers, and are in that respect state officers. As was said by Judge Staples in Burch v. Hardwicke, 30 Grat. [71 Va.] 24, 34 [32 Am. Rep. 640]: 'When the mob rages in the streets, when the incendiary and assassin are at work, they do not offend against the city, but against the state. When they are detected and arrested, it is by the chief of police and his subordinates, under the authority of the state laws, and as an officer of the state; and, when they are tried and convicted, it is by officers representing the state and her sovereign power.'" City of Winchester v. Redmond, 93 Va. 711, 25 S. E. 1001, 1002, 57 Am. St. Rep. 822.

There is no type of crime which might under circumstances prevailing in a municipality at a particular time when an ordinance of the nature here involved is passed be more especially hazardous to the welfare of the community as distinguished from the state at large than arson. Yet, from the decision just quoted it is apparent that, while there may be authority to the contrary in other states, even that crime does not become one against the municipality solely because of its nature; but in the instant case there is nothing in the nature of the offense committed and for the commission of which a reward was offered that takes it out of the crimes against the state. As further said in the case last cited: "Municipal corporations are chartered, as we have seen, to regulate and administer the local and internal concerns of the people of the particular locality which is incorporated. They are not created to execute the criminal laws of the state. That is a matter for which the state has made ample provision by general statutes, and with which the corporation, as such, has nothing to do, unless expressly authorized by its charter or by statute. Hence the offer of a reward for the apprehension and conviction of an offender against the criminal law of the state is the exercise of a state power, and is foreign to the objects and purposes of a municipal corporation." Other authorities to the same effect are cited in vol. 19, at page 794, Ruling Case Law; Murphy v. City of Jacksonville, 18 Fla. 318, 43 Am. Rep. 323; Hanger v. Des Moines, 52 Iowa, 193, 2 N. W. 1105, 35 Am. Rep. 266.

[12] We conclude, therefore, that, although in a proper case, the present charter of the city of Los Angeles does not prevent its legislative body from appropriating funds to pay a reward for the apprehension of one who has violated a penal law of the state, it must, in order that they may exercise such authority, appear, not only that the council recognizes that the action is taken for immediate protection of the public peace, health, and safety, but further that it is taken in recognition of the fact that the need for protection of public interest is peculiarly local and municipal, and that it be directed toward the apprehension of one so recognized as a menace to local rights.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

135 Cal.App. 7

MOFFITT v. FORD MOTOR CO.

Civ. 8918.

District Court of Appeal, Second District, Division 2, California.

Nov. 2, 1933.

Hearing Denied by Supreme Court Dec. 29, 1933.

1. Appeal and error 🔑930(1).

Appellate court must resolve every reasonable question as to meaning of evidence in favor of jury's verdict.

2. Theaters and shows 🔑6.

Woman injured by fall on rough, cloddy ground after stepping down unreasonably high step in leaving automobile show *held* entitled to recover damages from corporation conducting show, though particular substance which caused fall and corporation's knowledge of its presence were not shown.

3. Appeal and error 🔑972.

Court's finding that plaintiff's counsel was not guilty of misconduct in asking witness, examined as to party conducting exhibition, in leaving which visitor was injured, what insurance defendant's representative said he would obtain, *held* not abuse of discretion, though witness answered, "Liability insurance" (Code Civ. Proc. § 2055).

4. Theaters and shows 🔑6.

Instruction that it was duty of defendants, conducting automobile show, to keep entrances and passageways used by visitors in safe condition, *held* erroneous, only reasonable care being required.

5. Theaters and shows 🔑6.

Corporation conducting automobile show was not absolutely bound to keep premises in safe condition, but merely to exercise reasonable care to do so.

6. Trial 🔑296(3).

Instruction that defendants conducting automobile show were liable for visitor's injuries, if their managers, officers, or agents knew, or should have known, of unsafe condition of premises, *held* not erroneous, in view of correct instructions on all points objected to (Const. art. 6, § 4½).

7. Appeal and error 🔑1170(9).

Instructions as to defendants' duty to keep premises, used by them for automobile show, in safe condition and their liability for visitor's injuries, if their officers or agents knew, or should have known, of unsafe condition thereof, *held* not prejudicial error, in view of undisputed facts (Const. art. 6, § 4½).

Facts that step from door of auditorium, in which show was conducted, to ground was almost twice as high as ordinary step, that ground immediately under it was rough and contained hard clods and rocks, and that defendant knew of such condition, made no attempt to remedy it, and directed visitors to leave through such door, were undisputed.

8. Damages 🔑132(6).

$10,000 damages, in addition to medical and allied expenses, for fractured hip, with resulting confinement and crippling of 73 year old woman conducting rooming house, *held* not excessive.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Alice D. Moffitt against the Ford Motor Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Kidd, Schell & Delamer, of Los Angeles, and Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

Benjamin M. Stansbury, Paul Vallee, and Mott, Vallee & Grant, all of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

In the main, we adopt appellant's statement of the case, but because of a few deletions and changes we do not use quotation marks.

The appeal is by the defendant Ford Motor Company, a Delaware corporation, from a judgment for $16,573.63, after jury verdict in an action for personal injuries.

The complaint in the action was filed December 1, 1928, and was directed against a number of defendants. It alleged that the defendants conducted an exhibition designated the Ford Show, commencing December 2, 1927, at the auditorium on the grounds of the Ambassador Hotel in Los Angeles, and that plaintiff attended the exhibition at the invitation of the defendant, and was injured while utilizing an exit from the auditorium. The prayer, as afterwards amended, sought total damages in the sum of $56,573.63, to wit, $6,573.63 special damages for medical and allied expenses, and $50,000 general damages. The complaint in its final form also alleged negligence in the following respects: "The general level of the floor at the exit was approximately 13½ inches above the general ground level immediately outside the exit. The surface of the ground immediately outside the exit was rough and uneven." The answer of the defendant Ford Motor Company admitted its corporate capacity and entity, and was a general denial as to the other allegations of the complaint in its final form, with the special defense of contributory negligence.

The trial resulting in the present judgment was the second one. The first trial was had in October, 1929, and resulted in the court's granting defendant's motion for nonsuit upon the opening statement of plaintiff's counsel. On January 10, 1930, plaintiff's motion for a new trial was granted. The defendant prosecuted an appeal from this order, and during the pendency thereof respondent moved to dismiss the appeal. This court granted the motion to dismiss upon the ground that the order was nonappealable under the circumstances. Moffitt v. Ford Motor Co. (Cal. App.) 292 P. 698. On hearing therein the Supreme Court reached a different conclusion and denied the motion to dismiss. Moffitt v. Ford Motor Co., 212 Cal. 73, 297 P. 553. The respondent thereafter moved to affirm the order granting a new trial or to advance hearing of the appeal on the calendar. This court denied the motion to affirm, but granted the motion to advance. 115 Cal. App. 499, 1 P.(2d) 994. After hearing on the merits, the order granting plaintiff a new trial was affirmed. 117 Cal. App. 247, 3 P.(2d) 605. The second trial commenced April 13, 1932, and ended April 28, 1932. It resulted in a verdict against the defendant Ford Motor Company for $16,573.63, and in favor of all other defendants named. Judgment was entered upon the verdict. Defendant company's motion for a new trial having been denied, it prosecutes this appeal.

The defendant Ford Motor Company concedes on the appeal that it conducted the exhibition designated the "Ford Show." It concedes that plaintiff attended the exhibition at its invitation, and that its duly authorized agents directed plaintiff to retire by the exit at which she was injured. It also concedes that plaintiff incurred $6,573.63 medical and allied expenses as the result of her injuries.

The appellant relies upon the following points for reversal of the judgment: (1) The judgment lacks evidentiary support, for the reason that the evidence fails to establish that any breach of duty by the defendant Ford Motor Company proximately caused or contributed to plaintiff's injury. (2) Prejudicial misconduct and reversible error committed by plaintiff's counsel at the trial, in bringing before the jury the fact that the defendant Ford Motor Company was protected by liability insurance in connection with the Ford Show. (3) The jury was misled to the prejudice of the defendant Ford Motor Company by instructions erroneously charging such defendant with the duty of keeping the passageways from the Ambassador auditorium in absolutely safe condition, and erroneously charging such defendant with liability if any of its agents knew, or should have known, that the passageways were in an unsafe or dangerous condition. (4) The verdict for $16,573.63 is disproportionate to any reasonable compensation warranted by the evidence, and is therefore excessive as a matter of law.

With the advent of the model A Ford in 1927, the Ford Motor Company arranged exhibitions for the display of the new product throughout the United States. The exhibition in Los Angeles was conducted at the auditorium on the grounds of the Ambassador Hotel, and for that purpose the auditorium was rented for a period of four days commencing December 2, 1927. A general invitation was extended to the public to attend the exhibition, and the doors were opened for their patronage on December 2d at about 10:30 a. m. Approximately 65,000 people attended the exhibition that day. They were admitted through the main entrance in the east wall of the auditorium, and until about 3 p. m. departed through doors adjacent to the main entrance. As the day advanced, the crowds became congested, and around 3 p. m. doors (used ordinarily for freight) were opened in the south wall of the auditorium for the exit of patrons. At the southeast door thus opened there was a step down approximately 13 inches high, and the ground outside was not paved, but was in a somewhat natural state, with hard clods of dirt and rocks present. During the day some unidentified person or persons carried on grading operations to the south of the southeast door, but no fresh dirt was deposited within 20 feet of the door. Between the hours of 3 p. m. and 4 p. m. of December 2, 1927, vast crowds retired from the auditorium by the southeast door, and, after using the step down, turned either to the left and passed to a sidewalk about 40 feet away or turned to the right and passed to an alley leading out to Eighth street. From the record it does not appear that any patron other than plaintiff was injured in using the southeast exit.

Accepting the general invitation, plaintiff entered the exhibition through the main entrance at about 3 p. m. of December 2d, and, after viewing the exhibition, was directed to retire from the auditorium by the southeast exit. She was 73 years old and unescorted. About 4 p. m. she started out the southeast exit with some 25 to 40 other patrons. She stepped down from the auditorium floor to the ground outside and fell. At this point we have deleted the following from the original statement of appellant: "* * * And stepped on some unidentified object which cut her right shoe, turned her right ankle and caused her to fall to the ground," and have added in place thereof the words "and fell." The subject "unidentified object" will play an important part in the analysis of the evidence. A fracture of the femur bone of the right hip resulted. First aid treatment was administered at the receiving hospital, and Mrs. Moffitt was then taken to a private hospital, where the fracture was reduced by her own physicians and a cast applied. She returned to her home after six days and remained in bed for approximately six months. A brace was substituted for the cast in April of 1928, and she wore the brace for about a year. During her period of inactivity, bladder trouble developed. At the time of the trial she was using a cane. Physicians and nurses were in constant attendance upon her, and as she progressed physiotherapy treatments were administered. At the time of the injury she derived her living by renting rooms, and had a ten-room house with four apartments outside; and it was her claim that her injuries had incapacitated her from attending to the wants of these tenants. The evidence disclosed, however, that she had a constant flow of housekeepers at the premises.

Herein we treat appellant's first point, to wit: The judgment lacks evidentiary support for the reason that the evidence fails to establish that any breach of duty by the defendant Ford Motor Company proximately caused or contributed to plaintiff's injury.

Following the method of appellant in presenting its argument we shall at once agree in intent with the text of its brief, but not with the exact wording, wherein it states the following: "Under settled and governing law the appellant owed to its invitee the duty of maintaining the auditorium and its immediate approaches in a reasonably safe condition, and of exercising reasonable care in protecting her from injury. This duty, however, under equally settled and governing law was not absolute. The appellant was not an insurer of the safety of its invitee. It was not bound at its peril to keep the auditorium and its approaches absolutely safe. Its duty depended upon whether or not it had express or implied notice that a dangerous condition existed." Mautino v. Sutter Hosp. Ass'n, 211 Cal. 556, 296 P. 76. Appellant then asks the question: "Was the appellant guilty of a breach of duty to the respondent which approximately [sic] caused or contributed to her injury?" To understand this question we quote from the testimony of the respondent, most of which appellant quotes in its brief:

"Q. Did you go out? A. I started out, yes.

"Q. You started out, where did you start out? A. Well, I started—when I started out, I started for the same door that I came in.

"Q. That was the east door? A. At the east door, not thinking but what I could go out there and the man says, 'You can't go out here, you go out there,' and he motioned to the other door.

"Q. When you say, 'go out there,' and motioned, and indicated where to go, where did he indicate? A. To the southeast door.

"Q. What did you do then? A. Well, everybody was going, a great many people were going out that way and I went right along with them, but I fell, I stepped on something and turned my ankle and fell.

"Q. Where was that? A. Right close to the door, the first step I took.

"Q. Outside or inside? A. Outside.

"Q. The first step that you took down? A. The first step I took down I fell.

"Q. And then what happened? A. What?

"Q. What happened then? A. Well, someone picked me up and sat me in the doorway.

"Q. Were there many people at the show? A. Yes, there was quite a good many there.

"Q. Were there many going out at the same time you went out? A. Yes there was a crowd going out.

"Q. About how many? A. Oh, I don't know, I should think about at least 25 or so.

"Q. How close were you to the other people there as you were going out? A. Well, we were all going out together, one right after the other.

"Q. Close enough to touch them? A. Yes.

"Q. Did you see the—what was the condition of the ground? A. I didn't see that before I stepped, we was all close together and I couldn't see where I stepped, but it was very rough. * * *

"Q. Well, you say that immediately after the accident you sat on the door step and you looked down at your foot? A. After I sat there I saw that my foot was turned back like that (indicating).

"Q. Now, you looked down at your foot; what did you see on the ground in the vicinity of your foot? A. Well, I don't know that I noticed the ground.

"Q. Did you see any rock there? A. I didn't notice any—I didn't notice the ground.

"Q. But you didn't see any rock? A. I don't know that I did; I didn't notice it.

"Q. No—you didn't observe it? A. I noticed it was a dirt ground that I stepped on; there was no walk—there was no cement walk; there was nothing but dirt.

"Q. And so far as you can swear now of your own knowledge, so far as you can testify—of your own knowledge now—there was no foreign substance there at all, was there? A. There was something that I stepped on that turned my foot; whether it was a rock or a little bit of clay, or whatever it was, there was something that cut my shoe, anyway.

"Q. But you didn't see it, did you? A. I didn't think to look to see what it was; I had other things to think of just then; I was suffering. I didn't faint away because I never fainted in my life, but I was about as white as that handkerchief (indicating), and they all noticed that.

"Q. Now, how many steps were there as

you stepped out from that hallway? A. Oh, just about one step, but it was not a hallway, it was the main room of the auditorium.

"Q. Just one step? A. I think the first step I took down, I stepped with my right foot and I fell.

"Q. The one step took you down to the street, did it? A. Oh, certainly, but it was not a street.

"Q. There wasn't a series of steps there? A. No."

Quoting from the testimony of Police Officer Charles C. Kagley: "The ground was rather uneven and bumpy out there; it wasn't just smooth, where you stepped from onto it." Lawrence A. Valli, an employee of Ford Motor Company, likewise testified:

"Q. Can you state what was the condition there of the landing immediately outside of the step? A. Immediately outside of the step the ground was rough and clods and dirt and rocks over on the ground there.

"Q. Can you state whether the clods of dirt that were there appeared to be hard or soft? A. They appeared to be hard."

The shoe mentioned had a tear in the cloth covering of the heel. Appellant then proceeds to present in his brief those cases holding that an accident caused by the presence of a foreign substance on a floor, or by a faulty condition of a floor covering, is not enough upon which to base a recovery for resulting injuries. It must also be shown that the invitor knew, or by reason of the circumstances obtaining should have known, the facts, and in time for him to have cured the fault. Appellant contends that the evidence in the instant case shows that there was some foreign substance entirely unidentified which caused the accident; that there is no evidence tending to show that appellant had anything to do with, or knew anything about, such foreign substance. With due respect for the earnestness with which this premise is presented, we are compelled to differ with appellant.

[1, 2] We are bound to resolve every reasonable question as to the meaning of the evidence in favor of the verdict. Respondent was directed to leave the auditorium by a different door than she entered. She was in a crowd where the people were close enough to touch each other. She observed a step down and took it, but it was much more than an ordinary step down. The ground upon which all of the pedestrians leaving that door were compelled to step was loose and cloddy. She stepped down, and with that step—not a subsequent one—she fell, injured. The felt covering of her shoe heel was torn, her ankle had turned. There was no need here for the jury to have believed that some foreign substance such as some one might have dropped there was the cause of the fall and injury. Knowledge as to the condition of the rough landing and extra height of the step is not denied by appellant. Respondent, an elderly lady and unattended, followed directions, and with the crowd stepped down an unreasonably long or high step onto a rough, cloddy, earthen surface. She was precipitated to the ground and injured. Can it be that, because the injured one cannot swear just what piece of hard substance resisted the pressure she put upon it as she let herself down, appellant is for that reason relieved from any and all responsibility? We think not. The clods were sufficient to have caused the turn of the ankle. Appellant knew the clods were there. Comparing the situation with the floor scrap cases, it is plain that one falling upon the floor from a slip, scraps being on the floor, would not have to positively identify the exact scrap her foot pressed upon. These conditions and circumstances would present the question to the jury as to whether or not the scraps caused the fall.

[3] The second point upon which appellant seeks a reversal of the judgment is expressed in the opening brief as follows: "Prejudicial misconduct and reversible error was committed by plaintiff's counsel at the trial in bringing before the jury the fact that the defendant Ford Motor Company was protected by liability insurance in connection with the Ford Show. This point arises from the following facts: The first witness called by the plaintiff was Walter E. Fowler, a defendant whose answer was on file in the action. He was chairman of the Ford Dealers Advertising Committee, of Los Angeles county, in whose name the Ambassador auditorium was rented for the purpose of the exhibition. He was interrogated by plaintiff's counsel under section 2055 of the Code of Civil Procedure respecting conversations preliminary to the exhibition occurring between representatives of the dealers and representatives of the Ford Motor Company. The matter appears in the record as follows:

" 'Q. Was the Ford Show matter and the putting on of the Ford Show, discussed also? A. Well, this committee was appointed long before, a long time before the Ford Show was ever put on.

" 'Q. Yes, but was that matter actually discussed? A. Previous to the show it was.

" 'Q. And what was the—and what was said concerning that, or what was done?

" 'The Court: By whom?

" 'Q. By Mr. Stansbury (continuing): Who was present? A. Well, with reference—those that I have mentioned that were at the Ford Motor Company down here, and the conversation was general and then it was decided to go into the matter and look it up and we went out to the Ambassador Auditorium, and the Auditorium was inspected and

Mr. Capek said it was suitable and that he would put on the show out there if the Ford dealers would pay the rent, and he instructed me at that time to sign the lease. I asked him if I should place the insurance and he said he would take care of that, that he would take care of all the details and all of the expenses other than the rent.

"'Q. *What insurance did he mention? A. Liability Insurance.*'" (Italics appellant's.)

Upon the occurrence of the above an objection was interposed, but not in time to prevent an answer to the question put by respondent's counsel. The court ordered the answer stricken and that the objection should precede the answer in the record. Counsel and the court then retired to the court's chambers, and without the jury's presence counsel for appellant moved that the court declare a mistrial on the ground of misconduct of counsel for respondent in bringing in the insurance question. This motion was denied, and nothing further regarding the incident was done. It has been held under certain conditions that it is reversible error for the plaintiff in a damage action to inject into the evidence any reference to the carrying of liability insurance by a defendant, but we do not think plaintiff in the instant case did this, and we see no abuse of discretion of the trial court in finding that counsel was not guilty of misconduct. The latter appears to have been examining a party under the provisions of section 2055 of the Code of Civil Procedure, trying to ascertain the real party who was putting on the Ford Show. Counsel was pursuing a legitimate and material inquiry, when the witness mentioned that the Ford Motor Company's representative said to him that the auditorium would be satisfactory and that he would proceed with the show if the Ford dealers would pay the rent. The witness, continuing without any intervening question, said he asked if he should place the insurance. The motor company representative said that he would take care of that and everything but the rent. It was then that the complained of question was asked and answered.

Counsel for respondent was within the legitimate limits of cross-examination, and there is nothing whatever to indicate that counsel had any idea that the answer would be related to the touchy question of liability insurance. The situation was very different from Squires v. Riffe, 211 Cal. 370, 295 P. 517, or Citti v. Bava, 204 Cal. 136, 266 P. 954. We do not understand any of the cases to go so far as to make the introduction of the subject of liability insurance fatal to a trial where it enters the case in a legitimate manner and for a legitimate purpose. A reading of the cases cited by appellant will disclose no such ruling. But they all show that the harm came from plaintiff's own examination. It may also be remarked that the answer did not necessarily mean indemnity insurance to the patrons of the show; it might have meant, as respondent suggests in her brief, employer's liability insurance. Rising v. Veatch, 117 Cal. App. 404, 3 P.(2d) 1023; Dullanty v. Smith, 203 Cal. 621, 265 P. 814; Lahti v. McMenamin, 204 Cal. 415, 268 P. 642; Hodge v. Weinstock, etc., 109 Cal. App. 393, 293 P. 80; Noble v. Bacon (Cal. App.) 18 P.(2d) 699.

[4, 5] Herein we shall consider appellant's exception to claimed defective instructions. The two instructions claimed by appellant as erroneous and as prejudicial to appellant are the following, both of which were requested by respondent. The second one quoted immediately follows the first one as given by the court, and appellant claims that they are related. We have used italics exactly as appellant used them in its brief:

"If you find from the evidence that defendants or any of them were engaged in conducting a Ford Show which they or any of them invited the public to visit or patronize, then *I instruct you that it was the duty of the defendants conducting such show to keep the entrances and passageways to and from the premises as so occupied and used by them in a safe condition* and to use ordinary care to avoid accidents or injury to those properly and lawfully entering upon or leaving the premises through such entrances or passageways in connection with visiting such show."

"If you find that the entrance or passageway at which it is alleged plaintiff was injured was in an unsafe and dangerous condition and that such condition was the proximate cause of the injuries to plaintiff, *the defendants, if any, engaged in conducting said Show are liable therefor if their managers, officers, or agents knew of such alleged condition, or if, as careful and prudent men, they should have known it, provided that plaintiff was in the exercise of ordinary care.*"

There is no doubt whatever but that the first-quoted instruction misstates the law, though it is exactly what appellant concedes in our opening quotation from his brief. Appellant is correct when it says later on in its brief that it is the duty of the appellant to exercise reasonable care to keep the premises in a safe condition rather than his duty to keep them in a safe condition. Mautino v. Sutter Hosp. Ass'n, 211 Cal. 556, 296 P. 76. But we think this error could not have affected appellant for reasons which we shall particularize in our comment upon both criticized instructions.

[6] As to the second quoted instruction, appellant registers three complaints: That it repeats the error of the first criticized instruction; that it makes appellant responsible for the information of "managers, offi-

cers, or agents," whereas in fact it is responsible only for knowledge of such within their scope of authority; that it omits the necessary item of time by holding appellant responsible for knowledge, even though such knowledge was not obtained in time to remedy the condition before the accident.

A reading of all the given instructions in narrative reveals numerous statements of the correct rule on all of the points objected to by appellant, and it would hardly seem possible that the jury could have misunderstood the law upon any of these points. Of course, we understand that even section 4½ of article 6 of the Constitution will not relieve mistaken and erroneous instructions where the issue is such that the jury could very well have followed an erroneous course through an erroneous direction of an instruction, but such is not the case here.

[7] We are convinced that an erroneous premise as to fact has been assumed by appellant for his analysis of this case. Appellant bases his case upon the theory that some foreign substance on the ground caused the accident. By foreign substance he means something other than the effect of the overhigh step and something other than the hard clods of dirt and rocks in the rough ground upon which respondent, in a close crowd, was directed to step. In this, as previously herein made plain, we regard appellant as in error. Looking at these instructions in the light that we have explained and in which the jury had a right to view them, no harm was suffered by the terms of the two criticized instructions for the following reasons: There is no issue in the case as to the step from the auditorium doorsill to the ground being almost twice as high as an ordinary one. There is no issue as to whether or not the ground immediately under and away from this step was rough, and contained hard clods and rocks. There is no issue as to the knowledge of appellant that this condition existed. It is apparent that appellant could not direct people to pour out of a freight door, over an unusually high step to a rough cloddy, and rocky terrain, and excuse itself from liability for resulting injuries by saying, "I have no responsibility in the matter; I knew nothing about these things." It was its duty to know. Therefore the difference between the expressions "duty to keep the premises safe" and "duty to use reasonable care to keep them safe" can make no difference in this case. It is apparent that appellant knew of the dangerous condition, and that it left it that way and made no attempt to remedy it. The same reasoning also completely nullifies any objection to the instructions upon the score that the knowledge of "managers, officers or agents" is not imputable to it except within the scope of their authority. Appellant was bound to know the condition of the exit through which it directed its invitees to go, and was bound to know the condition of the terrain upon which it directed them to step. In addition to this, there is no contention but that the managers knew of this condition. It becomes of no importance, then, what knowledge the instruction imputed to the "managers, officers, and/or agents." The other criticism is as to time; that is, that knowledge of the defective condition must reach the inviter in time for it to take action to remove the dangerous condition before liability can be fastened upon it. But this argument is ineffectual, because the condition was present in the instant case when the doors were opened. Admittedly, if the case presented any question of a foreign substance having been placed in the pathway by some one after the doors were opened, such as a broken bottle, the objections to these instructions would be vital and, too, appellant's general argument throughout the case would be germane.

[8] The conceded special damages leaves an even $10,000 general award. In view of all of the facts of the case, we cannot say that the size of this award shows that it was arrived at through passion, prejudice, sympathy, or misunderstanding.

The judgment is affirmed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

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135 Cal.App. 218

SILVEIRA v. SIEGFRIED.

Civ. 8826.

District Court of Appeal, First District, Division 1, California.

Nov. 8, 1933.

1. Trial 🔑296(4, 5).

That court in instructions on defendant's negligence omitted to say anything upon plaintiff's contributory negligence *held* not prejudicial, where jury was repeatedly instructed in clear language on contributory negligence.

2. Trial 🔑295(7).

Instructions on defendant's negligence and plaintiff's contributory negligence must be taken as whole.

3. Trial 🔑194(16).

Instruction that there was no evidence of any contributory negligence of plaintiff *held* erroneous, where evidence on contributory negligence was conflicting.

4. Trial 🔑194(1).

To determine ultimate facts from evidence is for jury, and though it is judge's function to declare law, judges cannot charge juries respecting matters of fact.

5. Trial 🔑296(1).

Erroneous instruction may be cured by subsequent charge.

6. Trial 🔑296(4, 5).

Erroneous instruction that there was no evidence of contributory negligence *held* cured by supplementary instruction that plaintiff could not recover if he was guilty of negligence proximately contributing to accident.

7. Automobiles 🔑246(58).

Instruction on last clear chance in action for automobile collision *held* proper, where defendant admitted that she could have stopped automobile and avoided accident, but attempted to avoid collision by increasing speed.

8. Trial 🔑296(3).

Instruction that plaintiff's violation of speed limit of 20 miles per hour would not preclude his recovery unless it proximately contributed to collision *held* not erroneous for misstating speed limit, where court correctly instructed that speed limit at which plaintiff could operate automobile was 15 miles per hour.

9. Automobiles 🔑201(2).

Owner is not liable for excessive speed of automobile unless such speed is proximate cause of injury.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Manuel A. R. Silveira against Lou Vee B. Siegfried. From a judgment for plaintiff, defendant appeals.

Affirmed.

Frank V. Campbell and Harvey C. Miller, both of San Jose, for appellant.

Alfred J. Hennessy and Kennett B. Dawson, both of San Francisco, for respondent.

PER CURIAM.

Action to recover damages suffered by plaintiff in an automobile collision. The accident occurred at or near the intersection of Coleridge and Waverly streets in the city of Palo Alto. There was a conflict in the evidence as to the rate of speed the different cars were traveling when they entered the intersection, and also as to which entered the intersection first. Plaintiff recovered judgment against defendant based on the verdict of a jury in the sum of $5,000. Defendant moved for a new trial on all the statutory grounds. The motion was denied. This is an appeal from the judgment and order.

[1-6] The appeal is based solely upon claimed erroneous instructions given to the jury at the request of respondent. The complaint alleges negligence. This was denied by the answer, and contributory negligence was pleaded as a separate defense. The trial court gave numerous instructions upon the subject of contributory negligence, to the correctness of which no complaint is made. It is claimed, however, that the court gave other instructions upon the subject which omitted or misstated this defense. Upon this subject, except as hereinafter stated, the court fully and fairly instructed the jury. Where a jury is repeatedly instructed, as here, in clear and explicit language on the subject of contributory negligence, it cannot reasonably be said that the jury was misled to the prejudice of appellant, because in other instructions upon the subject of defendant's negligence the court omitted to say anything upon the subject of the contributory negligence of the plaintiff. The instructions are to be taken as a whole. Stephenson v. Southern Pacific Co., 102 Cal. 143, 34 P. 618, 36 P. 407; Swartz v. Acme Express & Drayage Co., 102 Cal. App. 615, 283 P. 358. At the request of respondent, however, the court gave the following instruction: "You are instructed that there is no evidence before you in this case of any contributory negligence on the part of the plaintiff." As the evidence upon this subject was conflicting, the instruction was clearly erroneous. It is the province of the jury to determine the ultimate facts in a case from the evidence introduced, and although it is the function of the judges to declare the law, they are expressly forbidden by the Constitution from charging juries with respect to matters of fact. 24 Cal. Jur. p. 836. However, an instruction though clearly erroneous may be cured by a subsequent charge. Mora v. Favilla, 186 Cal. 199, 199 P. 17. After the case had been submitted, the jury returned to the court and asked to be further instructed on the law of contributory negligence. The court then correctly instructed it as follows: "The court instructs you that if after a consideration of all of the evidence you should find that the drivers of both cars involved in this collision were guilty of some negligence and that such negligence of both proximately contributed to the happening of the accident, then your verdict must be in favor of the defendant even though the driver of the defendant's car may have been most to blame, for the law does not measure the degree of wrong or fault of negligent persons, and if the plaintiff was negligent in the slightest degree and his fault proximately contributed to the accident, he cannot recover." We are of the opinion that this supplementary instruction, coming as it did after the jury had retired, and given at its request, shows that the jury appreciated the conflict

in the instructions upon the subject, and whatever doubt may have been in the minds of its members was set at rest by this final instruction on the subject. It seems to us that to hold otherwise would be to attribute to the members of the jury lack of ordinary intelligence.

[7] Appellant further complains that the trial court committed error in instructing the jury upon the doctrine of the last clear chance, it being claimed that the evidence did not justify such an instruction. Defendant's own testimony shows that she had knowledge of the dangerous situation of plaintiff and could have stopped her car within a few feet and thus avoided the accident, but she elected to increase her speed and in this manner attempt to avoid a collision. Under these circumstances the instruction was a proper one, as it was for the jury to say whether or not defendant exercised ordinary care to avoid the collision. We are of the further opinion that the instructions upon this subject were proper in form.

[8, 9] And, finally, it is claimed that the court committed error in instructing the jury as to the rate of speed which applied at the intersection in question, contrary to the law in effect at the time of the accident. The court advised the jury in two instructions that the maximum speed limit allowed by law for plaintiff to operate his automobile at the time and place of the accident while entering or passing through the intersection in question was fifteen miles an hour. These instructions are conceded to be correct. The court had previously instructed the jury in substance that if it found from a preponderance of the evidence that plaintiff was guilty of violating the speed limit of *twenty* miles an hour in traversing the intersection, he would not be precluded from a recovery merely by reason of such violation unless it further found that such violation, if any, proximately contributed to the collision, or was one of the proximate causes of the collision; and even if he was exceeding the speed limit of *twenty* miles an hour in traversing the intersection, unless such excessive speed was one of the proximate causes of the collision, he was not precluded from a recovery. It is claimed that the giving of this instruction constituted error, as the rate of speed allowed at the intersection was fifteen and not twenty miles an hour. The instruction is merely one on proximate cause, and the rate of speed mentioned therein is of no consequence. The instruction would be proper no matter what rate of speed was stated. Although an automobile may be traveling at a rate of speed prohibited by law, unless the excessive speed of the car is the proximate cause of the injury complained of, the owner is not liable.

The judgment and order are affirmed.

CITY OF LOS ANGELES v. HIGGINS et al.*

Civ. 8256.

District Court of Appeal, Second District,
Division 2, California.
Nov. 3, 1933.

Rehearing Granted Nov. 8, 1933.

Eminent domain 🔑246(3).

City's failure to pay condemnation award for property taken for street within 30 days or one year *held* not implied abandonment of proceedings (Gen. Laws 1923, Acts 8198, 8199; Code Civ. Proc. §§ 1251, 1255a).

> Code Civ. Proc. § 1251, provides that compensation awards in street opening cases shall be paid within 30 days after interlocutory judgment, or, in the event bonds are to issue, within a year.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Condemnation proceedings by the City of Los Angeles against Thomas F. Higgins and others. From a judgment dismissing the proceedings, the plaintiff appeals.

Judgment reversed.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Thurmond Clarke and Arthur W. Nordstrom, Deputy City Attys., all of Los Angeles, for appellant.

J. R. Sahanow, of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This cause arises out of an eminent domain proceeding wherein the city of Los Angeles sought to take property belonging to defendant and respondent for street purposes under the Street Opening Act of 1903, as amended. Deering's Gen. Laws 1923, p. 3309, Act 8198, Stats. 1903, p. 376, and acts amendatory thereof. The interlocutory judgment was signed May 7, 1929, after the determination of awards. Such awards are to be paid from a special fund to be collected by the bureau of assessments of the city of Los Angeles from an assessment levied under and pursuant to the provisions of the Street Opening Act of 1903, which assessments may be represented at the option of those assessed by bonds to issue under and pursuant to the Street Opening Bond Act of 1911 (Deering's Gen. Laws 1923, Act 8199). On April 25, 1930, the court denied a defendant's motion to dismiss. Thereafter he filed another motion to dismiss which was granted July 21, 1931. This motion was based solely upon the files of the case and under section 1255a, Code of Civil Procedure, upon the theory that an

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*For subsequent opinion see 34 P.2d 754.

implied abandonment had taken place under section 1251, Code of Civil Procedure. Section 1251, Code of Civil Procedure, states that awards in street opening cases shall be paid within 30 days after interlocutory judgment, or, in the event bonds are to issue, within a year. The Street Opening Act of 1903, however, provides by section 31 thereof that awards shall not be paid until there is sufficient money collected therefor to pay them. It would be highly impractical, if not impossible, to collect such money within such a specified time, and we think, therefore, that section 1255a is not applicable to the situation. City of Los Angeles v. Agardy (Cal. App.) 24 P.(2d) 915.

Judgment reversed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

134 Cal.App. 755

SAN FRANCISCO MILLING CO., Limited, v. MORDECAI et al.

Civ. 9069.

District Court of Appeal, First District, Division 2, California.

Nov. 1, 1933.

Rehearing Denied Dec. 1, 1933.

Hearing Denied by Supreme Court Dec. 29, 1933.

1. Venue 🔑22(3).

Where action against corporation for conversion of cattle was independent of action against assignee of seller for reasonable value of care of cattle, residence of corporation must be disregarded in determining venue of action against assignee of seller (Code Civ. Proc. § 395).

2. Venue 🔑22(3).

On motion for change of venue, if it is manifest upon face of complaint that party is joined solely for purpose of retaining venue in particular county, improper joinder must be disregarded (Code Civ. Proc. § 395).

3. Venue 🔑22(3).

Where defendants charged with conversion of cattle were not sought to be held for reasonable value of care thereof which was only item upon which defendant seeking change of venue to county of his residence was sued, such defendant *held* entitled to change of venue where plaintiff pleaded no uncertainty as to which of defendants was liable for care of cattle and no relief was sought in the alternative against various defendants (Code Civ. Proc. §§ 379a–379c, 427).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the San Francisco Milling Company, Limited, against Brooke F. Mordecai and others. From an order denying motion for change of venue, named defendant appeals.

Reversed, with directions.

George Mordecai, of Madera, for appellant.

Carl R. Schulz and Norman A. Eisner, both of San Francisco, for respondent San Francisco Milling Co., Limited.

NOURSE, Presiding Justice.

This is an appeal from an order denying the motion of the defendant Mordecai for a change of venue. The plaintiff filed a complaint in the city and county of San Francisco containing four separate and distinct causes of action against four separate defendants praying separate and distinct relief against each defendant upon the cause of action specially pleaded as to him. The defendant Mordecai moved for a change of venue to the county of Madera, which was the county of his legal residence. The two corporate defendants had their residence in the city and county of San Francisco. The defendant Ornbaum was a resident of Stanislaus county. At the hearing of the motion these three defendants consented to the change. The theory of the motion was that these three defendants were improperly joined for the sole purpose of placing the venue of the action in the city and county of San Francisco. The plaintiff justified the joinder of these defendants on the theory that it was in doubt as to which of the defendants was liable.

Section 379a, Code of Civil Procedure, provides: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgments may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities."

Section 379b provides in part: "It shall not be necessary that each defendant shall be interested as to all relief prayed for, or as to every cause of action included in any proceeding against him."

Section 379c reads: "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties."

The first cause of action is directed against Mordecai alone. It alleges that on October 14, 1931, this defendant agreed to sell plaintiff's assignor a certain number of cattle for the price of $10,580.80 under the terms of a written contract which is attached and made part of this count; that, on February 23, 1932, this defendant elected to rescind said contract and thereupon took possession of said cattle without legal process; that, prior to such rescission, plaintiff's assignor had expended "under said contract" in the care of said cattle the sum of $7,526.60, which was the reasonable value of the goods and services so rendered.

The second cause of action is in substantially the same language, except that it alleges that Mordecai assigned all his rights under this contract to the Tri-State Livestock Credit Corporation, and that, on February 23, 1932, this corporate defendant elected to rescind the contract and took possession of the cattle. The plaintiff prays for a separate judgment against this defendant for the same sum alleged to have been expended for the care of the cattle.

The third cause of action alleges that on February 23, 1932, the plaintiff's assignor was lawfully possessed of these cattle, which were of the value of $7,847.28; that on that day the defendant Western Cattlemen's Association unlawfully took said cattle and converted them to its own use to the damage of plaintiff in the sum of $7,847.28. A separate judgment was demanded against this defendant for the value of the cattle alleged to have been converted.

The fourth clause is pleaded in similar language, except that it was therein alleged that the defendant Ornbaum was guilty of the conversion on the same day. A separate judgment in the same amount was demanded against this defendant for the alleged conversion. It should be here noted that the written contract of sale is not pleaded and is not made a part of the third or fourth counts.

Turning to this contract, which it must be noted is expressly made a part of the first and second causes of action, we find its pertinent provisions as follows: The seller (defendant Mordecai) agreed to sell the cattle to plaintiff's assignor for the total price of $10,580,80; the buyer agreed to pay from time to time as he resold the cattle, "but in all events not later than 90 days from the date hereof"; title was to remain in the seller until purchase price paid; should the buyer fail to make payment or default in any of the conditions, the seller "may, if he so elect rescind this contract, and take possession without legal process" of said cattle. "The cost of the care, fattening, conditioning, and marketing of said cattle * * * shall be borne at the sole cost and expense of the buyer."

The relief sought in the first two causes of action is limited solely to the recovery of the sum which plaintiff's assignor "had expended under said contract, in the care of said cattle," a sum which under the contract plaintiff's assignor assumed to pay without obligation to the seller. It should also be noted that it is not alleged that plaintiff or his assignor performed any of the obligations or conditions assumed by the buyer under the contract.

The first two counts which are both based on the claim for the reasonable value of the care of the cattle fail to state a cause of action because the claim arises under an express contract which specifically relieves the defendants from liability. A party cannot sue on a contract and at the same time repudiate his obligations under it. To recover on the contract he must allege performance or excuse or prevention of performance. The contract calls for payment in full of the cattle within ninety days from its date. The contract was executed October 14, 1931. Payment was due February 13, 1932. The election to rescind which the defendant is alleged to have exercised occurred February 23, 1932, at a time when plaintiff's assignor was in default.

[1] Directing our attention to the second count, we find the assignee of the seller sued upon an obligation which the plaintiff expressly assumed to pay and one for which the seller was expressly made not liable. Failure to plead performance, excuse, or prevention of performance is a defect which cannot be cured by amendment because, if plaintiff had paid the purchase price and the cost of the care of the cattle as required by the contract, then the contract was at an end on February 23d, and the alleged taking on that date was not under the contract, but was an unlawful conversion. But the action for conversion is a wholly independent and separate cause of action from the one pleaded for reasonable value of the care of the cattle. For these reasons it is apparent that the corporation sued in the second cause of action was joined for the sole purpose of placing the venue of the action in the city and county of San Francisco. For the purposes of this motion the residence of this corporation must be disregarded. Section 395, Code Civ. Proc.

[2, 3] The third and fourth counts plead a conversion of the same cattle. Neither count pleads the contract or relies in any respect upon the transaction pleaded in the first count against this appellant. The claim for the reasonable value of the care of the cattle is not related in any sense to the claim for damages for a conversion. There is no allegation in any part of the complaint which connects this appellant with the alleged conversion by either defendant named in the third or fourth count. If, as alleged in the first count, the appellant took under the contract when the plaintiff was in default, there was no conversion on his part. If, as alleged in the third and fourth counts, the defendants named therein unlawfully took the cattle and converted them to their own uses, the plaintiff

has pleaded a case of tort wholly unrelated to the transaction pleaded in the first count. The impropriety of this joinder is manifest. Section 427, Code Civ. Proc.

It is argued that, on a motion for change of venue, the impropriety of the joinder of parties cannot be considered. The statement is too broad. If it is manifest upon the face of the complaint that a party is joined solely for the purpose of retaining venue in a particular county, such improper joinder must be disregarded. Section 395, Code Civ. Proc.; McClung v. Watt, 190 Cal. 155, 160, 211 P. 17; Freeman v. Dowling (Cal. Sup.) 25 P.(2d) 980.

In the Freeman Case the court quotes with approval the following language from Hellman v. Logan, 148 Cal. 58, 60, 82 P. 848, 849: "The test is to be made by ascertaining who are necessary parties to the action as it is set forth in the complaint, and what parties are necessary in order to enable the plaintiffs to obtain all the relief which is properly included in the prayer for relief made therein."

Here the complaint really pleads four separate and distinct actions, each praying for distinct relief against each of the four defendants separately. As no cause of action is pleaded against any one of the defendants in conjunction with any other, and as no relief is sought against any one under any of the counts in which he is not named as defendant, no defendant is a necessary party to any one of the causes of action other than the one in which he alone is sued.

It is argued that the plaintiff was in doubt as to the defendant from whom he is entitled to redress, and that, for this reason, the joinder is permissible under section 379c, Code of Civil Procedure. There is no allegation in any part of the complaint that the plaintiff entertained such doubt. On the contrary, the complaint demonstrates no doubt as to the liability of the appellant under the first cause of action or of either defendant named in the third and fourth counts. In the first cause of action plaintiff sued upon an implied contract for the care of cattle, title to which rested in the appellant. He had no doubt that some one who unlawfully took the cattle from his possession might be liable upon this implied contract with the appellant. In the third and fourth counts he sued for damages for an express tort alleged to have been committed by third persons. He had no doubt that the appellant might be liable for such damages because he did not join the appellant in those causes of action and does not seek relief from the appellant for the alleged conversion. Thus, if none of the defendants appeared and judgment went against them by default there is no possible theory under which judgment could have been entered against the appellant on either the third or the fourth count.

To restate the proposition here involved, the venue must be determined by the answer to the question whether the defendants charged with conversion were joined for the obvious purpose of placing the venue in a county other than that of appellant's residence. This question must be answered in the affirmative because the defendants charged with conversion are not sought to be held for the reasonable value of the care of the cattle which is the only item upon which appellant is sued. Now, if the plaintiff had pleaded any uncertainty as to whether the appellant or either of these named defendants was liable for the care of the cattle, the joinder of these defendants would have been permissible under the Code section. Not only does he fail to plead any uncertainty, but his allegations show affirmatively that no uncertainty exists. In Busset v. California Builders Co., 123 Cal. App. 657, 666, 12 P.(2d) 36, 40, it is said: "A mere doubt or suspicion is not enough to bring section 379c into play. There must be some nexus associating the defendants in an event or series of events productive of the injury complained of, under such circumstances that, while there is certainty as to the alleged wrong to be righted, there is uncertainty as to which of two or more individuals implicated is legally liable therefor. As is said in Klein v. Betzold, 119 Misc. 505, 197 N. Y. S. 501, and repeated in Freund Coat Corp. v. Lipschutz, 135 Misc. 553, 238 N. Y. S. 239, the doubt contemplated in the section must be 'a fair doubt as to whom plaintiff should look to right a single wrong, and not a doubt as to whether one or several persons have separately wronged plaintiff.'"

In Garrett v. McAllister, 137 Misc. 721, 244 N. Y. S. 283, 286, the court, in construing section 213 of the Civil Practice Act of New York, which is identical with section 379c of our Code, said: "It [section 213] does not apply where the plaintiff's only doubt is whether a particular defendant is or is not liable. It does not authorize a plaintiff, who asserts a cause of action against one party concerning which no uncertainty exists, to combine with it a cause of action against others upon allegations that they also 'may' be liable. * * * Even where the action is properly in the alternative, it must appear that there exists a cause of action in favor of the plaintiff against the defendants collectively considered, although the plaintiff is not able to identify among them the author of the wrong."

Here the relief is not sought in the alternative. Separate judgments are demanded against each defendant separately on each cause of action. There is no doubt or uncertainty as to the want of liability of the appellant under any one of the three succeeding causes of action. There is likewise no doubt or uncertainty as to the want of liability of the three other defendants under the first cause of action. See, generally, Ader v. Blau, 241 N. Y. 7, 148 N. E. 771, 41 A. L. R. 1216; Bisceglio v. Lamb, 48 R. I. 496, 139 A. 307; Lally v. Ventrone (R. I.) 120 A. 161.

For the reasons given it is apparent that the actions seeking damages for the conversion of the cattle are in no wise related to the cause pleaded against the appellant, but have been joined with that cause of action for no other purpose than that of fixing the venue outside of the county of appellant's residence. No cause of action is stated against the defendant named in the second count, and it cannot but appear from the face of the pleading that this defendant was joined for the same purpose.

The order is reversed, with directions to grant the motion.

We concur: STURTEVANT, J.; SPENCE, J.

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135 Cal.App. 277

BRUNAU et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9050.

District Court of Appeal, Second District, Division 1, California.

Nov. 9, 1933.

Master and servant ⚷416.

Where Industrial Commission has granted rehearing, and on such rehearing has made different order than its original order, and against party in whose favor first order was made, party aggrieved by second order has right to make one application for rehearing (St. 1917, pp. 873–875, §§ 64, 65, 67).

Proceeding under the Workmen's Compensation Act by Katrine Brunau and another, claimants, opposed by the Metro-Goldwyn-Mayer Corporation, employer, and the American Motorists Insurance Company, insurer. To set aside and annul an order of the Industrial Accident Commission granting rehearing and annulling an award, claimants bring certiorari.

Affirmed.

Leo E. Anderson and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for petitioners.

Arthur I. Townsend and Everett A. Corten, both of San Francisco, for respondent Industrial Accident Commission.

Willis I. Morrison, of Los Angeles, for respondent American Motorists Ins. Co.

YORK, Justice.

This is an application by petitioners to set aside and annul an order of the Industrial Accident Commission made upon what they call a second petition for rehearing. Petitioners state that they "desire to review the legality of the action of the Industrial Accident Commission in considering the second petition for a rehearing and in granting it and annulling the award."

While no case has been cited as direct authority for the holding of the commission, there is dictum in the case of Dalsheim v. Industrial Accident Commission, 215 Cal. 107, 8 P.(2d) 840, which supports the holding. However, the reasoning in that case, as we construe it, is practically this: Where the commission has granted a rehearing, and upon such rehearing has made a different order than its original order and against the party in whose favor the first order was made, the party aggrieved by the second order has the right to make one application for a rehearing. In other words, while there might be a limitation to the granting by the commission of two petitions for rehearing to the same party, sections 64, 65, and 67 of the Workmen's Compensation Act (St. 1917, pp. 873–875) should be construed to allow a rehearing of a decision which was rendered after a motion for rehearing had been granted, if upon such first rehearing the first decision rendered was reversed or a totally different decision rendered against the petitioner filing the second petition for rehearing, after such petitioner for such second rehearing had been successful in securing an award in his favor upon the original hearing.

The dictum in the cited case is so reasonable, clear, and decisive in its statement that, although the court states it to be purely dictum, it is a very convincing argument when applied to the facts involved in the instant case. In fact, in our opinion, it is determinative of the only real issue here present.

There is sufficient evidence set forth in the record before us to show that the commission had jurisdiction to make the finding complained of.

The commission being duly authorized to make its final order and decision of February 27, 1933, that final order and decision is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

135 Cal.App. 74

COLEMAN v. SUPERIOR COURT IN AND FOR CALAVERAS COUNTY et al.

Civ. 5023.

District Court of Appeal, Third District, California.

Nov. 6, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. Limitation of actions 🔑6(1).

Statute of limitation may be lengthened or lessened, but existing right cannot be cut off without giving reasonable time after act becomes effective to exercise such right.

2. Prohibition 🔑10(1).

Prohibition lies to prevent court from proceeding with trial of action where jurisdiction is wanting.

3. Prohibition 🔑10(2).

Reasons for failure over long period to bring case to trial were properly inquired into by trial court, but where trial court refused to dismiss case, reasons for delay are immaterial in prohibition proceeding.

4. Statutes 🔑253.

Statute amending Code provision, providing for dismissal of action not brought to trial within five years after filing of defendant's answer by making period run from filing of action, did not become effective until August 21, 1933, because not emergency measure (Code Civ. Proc. § 583, as amended by St. 1931, p. 373; Const. art. 4, § 1).

5. Evidence 🔑65.

One is not chargeable with notice of an act until it becomes effective (Const. art. 4, § 1).

6. Dismissal and nonsuit 🔑45.

Statute amending Code provision providing for dismissal of action not brought to trial within five years after filing of defendant's answer by making period run from filing of action *held* not to require dismissal of action, not dismissible before amendment, as to which period as reduced by amendment had already run (Code Civ. Proc. § 583, as amended by St. 1931, p. 373; and, as amended by Act effective Aug. 21, 1933).

7. Dismissal and nonsuit 🔑60(1).

Time during which further proceedings in action were restrained by appellate court should not be counted in ascertaining five-year period allowed plaintiff for bringing action to trial (Code Civ. Proc. § 583, as amended by St. 1931, p. 373).

Application by Minnie H. Coleman, as administratrix, etc., of the estate of James V. Coleman, deceased, for a writ of prohibition to be directed to the Superior Court of the State of California in and for the County of Calaveras, and A. Caminetti, Jr., as Judge thereof, restraining respondents from proceeding with the trial of a certain action, or taking any action therein other than to enter an order of dismissal.

Peremptory writ denied.

Wm. H. Smith, Jr., of San Francisco, Charles P. Snyder, of San Andreas, and Henry Eickhoff, Jr., of San Francisco, for petitioner.

Nutter & Rutherford and D. R. Jacobs, all of Stockton, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

On the 14th day of September, 1933, the petitioner herein, after notice duly given, moved the superior court of the county of Calaveras to dismiss a certain action therein pending wherein one Giacomo Oneto is plaintiff, and the petitioner herein is defendant, on the ground that said action had not been brought to trial within five years after filing the complaint in said action. On the 19th of September, 1933, the superior court denied said motion, and upon application, set said cause for trial on the 3d day of October, 1933. Thereupon, the petitioner instituted this proceeding to obtain a writ of prohibition restraining said superior court and the judge thereof from proceeding with the trial of said action, or denying any action therein, other than to enter an order of dismissal. Thereupon, this court issued an alternative writ of prohibition restraining the respondents from proceeding with the trial of said action until the hearing of said petition, and requiring respondents to show cause why they should not be permanently enjoined and prohibited from proceeding with the trial thereof.

The record shows that the motion to dismiss the action of Oneto against the petitioner herein was made prior to the expiration of five years after the filing of the answer therein, and was based upon section 583 of the Code of Civil Procedure as amended by the act of the Legislature becoming effective August 21, 1933.

Prior to the amendment just referred to, section 583, supra, so far as material here, read as follows: "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the defendant has filed his answer." The amendment changed the section to read as follows: "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, or to which it may be transferred on motion of the defendant, after due notice to plaintiff, or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action."

The amendment, it will be noted, designates that the five years shall run from the time the plaintiff has filed his action, that is, from the time the plaintiff has filed his complaint, instead of from the time when the defendant has filed an answer. That portion of the section which authorizes the court to dismiss an action at its discretion is not involved herein, as the respondent court and judge thereof exercised its discretion in favor of the plaintiff in denying the motion to dismiss. In this particular the record shows that testimony was taken by the court upon which to determine as to how its discretion should be exercised, and upon this proceeding no contention is made that the court abused its discretion.

Only one question is tendered for determination, to wit: Had the court jurisdiction to set the cause for trial and proceed with the same, notwithstanding the defendant's motion to dismiss? To state the question in another manner: Did the amendment to section 583 of the Code of Civil Procedure, which became effective August 21, 1933, act as a bar to any action where the complaint had been filed five years prior to that date, irrespective of the date upon which the answer therein was filed?

[1, 2] The authorities appear to be uniform in holding that the Legislature has the right to either lessen or lengthen a statute of limitations, subject only to the exception that an existing right cannot be cut off summarily, that is, without giving a reasonable time after the act becomes effective to exercise such right. The authorities are also likewise uniform in holding that a writ of prohibition is proper to prevent a court from proceeding with the trial of an action where jurisdiction to do so is wanting.

[3] While the action sought to be dismissed by the petitioner was begun in 1920, the record shows that by stipulations extending time the defendant's answer was not filed until a date within five years of the making of the motion to dismiss. The reasons for the long delay inquired into by the trial court were proper for the trial court to take into consideration in exercising its discretion, but are wholly immaterial here. Had the trial court exercised its discretion in favor of the petitioner and dismissed the action, then the case of Steinbauer v. Bondesen, 125 Cal. App. 419, 14 P.(2d) 106, would have been controlling here.

It may be noted that, irrespective of the sections of the Code involved in that action, the rule was reaffirmed that courts have the inherent power to dismiss actions where there has been any unreasonable delay in bringing the same to trial.

[4] So far as the record before us is concerned, it is not disclosed on what date the Legislature passed the act amending section 583, supra, changing the time when the five-year period begins to run, nor does the record disclose when the amending act was approved by the Governor. All that appears is that the Legislature adjourned on the 22d day of May, 1933. Not being an emergency measure, the referendum provisions of section 1 of article 4 of the Constitution specifying that no act of the Legislature shall become effective until ninety days after the adjournment thereof, and until the expiration of ninety days after the adjournment of the Legislature on May 22, 1933, the amendment to section 583, supra, did not become any part of the substantive law of the state.

[5] While we readily concede that all persons are chargeable with knowledge of the law, we do not perceive just how they can be held chargeable with the existence of an act which does not rise to the dignity of law until a certain date. The referendum provisions of the Constitution which prevent an act of the Legislature from rising to the dignity of law, are distinguishable, we think, from acts of the Legislature which become a law immediately upon passage and approval by the Governor, but which contained provisions postponing the effective date thereof. In the former case one cannot be held chargeable with notice of that which may never become a law, and in the latter case, all persons are held to be chargeable with that which has become a law, irrespective of the date designated therein when it shall become effective.

[6] No saving clause was contained in the act amending section 583, supra, changing the date from the time of filing the answer to that of filing the complaint when the five-year period should begin to run. Hence, the cases which we are about to consider we think determinative of this proceeding. While these cases have to do with the statute of limitations, we think the same principle applies when an attempt is made to cut off the right to prosecute an action which is already pending. If applicable to the case sought to be dismissed, the amendment to the section in question shortened the period of limitation to a time which had already run, absolutely cutting off a property right which the authorities are uniform in holding cannot be done.

In 17 Ruling Case Law, page 676, we find the following: "An existing right of action cannot be taken away by mere legislation, as by shortening the period of limitation to a time which has already run, nor is it competent to cut off the remedy entirely, as this would amount to a denial of justice, and, therefore, the limitation statute is void if the period allowed is unreasonably short. But it is entirely competent to shorten the period if a reasonable time is given for the commencement of an action before the bar takes effect. The general rule, therefore, may be stated as follows: When a new limitation is made to apply to existing rights or causes of action, a reasonable time must be allowed before it takes effect, in which such rights may be asserted, or in which suit may be brought on such causes of action. Similarly, in all cases in which the period of a statute of limitations is shortened as to existing causes of action, a reasonable time must be left in which such actions may be commenced." Numerous authorities are listed in the notes supporting the foregoing quotation.

Where the statute provides the time limit before the bar becomes effective, it is usually held that the Legislature in such instances is the exclusive judge of the reasonable time allowed, and also in states where an act becomes effective immediately upon being approved by the Governor and contains a provision setting forth the time that must elapse before the bar becomes binding, the weight of authority supports the conclusion that the time lapsing between the passage and approval of the act and its effective date may be considered in determining the question of reasonable time.

In the case of Rossi v. Caire, 186 Cal. 544, 199 P. 1042, 1044, the court, having before it a similar question, held that the time should be calculated from the effective date of the amendment therein being considered. The language of the court is as follows: "This action was instituted August 28, 1917, just four years after the attempted revivor. Defendants interposed a plea of the statute of limitations, alleging the action to be barred by subdivision 3 of section 341, Code of Civil Procedure, a subdivision added by the Legislature July 27, 1917 (St. 1917, p. 381). This section as so amended bars an action 'to set aside or invalidate any action taken or performed by a majority of the trustees of any corporation heretofore or hereafter dissolved by operation of law, including the revivor of any such corporation,' unless brought within six months. We regard this matter and the finding of the court thereon as unimportant in the determination of this cause. The amendment cannot be accepted as absolutely destroying any right of action existing at the time of its adoption, which would be the effect if applied here in any other way than as requiring an action to be instituted within a reasonable time from the taking effect of the amendment. Section 17, Ruling Case Law, p. 676, et seq."

The referendum provisions of the Constitution to which we have referred were then in existence, but the time appears to have been calculated by the court as of the date the amendment became effective, just as we have held is the rule that should be applied in this case.

That a statute cannot become effective to bar an existing right without providing a reasonable time for its exercise is likewise supported by the opinion in the case of Doehla v. Phillips, 151 Cal. 488, 91 P. 330.

In 12 C. J., page 978, the text reads: "The power to enact statutes of limitations is subject to the fundamental condition that a reasonable time shall be allowed for the exercise of the right of action, whether existing or prospective, after it comes within the prospective or present operation of the statute and before the bar becomes effective." This text is supported by a long list of authorities. The present operation of the amendment referred to applies as of August 21, 1933, and no time is specified therein, or allowed therein, for the exercise of an existing right, and therefore falls within the proscription contained in the text thus quoted.

In 111 Am. St. Rep. page 457, annotations to the case of Brown v. Pinkerton, 95 Minn. 153, 103 N. W. 897, 900, we find the following, supported by an overwhelming weight of authority: "To deprive a person of all remedy for the enforcement of a right is equivalent to depriving him of the right itself, and this, in a constitutional government, is not permissible. Hence, one having the right to maintain an action cannot, by legislation under the guise of a statute of limitations, be deprived of that right. The utmost that can be done is to fix a time within which the right may be exercised, and the time so fixed must be reasonable. A statute which cuts off all remedy or so shortens the time within which it may be pursued as to practically cut it off is unconstitutional. The general language of the decision is that a reasonable time must be allowed."

[7] That the Legislature may designate what is a reasonable time, but that a reasonable time must be given, see Kozisek v. Brigham, 169 Minn. 57, 210 N. W. 622, 49 A. L. R. 1260. As reported in A. L. R., a long list of notes may be found beginning on page 1263, supporting the rule that the Legislature cannot arbitrarily cut off an existing right, but may shorten the time of limitation if a reasonable time for the exercise of the right is given in the act purporting to shorten the time. To the same effect is the text in 16 Cal. Jur., page 398, § 9. See, also, annotations to the case of Krause v. Rarity, 77 A. L. R., beginning on page 1327; Security National Bank v. Young, 84 A. L. R. 100; Anderson v. General Accident, Fire & Life Assur. Corp., Ann. Cas. 1918B, 615; Lamb v. Powder River Live Stock Co., 67 L. R. A. 558. To all of the cases cited numerous notes are appended showing that the cases universally support the conclusion that a statute which purports

to bar an existing right, without giving reasonable time for its exercise, cannot be upheld, nor can such statutes be applied to existing rights. While constitutional in limiting time for the exercise of rights which are not barred, and allowing reasonable time therefor, application cannot be so given as to absolutely bar an existing right. In the present case the five-year period had not elapsed at the time the defendant made her motion for dismissal. It follows, therefore, that the trial court was not in error in denying the motion and setting the cause for trial. The action of this court upon the application of the petitioner prevented the cause from being brought to trial within the five-year period, and such time therefore cannot be calculated. The petitioner therefore is not entitled to a writ of prohibition, and the same must be, and is hereby, denied.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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135 Cal.App. 279

EMPIRE REALTY & MORTGAGE CO., Limited, v. MEHL.

Civ. 1444.

District Court of Appeal, Fourth District, California.

Nov. 9, 1933.

1. Brokers ⚷86(4).

In action for commission, evidence sustained finding that buyer was procured by broker, and that property was disposed of directly or indirectly through agency of broker.

2. Brokers ⚷86(8).

In action for commission, evidence sustained court's finding that $1,250 was due broker under contract.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by the Empire Realty & Mortgage Company, Limited, against Henry Mehl. Judgment for plaintiff, and defendant appeals.

Affirmed.

Pollock & Mitchell, of Ontario, for appellant.

Sanford & Sanford, of Claremont, and Fred A. Wilson, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

On July 25, 1931, the defendant, in writing, appointed the plaintiff as his exclusive agent to dispose of certain described real property by sale or exchange. The listing instrument contained an agreement to pay a certain commission if the property was disposed of "directly or indirectly" through the agency of the plaintiff or if the same was disposed of by the defendant to parties procured by the plaintiff and further provided that it was to continue in force until canceled. On or about May 10, 1932, the defendant exchanged the property thus listed for another piece of property owned by a Mr. and Mrs. Magill. On May 13. 1932, the plaintiff brought this action to recover the amount agreed to be paid as a commission. The court found practically all of the allegations of the complaint to be true and particularly found that the defendant was brought into contact with the Magills through the efforts of the plaintiff pursuant to the provisions of the contract of employment referred to; that pursuant to the contract and the efforts of the plaintiff an agreement of exchange was executed between the defendant and the Magills on February 19. 1932; that the same was not then consummated; and that thereafter, on or about May 11, 1932, while the contract of employment was still in force, the defendant consummated an exchange of the same properties with the Magills. From a judgment for $1,250 in favor of the plaintiff, the defendant has appealed.

Upon the main issue, the only point raised by the appellant is that the evidence is not sufficient to sustain the court's findings to the effect that the buyer was procured by the respondent and that the property was disposed of either directly or indirectly through the agency of the respondent.

[1] The following facts appear from the evidence. The respondent acted in this matter through one of its salesmen, J. L. Messenger. For four or five months prior to February, 1932, Messenger had been working with another agent named Moses in an effort to bring about a sale or exchange of the appellant's property and to this end they had together shown several properties during this period. About February 19, 1932, Moses told Messenger that he had talked to the appellant about certain property owned by Mr. and Mrs. Magill and that he seemed interested and asked him if he could get the appellant to go out and look at the Magill property. Messenger took the appellant to the Magill property and went over it with him. As a result of this visit, the parties agreed to an exchange of properties and Messenger prepared a contract providing for such an exchange, which agreement was dated February 19, 1932. This contract contained a pro-

vision that it should not go into effect unless the appellant was able to make certain arrangements with his banker. It also contained a provision for the payment of a commission by the appellant to the respondent. Messenger took this contract to the appellant and obtained his signature and then turned it over to Moses, who took it to another agent with whom the Magill property was listed, and that agent obtained the signature of the Magills. The same day, or the next day, the appellant reported to Messenger that he was unable to make the desired arrangement with his banker and could not proceed with the agreement. In the meantime, Messenger and Moses had agreed between themselves how the commission should be divided.

Moses testified that he knew during this time that the respondent had an exclusive listing on the appellant's property; that he knew the appellant was a client of the respondent's office; that he himself occupied the position of a "go-between" between the other two agents; that he negotiated with Messenger for a division of his commission because Messenger had an exclusive listing; that he himself had no listing on either one of the properties involved in the deal; that for this reason he communicated with Messenger in the hope that he could bring about the exchange, if possible; and that Messenger had complete charge of the negotiations with the appellant and the drawing of the agreement.

No effort was made to cancel respondent's listing agreement and Messenger continued to endeavor to find a sale or exchange for the appellant's property. He submitted to the appellant a number of propositions for an exchange during March, April, and the early part of May, 1932, and in each instance the appellant made a trip to examine the property submitted. As late as May 6, 1932, Messenger took the appellant to Whittier on such an errand. During all of this time the appellant said nothing to the respondent about being further interested in the Magill property or about having listed his own property with Moses. On or about May 10, 1932, the appellant and the Magills consummated an exchange of the properties covered by their previous written agreement of February 19, 1932. It appears that some time during April, 1932, the appellant had listed his property with Moses, who conducted the final negotiations with the Magills.

While the appellant relies upon certain other evidence as being more favorable to him, we are not here concerned with any such conflicts. The appellant agreed in writing to pay a commission to the respondent if his property was disposed of either directly or indirectly through the agency of the respondent, or if the property were disposed of by the appellant himself to parties procured by the respondent. Not only may the inference be reasonably drawn from the evidence that this buyer was procured by the respondent who had enlisted the aid of Moses in finding a purchaser, but it appears that the property was disposed of indirectly, if not directly, through the agency of the respondent. The findings and judgment are fully supported by the evidence.

[2] The appellant also complains of the amount of the judgment. While he testified that during the negotiations leading up to the agreement of February 19, 1932, he told Messenger that he would pay him $1,000 if the deal went through, the contract itself provides for a fixed percentage on the selling price. Subsequently the respondent did considerable other work in trying to dispose of the property and there is neither sufficient evidence of any modification of the contract nor a lack of evidence to sustain the court's finding as to the amount due.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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135 Cal.App. 267

RUMETSCH v. CITY OF OAKLAND et al.

Civ. 9047.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1933.

1. Municipal corporations ⚷58.

In determining meaning, effect must be given to every word and clause used in charter, if possible.

2. Statutes ⚷202.

Words in statute should not be construed as surplusage, if reasonable construction which will give them some force and meaning is possible.

3. Municipal corporations ⚷187.

Where policeman, injured in performance of duty after about six years of service, was retired on pension in 1919 and died in 1931, his widow was not entitled to $1,000 under city charter providing for payment of such sum after ten years of "service," since active service, and not mere membership in department, was required.

[Ed. Note.—For other definitions of "Service," see Words & Phrases.]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Mandamus by Luceille Rumetsch to require City of Oakland and others to award her a pension. From a judgment for petitioner, respondents appeal.

Reversed.

C. Stanley Wood, City Atty., and John W. Collier, Deputy City Atty., both of Oakland, for appellants.

Decoto & St. Sure, of Oakland, for respondent.

NOURSE, Presiding Judge.

The petitioner commenced this proceeding in mandamus to require the trustees of the police relief and pension fund to award her a pension. Her application had been denied by the trustees after a hearing. She had judgment in the superior court.

The facts are undisputed. Herman Rumetsch entered the police department of the city of Oakland on December 16, 1911; on November 15, 1917, he was injured while in the performance of his duties; on April 1, 1919, he was retired on a pension which he was paid until the date of his death—March 1, 1931; he performed no police duty after the date of his injury.

The petitioner is the surviving widow of Herman Rumetsch. She seeks relief under the provisions of section 96, subdivision 2, of the Oakland city charter, which reads: "When a member of the Department shall die from causes other than those specified in Subdivision (1) of this section after ten years of service, then his widow, and if there be no widow, then his children, and if there be no widow or children, then his mother, if dependent upon him for support, shall be entitled to the sum of One Thousand (1,000) Dollars."

[1-3] The single question involved in this proceeding is whether the word "service" as used in the foregoing paragraph implies merely membership in the department or whether it means the performance of services or duties as such member. The charter uses the word to convey both meanings. Section 95 provides that any member of the police department who has become physically disabled "may be retired from the department upon an annual pension," and that, when his disability shall cease, he shall be "restored to the service." Section 102, relating to the fire department, authorizes the trustees to "retire and relieve from service" any member of the age of fifty-five unfit for duty, and also to retire any member on his own request "who has served twenty-five years." Section 103 permits the retirement of firemen disabled in the performance of duty, and provides that, when his disability shall cease, "he shall be restored to the service." Section 94, relating to the police department, authorizes the trustees to "retire and relieve from service" any member sixty years of age found unfit for duty, and to retire any member on his own request who has reached the age of sixty, and who has been "an active member of the Department for twenty years." Section 33, subdivision 3, which relates to the pensioning of other employees, uses the expressions "ten years of continuous service" and "thirty years' service."

Throughout these sections relating to the police and fire departments, we find the charter provides that, when a member is pensioned, he shall be "retired from the department" or retired and relieved "from service." Where the pension is on account of injury received in the course of duty, the former expression is used; when it is on account of age or disability, the latter is used. Here the husband of the petitioner was "retired from the department" because of injuries under section 95, and he was subject to be "restored to the service" under that section if his disability should cease.

There is no uncertainty as to the purpose of the entire pension plan. Retirement either voluntary or involuntary is permitted on account of age or infirmity after twenty years' active service, and, irrespective of the length of service, when a member is injured in the performance of duty. When a member is killed while in the performance of his duty, his widow is entitled to a pension equal to one-half the salary paid the member. (Section 96(1). But, if a member die from natural causes, his widow is entitled to a pension of $1,000, provided the member shall have died "after ten years of service" (section 96(2).

We are compelled to give effect to every word and clause used in the charter, if possible. Words in a statute should not be construed as surplusage if a reasonable construction can be given them which will give them some force and meaning. Section 96 is clearly limited to the benefits passing to the widow and certain dependents. If the husband, after twenty years of active service, has been pensioned, the widow readily qualifies under subdivision 2. Kavanagh v. Board of Police Pension Fund Com'rs, 134 Cal. 50, 66 P. 36. If the husband is killed in the performance of his duty, the widow qualifies under subdivision 1, irrespective of length of service. Under section 94, a member of the department not injured in the performance of his duties is not entitled to a pension unless he has served twenty years. Under section 95, a pension may be given for injuries in course of employment without regard to length of service. This same general scheme is carried out with respect to firemen and their widows. To hold that the expression "ten years of service" means nothing more than ten years of membership is to hold that this clause adds nothing to the section.

We cannot escape the conclusion that the expression means just what the words imply—ten years of service as a police officer—and that the same meaning would have been conveyed if the charter had used the words "served ten years"; that, though one may be a "member" of the department for certain purposes while retired from duty and pensioned, he is not during the period of retirement an "active member" or one performing "service" as such officer.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

STAFFORD et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.[*]

Civ. 9217.

District Court of Appeal, First District, Division 1, California.

Nov. 14, 1933.

Hearing Granted by Supreme Court Jan. 12, 1934.

1. Insane persons 🔑94(1).

Attorney for guardian ad litem is officer of court, and court making use of his services has jurisdiction to fix his compensation.

2. Insane persons 🔑44.

Court appointing guardian retains jurisdiction, upon ward's death, for settling of guardian's account and may make allowance for attorneys' fees (Probate Code, § 1555).

3. Insane persons 🔑94(1).

Superior court appointing guardian ad litem of ward had jurisdiction to entertain petition for allowance of attorneys' fees for guardian's attorneys notwithstanding ward had already died (Probate Code, § 1555).

4. Mandamus 🔑31.

Mandamus will lie when court erroneously refuses to act on ground that it lacks jurisdiction.

Petition by Harry I. Stafford and another for a writ of mandamus to be directed to the Superior Court of the City and County of San Francisco.

Peremptory writ directed to issue.

Edward A. Cunha, of San Francisco, for petitioners.

Oliva & Coleman, of San Francisco, for respondent.

PER CURIAM.

On February 5, 1927, S. Morton Cohn filed in the superior court in and for the city and county of San Francisco an action numbered 178,436, to annul his marriage with Lilian E. Cohn on the ground that she was insane at the time of the marriage. On February 10 Matilda G. Mahr was appointed the guardian ad litem of defendant, and an answer to the complaint was filed. Following a hearing a decree was entered annulling the marriage, and an order made authorizing a property settlement between the parties. An agreement settling their rights was thereafter entered into. Subsequently said guardian ad litem employed petitioners, who are attorneys at law, to take proceedings to vacate said decree and the settlement made pursuant thereto on the grounds of fraud and mistake.

On August 11, 1927, petitioners, pursuant to their employment, served and filed a notice of motion to vacate said proceedings, and an order to show cause issued. On May 10, 1930, the motion was denied, and an appeal was taken from the order by petitioners on behalf of defendant at the request of the guardian ad litem, and thereafter a brief on appeal was also filed by them.

On October 1, 1932, said defendant died, and on January 26, 1933, letters of administration upon her estate were duly issued to Marie Stanford. The administratrix was thereupon substituted as appellant in the action, and other attorneys were substituted for petitioners, following which, upon motion by the administratrix, the appeal was dismissed on April 27, 1933.

On January 27, 1933, a petition for allowance of attorneys' fees for services rendered in connection with said litigation was filed in respondent court. An order issued thereon directing said administratrix and the guardian ad litem to show cause why the petition should not be granted. On the date fixed for the hearing the administratrix and the guardian objected to the petition on the ground that the respondent court was without jurisdiction to entertain the same. The court so ruled, and the present proceeding was brought, in which petitioners ask a writ of mandate requiring respondent court to proceed to a hearing of such petition.

It has been decided in numerous cases (in which, however, the question of jurisdiction was not involved), that a guardian who employs an attorney is primarily liable for his compensation (Tasker v. Cochrane, 94 Cal. App. 361, 271 P. 503), and that an action therefor cannot be maintained against the ward personally (Hunt v. Maldonado, 89 Cal. 636, 27 P. 56); nor can a guardian bind the ward or the ward's property by such contracts of

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[*] For subsequent opinion see 34 P.2d 998.

employment without an order of court (Morse v. Hinckley, 124 Cal. 154, 56 P. 896; McKee v. Hunt, 142 Cal. 526, 77 P. 1103). As respects minors, the latter rule is contained in the provisions of the Code (section 1810b, Code Civ. Proc., now section 1509, Probate Code); but these sections impliedly recognize the power of the court to allow attorneys' fees in cases where guardians ad litem have been appointed. Courts are given general power by section 372, Code of Civil Procedure, to appoint such guardians in all cases where it is deemed expedient; and this power is not limited by the Code sections relating to the appointment and duties of guardians generally (Code Civ. Proc. § 1759, now Probate Code, § 1607). In other jurisdictions the authority to employ attorneys, and the power of the court to allow compensation in proper cases are well settled. 14 R. C. L., Insanity, § 64, p. 613; Infants, § 57, p. 290; 31 Cor. Jur., Infants, § 305, p. 1143.

[1] In this state the question first arose in Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78, where a guardian ad litem had been employed to represent certain infants and an insane person. The guardian employed counsel and made a contract with him as to the compensation he should receive. It was held that the court appointing the guardian is in effect the guardian; that the person named as such is an officer of the court appointing him, his duties being to represent the insane or incompetent person in the action or proceeding; that he may employ counsel to assist him, but cannot make a contract for the payment of compensation which will bind the ward or his property; and that the court in which the litigation is pending has power to fix the compensation. In this connection the court said: "The attorney performing legal services for the infant aids the court in carrying out its duty of protection; he is not only an officer of the court in the general sense, but is the special agent through which the court acts; in this respect his position being analogous to that of an attorney employed by a general guardian, or by an executor or administrator. * * * The statute being silent as to the tribunal which is to fix the compensation in case of a guardian ad litem, it seems to reasonably follow that the court placing him in position and making use of his service would have the fixing of his disbursements and the compensation of the attorney employed." The rule thus declared has not been changed by statute, nor has it been disapproved, although the decision has been referred to in a number of cases, namely, Taylor v. Hill, 115 Cal. 143, 149, 44 P. 336, 46 P. 922; Aronson v. Levison, 148 Cal. 364, 83 P. 154; Lund v. Superior Court, 159 Cal. 439, 114 P. 569.

In re Price, 61 Cal. App. 592, 215 P. 710, is cited to the contrary. There an application was made to the court in a guardianship matter for allowance of attorneys' fees for services rendered in litigation in which certain minors were represented by a guardian ad litem. The attorneys were not employed by the guardian ad litem but by a third person, and an allowance for their services from the estates of the minors was held to be erroneous. The question of jurisdiction was not raised, nor was there a departure from or any criticism of the rule in Cole v. Superior Court, supra.

This rule is supported by reason and authority, and, as stated, it has not been changed by statute or subsequent decision. Consequently this court is bound to follow it. Canadian Bank of Commerce v. Leale, 14 Cal. App. 307, 111 P. 759; Capron v. West, 114 Cal. App. 633, 300 P. 149.

[2] As stated, Mrs. Cohn died, and an administratrix of her estate was appointed and substituted as appellant in the action before petitioners filed their application for an order fixing their fees. It appears that the guardian ad litem received property of the value of several thousand dollars under the settlement contract. Whether possession of this property was surrendered by her to the administratrix, or an accounting was had between them, does not appear. Under the general provisions of the Code relating to guardians the court upon the death of the ward retains jurisdiction for the purpose of settling the guardian's accounts, and may make an allowance for attorneys' fees. Code Civ. Proc. § 1774, now Probate Code, § 1555; Estate of Clanton, 171 Cal. 381, 153 P. 459; Estate of McGue, 180 Cal. 413, 181 P. 637. Such proceedings being in rem (Estate of Kincaid, 120 Cal. 205, 52 P. 492; Estate of Boyes, 151 Cal. 151, 90 P. 454), the guardian is not required to present a claim for these amounts against decedent's estate (Estate of Clanton, supra); and the decisions make it clear that the court, having jurisdiction to fix such fees, may order the same paid from funds in the hands of the guardian ad litem. It has also been held that the court in which a guardianship matter is pending may in a proper case declare an equitable lien upon the property of a deceased ward to secure the payment of a balance found due the guardian upon a final accounting. Estate of Clanton, supra; Estate of Schluter, 209 Cal. 286, 286 P. 1008.

[3] It is apparent from the foregoing that as a general rule the court appointing a guardian does not for all purposes lose jurisdiction of the property of a ward on the ward's death. As was said in the Cole Case, guardians ad litem as well as their attorneys being officers of the court, and the statute being silent as to the tribunal which is to fix the compensation in such cases, it seems reasonable that the court making use of their services should have jurisdiction to do so. Like proceedings by a general guardian for the settlement of his accounts the proceeding

in question is in rem; and in view of the Cole decision and the other cases cited we are satisfied that the respondent court, notwithstanding Mrs. Cohn's death, had jurisdiction to hear and determine the petition.

[4] It is well settled that when a court erroneously refuses to act on the ground that it lacks jurisdiction mandamus will lie. Temple v. Superior Court, 70 Cal. 211, 11 P. 699; Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 P. 978.

Let a peremptory writ of mandate issue as prayed, requiring respondent court to hear and determine said petition.

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134 Cal.App. 775

PEOPLE v. WILLIAMSON.

Cr. 2334.

District Court of Appeal, Second District, Division 2, California.

Nov. 1, 1933.

Hearing Denied by Supreme Court, Dec. 1, 1933.

1. Jury 🔑75(6).

Juror, after being discharged, becomes stranger to case and cannot thereafter be recalled.

2. Jury 🔑75(6).

Where court excused juror and immediately after juror left courtroom had bailiff bring him back, whereupon court rescinded order excusing juror, court acted within its jurisdiction.

3. Criminal law 🔑1186(4).

In forgery prosecution, conduct of court in excusing juror and immediately thereafter rescinding order and calling juror back, if error, *held* not prejudicial (Const. art. 6, § 4½).

> Error, if any, in excusing juror and immediately thereafter rescinding order and calling juror back, was not prejudicial and came within healing provisions of Const. art. 6, § 4½, where case was finally tried before twelve jurors properly impaneled and sworn, and alleged error related merely to procedure, and counsel for the defendant stipulated that there was no irregularity in the proceedings. Furthermore, it was not claimed that any one talked to juror or that anything happened to disqualify him.

4. Forgery 🔑48.

In prosecution for forgery, instruction, in substance, authorizing conviction if defendant signed maker's name to check with intent to defraud party cashing check or bank, *held* not misleading and confusing (Pen. Code, § 470).

5. Criminal law 🔑824(5).

In forgery prosecution wherein handwriting expert testified, trial court's failure to instruct jury on subject of expert testimony, even though defendant did not request instruction, *held* error (Pen. Code, § 1127b).

> Pen. Code, § 1127b, provides that, in any criminal trial or proceeding, wherein opinion of any expert witness is received in evidence, "the court shall instruct the jury substantially as follows. * * *"

6. Criminal law 🔑1186(4).

In forgery prosecution, failure to give instruction that jury are sole judges of value of evidence and credibility of witnesses, though error, *held* not prejudicial (Const. art. 6, § 4½).

> Failure to give instruction that jury are sole judges of value of evidence and credibility of witnesses, though error, was not prejudicial so as to warrant reversal in view of fact that defendant admitted forging check in question, and entire evidence disclosed that different verdict could not have been reached even if omitted instruction had been given.

7. Criminal law 🔑1186(4).

Word "procedure" within constitutional provision precluding reversal because of procedural error, means legal rules directing course of proceeding to bring parties into court and course of court after parties are brought in (Const. art. 6, § 4½).

[Ed. Note.—For other definitions of "Procedure," see Words and Phrases.]

8. Forgery 🔑44(½).

Evidence *held* to support conviction of forgery based on signing of maker's name to check (Pen. Code, § 470).

9. Forgery 🔑44(1).

In prosecution for forgery based on signing of maker's name to check, evidence *held* to sufficiently establish intent to defraud (Pen. Code, § 470).

10. Indictment and information 🔑59.

Purpose of information is to advise defendant of crime charged.

11. Forgery 🔑8.

In prosecution for forgery, it is immaterial whether forgery is of name of existing or fictitious person (Pen. Code, § 470).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Alfred Williamson was convicted of forgery, and he appeals.

Judgment and order denying new trial affirmed.

L. J. Faust, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Appellant was accused by an information filed by the district attorney of the crime of forgery, in two counts, and also with three prior convictions of felony, one of which was afterwards withdrawn and the two remaining were admitted. He entered a plea of not guilty to the two counts of forgery. The jury found him not guilty as to count I, but guilty as to count II. From the judgment of conviction entered on said verdict and from the order denying his motion for a new trial, he has appealed.

The evidence as to count II shows that on February 27, 1932, appellant went to the grocery store of Morris Boguslaw and gave him a check for $25 drawn on the Security First National Bank of Los Angeles, Cahuenga and Hollywood branch, signed "O. Fuller," and payable to the order of Al Williamson. This check was given in payment of the bill of one Mrs. Goodhue, amounting to $15, and appellant was paid by Boguslaw the balance of $10 in cash. Appellant's name was indorsed on the reverse side of the instrument. The check was later sent to the bank and returned unpaid. There was no account in said bank in the name of O. Fuller during the month of February or at any other time. Police officer Lynde arrested appellant June 29, 1932, and had a conversation with him the next day to the following effect: "I showed him the check and asked him if he had ever seen it before and he said he had, and that he cashed the check and paid an old lady's bill and received some change back. I asked him if he knew anyone by the name of O. Fuller. He said he didn't, that is just a fictitious name. I asked the defendant if he wrote the check. He hestitated awhile and then said he did." The officer then identified specimens of appellant's handwriting. A handwriting expert, H. C. Nutt, compared said specimens of handwriting with the $25 check and testified that all were written by the same person.

At the beginning of the trial a jury was impaneled and sworn and the first witness for the prosecution was sworn and began testifying. After a few questions were asked, the following occurred: Juror No. 4 was Frank H. Eager. His brother called the courtroom, while the witness was testifying, to advise Mr. Eager that his sister had passed away suddenly. The bailiff informed the judge and the following took place in the courtroom:

"The Court: Will Juror No. 4 step into the court's chambers and talk on the telephone? Someone wants him on the phone. Will counsel approach the desk?"

(Juror No. 4, Mr. Frank H. Eager, steps out of the jury box into the judge's chambers. Balance of jury remain in box.)

(Conference at bench.)

(Juror returns to courtroom, standing in front of jury box.)

"The Court: Do you want to be excused?

"Juror: Yes sir.

"The Court: Well under the circumstances I think you should be excused. You are excused."

The juror then took his hat and coat and left the courtroom, after which there was a further conference at the bench, and the following occurred: "The Court: Mr. bailiff, will you please go and find the juror and bring him back here?"

The bailiff left the room and returned with the juror, apparently almost immediately. Then the following transpired:

"The Court: Mr. Eager, if we continue this case until Monday morning at 10 o'clock, do you think you can be back here at that time?

"Mr. Frank H. Eager (juror No. 4): Yes sir.

"Mr. Johnson: May I ask if counsel will stipulate with me that there is no irregularity?

"Mr. Faust (counsel for defendant): We will so stipulate."

The court then admonished and excused the jury until the following Monday morning at 10 a. m., and further stated: "Let the record show that Juror No. 4, Mr. Frank H. Eager, was excused by the court, and no proceedings were had until he was recalled; that he just walked out of the courtroom and as he went out in the hallway he was recalled, and then he was back to the jury box, and the case was continued until Monday morning." At the session Monday morning appellant objected to any proceeding being had with Eager as one of the jurors, "he having been excused and then recalled, and the defendant's peremptory challenges not having been exhausted."

Appellant urges that the court erred in "excusing" the juror while the trial was in progress and in recalling him after so "excusing" him, instead of declaring a mistrial or summoning another juror; that when the court "excused" the juror he became a stranger to the case and the court had no power to recall him; that by so doing the court deprived appellant of the right to trial by a jury of twelve persons; that the effect of Mr. Eager's participation in the case amounted to misconduct on the part of the jury, preventing a fair consideration of the case, and resulted in a verdict by means other than a fair expression of opinion on the part of all the jurors.

[1-3] About two-thirds of appellant's opening brief is used to discuss the points based on the incident described. There can be no question but that where a juror is discharged he becomes a stranger to the case and cannot thereafter be recalled and placed on the panel. Isaac v. State, 39 Tenn. (2 Head) 458. The weakness in appellant's argument is in its base, which rests upon the assumption that the juror was "discharged." No doubt the court in the stress of the moment intended to discharge the juror. However, before the latter had reached the elevator he was recalled, after it was ascertained that if the case could be continued until the following Monday, the trial could proceed. We think the jurisdiction of the court over the proceedings before it gave it the power to do as it did; that its action in effect rescinded the order theretofore made excusing the juror, while yet it could do so; and that the result of such action was to leave the case where it was before the incident occurred. The case was tried before twelve jurors properly impaneled and sworn, and we see no merit in appellant's contention. If there was any error, it was simply one of procedure, and after appellant's stipulation it is too late to complain. Furthermore, it is not claimed that any one talked to the juror or that anything happened to disqualify him other than what we have related, and we fail to see how any prejudice resulted. Even if there was a technical error, it came within the healing provisions of section 4½ of article 6 of the Constitution.

[4] The court instructed the jury, in substance, that if it found that the name of O. Fuller was signed to the check by appellant "with intent to defraud M. Boguslaw and the Security-First National Bank of Los Angeles, or either of them," as charged in Count II of the information, they should find defendant guilty. The information changed an intent to defraud "M. Boguslaw and the Security-First National Bank of Los Angeles." We see no merit in the claim that such instruction was misleading and confusing. The verdict supported the judgment if the evidence showed that the intention was to defraud Boguslaw only. People v. Stine, 110 Cal. App. 156, 293 P. 907.

[5] Appellant also urges that because of the fact that a handwriting expert testified in the case, the court misdirected the jury in failing to instruct them upon the subject of expert testimony as required by section 1127b of the Penal Code, which section reads, so far as material here, as follows: "When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court *shall* instruct the jury substantially as follows: * * * No further instruction on the subject of opinion evidence need be given." (Italics ours.) It is contended that it was the duty of the court to give such instruction even though not requested by defendant so to do. Respondent answers that the general rule applies, viz., "that, where a party in a criminal case fails to ask the court to give instructions to the jury upon a particular point, he cannot complain of error on the part of the court in not giving the instructions." People v. Rogers, 163 Cal. 476, 484, 126 P. 143, 146. The court in the case cited says: "This appears to be the conclusion reached in other states where the question has been presented, except in Washington, where a statute in terms provided that '*it shall be the duty of the court to instruct the jury* that no inference of guilt shall arise against the accused if he fail or refuse to testify as a witness in his own behalf.' See State v. Myers, 8 Wash. 183, 35 P. 582, 756. We have no statute here that specifically requires any instruction on this subject." Section 1127b was adopted in 1929 (Stats. 1929, p. 1939), and our attention has not been called to any case construing its apparently mandatory provision.

Seemingly the mandatory nature of the statute of Washington was first upheld in the case of Linbeck v. State, 1 Wash. 336, 25 P. 452, where the court said: "The defendant was not sworn as a witness in his own behalf, and the court failed to instruct the jury, as required by statute, that from such fact no inference of guilt should be drawn. We think this was error. The statute in question makes it the duty of the court to give such instruction irrespective of the action of the defendant in relation thereto; and while we do not now hold that the right to have this instruction given may not be waived by some express act of the defendant to that end, we do hold that the simple fact that he remained silent did not amount to such waiver." In the case of State v. Myers, supra, it was urged that while the defendant did not request the particular instruction, he did ask for certain specific instructions, and apparently the claim was made that such action should be held to be a waiver of his right to the particular instruction under the statute. The court, however, was not impressed with the contention made, and after discussing the cases laying down the general rule which we have quoted, among them some from California, said: "Such cases, it can plainly be seen, are no basis whatever for decisions on questions of the kind at bar, where the law has attached so much importance to this particular instruction, and has called it especially to the attention of the court, and given it specially into its charge." We doubt if the decision of our own Supreme Court would have been as it was in the case of People v. Rogers, supra, if a statute had made it the duty of the court to give the instruction therein involved. Section 1127b, Penal Code, says the court "shall instruct," not "shall instruct, if requested so to do," and we do not believe the general rule is applicable where a mandatory statute applies, as here. In our opinion it was error to fail to give the statutory instruction as to expert witnesses.

[6, 7] In the instant case the court did give the usual instruction as to the jurors being the sole and exclusive judges of the effect and value of evidence and the credibility of witnesses. The jury had before it the statement made by appellant to the police officers admitting facts from which it could only be concluded that O. Fuller was a fictitious person, existing only in the imagination of appellant, and that appellant forged the check in question. After an examination of the entire cause, including the evidence, we fail to see how a different verdict could have been reached, even if the omitted instruction had been given. Under such circumstances, is the saving grace of section 4½ of article 6 of the state Constitution of any avail? We think it is.

That such a statutory rule, though mandatory in its nature, is purely procedural and does not create substantive rights, there can be no doubt. It simply directs a step in the proceeding after a party is brought into court. "The word [procedure] means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in." Kring v. Missouri, 107 U. S. 221, 2 S. Ct. 443, 452, 27 L. Ed. 506. In this connection see the case of State v. Pavelich, 153 Wash. 379, 279 P. 1102, 1104, which upheld a rule of the Supreme Court which abrogated the statutory rule compelling the court to give the instruction referred to in State v. Myers, supra, as unconstitutional. Speaking of the statute in which such requirement is found, which, among other things, made a defendant in a criminal case a competent witness in his own behalf, guaranteed the constitutional right that nothing should be construed to compel him to offer himself as a witness, and, in the last clause, stated the statutory rule discussed in the case of State v. Myers, supra, the court in the Pavelich Case said: "The last proviso in the statute was not a constitutional provision, *but merely a statutory and procedural provision.*" (Italics ours.) In a case of the same name, but involving a different defendant, reported in 150 Wash. 411, 273 P. 182, 183, speaking of the same statute and the constitutional provisions first mentioned therein, the Washington court said: "The statute which remained in force after the adoption of the Constitution was, of course, but a legislative protection to the accused in criminal cases already afforded by the Constitution. The statute went further, however, and *in a purely procedural way* provided for the court to instruct the jury. * * *" (Italics ours.)

We cannot think that the Legislature intended by the statutory provision under consideration to say that the court should not exercise its constitutional duty under said section 4½ of article 6, or to give to the instruction provided for therein any more sacredness than one given by the court at the request of the parties, but that it did intend that the instruction should be given where applicable. Section 4½ is equally mandatory in its nature, and applies to any "misdirection of the jury" or error "as to any matter of procedure"; and as we cannot see where any miscarriage of justice has resulted from the failure to give the missing instruction, we have no power to set the judgment aside.

[8] We see no merit in the contention that the judgment is not supported by the evidence. On cross-examination of Boguslaw it was attempted to show that he was told by appellant to hold the check for three or four days. The witness said he did not recall any such conversation. The matter was for the jury to determine, and not for this court.

[9] In our opinion the evidence amply establishes the intent to defraud. Such intent follows from the deliberate commission of an unlawful act (People v. Ball, 102 Cal. App. 353, 282 P. 971), and the evidence does not support any other conclusion than that the act was committed deliberately and willfully.

[10, 11] The purpose of an information is to advise a defendant of the crime with which he is charged. The information in the instant case charges forgery, and the case was tried on the theory that forgery was the offense charged. The verdict was "guilty of forgery, a felony." Appellant urges that the evidence shows only the making, passing, etc., of a fictitious check, and not forgery, citing as authority the cases of People v. Elliott, 90 Cal. 586, 27 P. 433, and People v. Eppinger, 105 Cal. 36, 38 P. 538. Those cases arose prior to the amendment of section 470 of the Penal Code in 1905, since which time it is immaterial whether the forgery is of the name of an existing or a fictitious person. People v. Gayle, 202 Cal. 159, 259 P. 750.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

135 Cal.App. 223

PEOPLE v. VESTER.

Cr. 2428.

District Court of Appeal, Second District, Division 1, California.

Nov. 8, 1933.

Hearing Denied by Supreme Court Dec. 8, 1933.

1. Criminal law 🔑625.

Doubt as to sanity of defendant, which requires question of sanity to be submitted to jury during criminal trial, must be one which arises in trial judge's mind, as distinguished from uncertainty existing in minds of other persons (Pen. Code, §§ 1367, 1368).

2. Criminal law 🔑625.

Determination of question whether, during criminal trial, doubt arises regarding defendant's sanity requiring submission of question to jury, must be determined from any pertinent, substantial, and reliable evidence, however introduced to trial judge's attention (Pen. Code, §§ 1367, 1368).

3. Criminal law 🔑561(1).

Every material element constituting offense charged must be established beyond reasonable doubt.

4. Criminal law 🔑1158(1).

Trial judge's decision on whether doubt has arisen during criminal trial regarding defendant's sanity so as to require submission of question to jury is not conclusive, but may be reviewed on appeal (Pen. Code, § 1368).

5. Criminal law 🔑1166½(1).

If it appears on appeal as matter of law that doubt must or should have arisen during trial regarding defendant's sanity so as to require submission of question to jury, prejudicial error in not submitting question is shown (Pen. Code, § 1368).

6. Criminal law 🔑1035(3).

Defendant's rights are not lost by his failure to request that question of his present sanity be submitted to jury, where doubt of sanity arises during trial (Pen. Code, § 1368).

7. Criminal law 🔑625.

Question of defendant's sanity must be submitted to jury when doubt arises during trial only where supposed insanity is such that defendant was not conscious of wrongful nature of act committed (Pen. Code, §§ 1367, 1368).

8. Criminal law 🔑625.

Where medical reports made to court before trial were in effect that defendant was insane and similar evidence was introduced during trial, doubt arose regarding defendant's sanity, and failure to submit question to jury was prejudicial error (Pen. Code, §§ 1367, 1368).

Record showed that order was entered on minutes before trial to effect that it having appeared to court that defendant should be examined as to his mental condition, it was ordered that he be transferred to general hospital for observation and examination, and report made by staff physician was that defendant had psychosis probably of syphilitic infection, and an additional report presented by a physician, after setting out medical history and results of examination, stated that defendant was insane, and county jail physician presented third report that defendant was suffering from dementia præcox.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Carl E. Vester was convicted of robbery, and he appeals.

Reversed.

Hearing Denied by Supreme Court; SEAWELL, CURTIS and THOMPSON, JJ., dissenting.

John S. Cooper and L. Clark Davies, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

HOUSER, Justice.

On the trial of an action on each of three counts contained in an information filed against him, defendant was found guilty of the crime of robbery. Later, on the trial of the issue of his sanity at the time when each of such crimes was committed, defendant was found to have been sane. Although somewhat defective in form, if not in substance, it is understood that the appeal presented by defendant is from each judgment that was rendered against him in response to the corresponding verdict that was returned by the jury.

Perhaps the principal issue that is raised by appellant has reference to the point that prejudicial error was committed by the trial court in its failure to determine judicially whether defendant was sane at the time when the trial occurred.

By the express terms of section 1367 of the Penal Code, the lack of authority of a judicial tribunal to proceed with the trial of an insane person is clearly indicated by the provision that "a person cannot be tried * * * while he is insane." And in that connection, as far as concerns the point here under consideration, the pertinent portion of section 1368 of the Penal Code is that "if at any time during the pendency of an action, * * * a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury. * * *"

[1, 2] The statutory inhibitions may thus be noted, first, that an insane defendant in a criminal action "cannot be tried"; and secondly, that if a "doubt" arises as to his sanity, the trial court is required to proceed to a test of the question of the sanity of the defendant. Manifestly, on the one hand, at least as far as the court is concerned, the ultimate fact of insanity of any person may be determined by a judicial proceeding only; on the other hand, when the question as to whether a statutory "doubt" regarding the sanity of a defendant has arisen, and regarding which in consequence of either an express or an implied affirmative finding thereon a hearing should result, constitutes the matter to be considered, the decision with reference thereto, although likewise to be reached by judicial inquiry and determination, nevertheless may be subject to uncertainty. But in any event, construing the express language employed in the statute, as well as that which may be therein implied, it would seem probable that the "doubt * * * as to the sanity of the defendant" must be one which "arises" in the mind of the trial judge, as distinguished from any uncertainty which may exist in the mind of any other person regarding such question. Neither statute, legal principle, nor maxim of equity is suggested as a guide for the determination as to when, or under what circumstances, a "doubt" may be said to have legally arisen or to have been thus created. Whether its existence is legally required or demanded from a mere trifling remark or by a single apparent eccentricity of the defendant; or by opinions of his intimate acquaintances; or by alienists, based upon either few or many facts or abnormal conduct regarding the mental integrity and responsibility of the defendant; or even the required extent of the insanity—is nowhere directly indicated in the law. In such circumstances, necessarily the determination by the trial judge of whether the statutory "doubt" has arisen constitutes a matter of ultimate fact, not necessarily to be arrived at by and in accordance with the fixed rules of evidence applicable to any other judicial proceeding, but rather, because of the intricacies, difficulties, and peculiar circumstances which may be present, by any pertinent, substantial and reliable evidence, however introduced to the attention of the trial judge. Whatever may have been the inducing cause therefor, after a preliminary inquiry regarding the sanity of a defendant has been initiated, necessarily the ultimate and deciding question which confronts the trial judge for his determination must be either, has a "doubt" been created, or is the question of his insanity free from doubt? Nor may any positive indication be discovered in the language of the controlling statute, or in any related law, by which may be determined the question of the finality, or the conclusiveness, of the decision which may be reached by the trial judge. Whether his judgment in the premises is wholly discretionary; whether it must be reached in accordance with a preponderance of evidence; or, going beyond either of such requirements, by evidence which leaves no reasonable doubt as to its correctness—no "guiding star," at least in this jurisdiction, either by statutory direction, or by judicial precedent, seems available. In such circumstances, general principles of law governing situations more or less analogous in their nature to the fact here under consideration must suffice.

[3] At the outset, it may not be amiss to direct attention to the obvious fact that the question here at issue arises within a criminal action, and consequently that it directly involves a principle which, under varying circumstances, may affect the life or the liberty of an innocent person. With so much in mind, and in accordance with long-seasoned rules affecting the administration of justice in such matters, the conclusiveness of the implied decision by the trial judge as to whether a "doubt" had arisen respecting the sanity of the defendant, founded entirely upon his discretion, may be regarded as entirely inappropriate. In itself, unbridled legal discretion in reaching a decision may go so far as to contemplate or to embrace the disregard of apparently substantial, reliable and uncontradicted facts and evidence, and in their place and stead the substitution of a legal presumption, or evidence which, generally speaking, may be regarded as flimsy, weak, or correspondingly impotent. Ordinarily, the proper and legal protection of the rights of a defendant, presumably innocent of the crime of which he is charged, will not tolerate such a course. As it may affect personal privileges, favors, or acts of grace which may be extended by a court to a person who already has been convicted of the commission of a criminal offense, it is readily perceivable how a legal discretion in a court may become an eminently proper, and conclusive element; but as a broad and unlimited discretion may affect positive and affirmative rights of persons who may be before the court merely accused of the commission of crimes, it is difficult, if possible, to admit its appropriate applicability; or, if attempted to be and actually exercised, to recognize its binding force, or its legal conclusiveness. Nor has the doctrine of preponderance of evidence any rightful place where the question of the guilt of a defendant is the issue. In such circumstances, a decision in that regard, if determined in the affirmative, must be reached by evidence which leaves no reasonable doubt as to the correctness of the conclusion. On the trial of a criminal action, viewed from the position of the prosecution, preponderance of evidence is entirely inappropriate as an expression relative to the

burden of establishing any fact in the case. It is an undeviating rule that every material element constituting the offense charged must be established beyond a reasonable doubt. But in complete opposition thereto are the rules which affect rights, or so-called "defenses," interposed by the defendant. For their legal recognition, the defendant is not required to prove beyond a reasonable doubt either justification, excuse, or any other ultimate fact which properly may result in an acquittal. For example, when the defendant seeks to prove the so-called "defense" of alibi, the burden is not cast upon him to establish the ultimate fact beyond a reasonable doubt, or even by a preponderance of evidence. Rather, any evidence, however apparently weak, or contradictory in itself, is sufficient, provided that it create a reasonable doubt as to his guilt. Similarly in some respects is the "defense" of insanity. It is not offered, nor may it be considered either as justification or in mitigation of the offense of which the defendant is charged. When established, it serves simply as an evasion of responsibility; in effect, confession and avoidance. But unlike the "defense" of alibi, as far as the quantum of evidence for its establishment is concerned, the "defense" of insanity of the defendant at the time when the alleged crime was committed requires for its proof not merely the creation in the minds of the jurors of a reasonable doubt regarding the guilt of the defendant, but demands that his insanity at the time in question be established by a preponderance of evidence. However, such rules have relation either to the trial of a criminal action; or, following a conviction of the defendant, to a hearing had for the express purpose of adjudicating the issue of his sanity, limited to the time when the offense was committed. And it may be assumed that on a trial instituted under the provisions of sections 1367 and 1368 of the Penal Code for the purpose of determining the then present sanity of the defendant, the burden of establishing the ultimate fact of his then insanity would rest upon him, and which latter fact could be properly determined only by a preponderance of evidence to that effect. But in the instant case, as hereinbefore has been indicated, a reference to such issues and to some of the rules by which they are governed, is material only as illustrative of the duty and the burden which is cast upon the respective parties in particular circumstances which may arise in the course of a criminal action; from which it is thought may be deduced the general rule that, as affects the maintenance by the defendant of positive rights afforded him, or to which he may be entitled, the most that may be required is that he establish such rights by a preponderance of evidence.

[4, 5] However, the question here under consideration does not concern the actual inquiry into the question of the sanity of the defendant, but simply involves the right to have such inquiry invoked or initiated. The language of the statute (section 1368, Pen. Code) is that "if at any time during the pendency of an action, * * * *a doubt arises* as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury. * * *" Concretely, the pivotal issue is, how may it be determined that a "doubt" has arisen? If it be not a conclusion of fact that must be established beyond a reasonable doubt, or strictly, by a preponderance of evidence, nor one the existence of which depends upon a decision resting within the discretion of the trial court, by what process or procedure may such a substantial right, so positive in its nature and so important in its possible consequences to the defendant, be secured to him? It is clear enough that, in the first instance, the trial judge must weigh the relevant, material, facts which have come, or which have been brought, to his attention, and from a consideration of them decide whether a "doubt" has arisen. But manifestly his decision thereon cannot be conclusive and final. At least, if on appeal from a judgment of conviction, prejudicial error of the trial court in that regard be properly presented as a reason for reversal of the judgment, the application of no rule of law or of procedure is suggested as a preventive of its consideration. If, then, as a matter of law it appear that the facts were such that necessarily a "doubt" must or should have arisen (and not simply that as a privilege, or as a favor, such a conclusion might, or might not, have been accorded to defendant, dependent upon the discretion of the trial judge), it becomes clear that in the failure by the trial judge to decide that a "doubt" had arisen as to the sanity of defendant, and thereupon to order that "the question as to his sanity * * * be submitted to a jury," an omission by the trial court to exercise what may be termed a jurisdictional duty resulted, with the inevitable consequence that defendant was prejudiced in his substantial rights in the premises.

It then becomes advisable to consider the facts. From the record herein it appears that, as early as March 17, 1933, at a time when defendant was arraigned to plead to the information by which he was charged with the commission of the several offenses of robbery, the following order was entered on the minutes of the trial court: "It appearing to the Court that defendant Carl E. Vester *should be examined as to his mental condition*, it is ordered that he be transferred from the county jail to Ward 110 of the Los Angeles General Hospital for observation and examination *as to his mental condition*. It is further ordered that when said examination has been completed, said defendant shall be returned to the county jail and it is requested that a copy of the report be furnished to this court for its information and record."

Presumably in response to said order, defendant was "transferred from the county jail to Ward 110 of the Los Angeles General Hospital for observation and examination *as to his mental condition*." At any rate, under date of March 24, 1933, the following "report" regarding defendant was made to the trial judge by the superintendent of the General Hospital, to wit:

"1. We are today returning to the county jail the above named patient who was admitted to this hospital March 20, 1933, on your Court Order No. 51559.

"2. We herewith give you the following report: Findings by examining psychiatrist (Staff physician) 'this man seems confused, cannot carry on a very relevant and connected conversation. Is restless, cannot sleep well, says he has "shocks" or "explosions" in his chest. He is in a semi-dazed condition most of the time. Gives a history of syphilitic infection eight years ago and now has a positive (4 plus) Wasserman. Diagnosis: psychosis probably of syphilitic infection.' "

Under date of April 8, 1933, an additional "report," presented by Dr. Victor Parkin in apparent response to the order made by the trial court, read as follows:

"I herewith very respectfully submit my report of the examination I made of Carl E. Vester at the Los Angeles County Jail on April 4, 1933.

"Personal History: Mr. Vester is 28 years of age, married, has no children. Education —one year in high school. Occupation, sewing machine salesman.

"Medical History: The prisoner contracted syphilis nine years ago. He attempted suicide with poison while in Portland and was treated in the hospital. While there, it was ascertained that he had a four plus Wasserman of the blood. He has complained of headaches and dizzy spells for several years—worse at night.

"Mental Status: The subject is emotionally depressed, mentally confused; sustains a connected train of thought only with difficulty. He complains almost constantly that he is being neglected because he is not receiving treatments for syphilis, which every one knows that he has because he states he continually hears people talking about him. He is incompletely oriented—does not know the date of the week, but knows the year. His content of thought appears to be largely delusional. He blames his father for his present predicament and says that his father has it in for him and prevents him from getting treatment. He is also suspicious of others, his wife in particular. At times he refuses to eat food prepared by his wife, saying: 'I don't trust her. I hid the oxalic acid in the house and wanted to be careful.' He also hid knives under the rug in their home. He is also apparently hallucinated, stating that he hears people talking about him and from time to time he hears his father's voice calling him. He says he has been unsuccessful in selling sewing machines because other sewing machine men talk about him. He also states he has not been selling any sewing machines because he cannot remember what to say like he used to.

"Physical Examination: The prisoner is somewhat undersized, undernourished individual with a muddy, pasty complexion. His deep reflexes are normal. The pupils are round, equal and react to light and accommodation; and no objective signs indicating involvement of the brain and central nervous system in a syphilitic infection were noted.

"Diagnosis: Insane."

And under date of April 20, 1933, Dr. Benjamin Blank, county jail physician, presented a third "report" as follows:

"As an appointee of the court, an examination of the above man was made to ascertain his mental condition, and submit the following:

"In my opinion this man is of unsound mind, does not know the difference between right and wrong, nor the nature and consequences of his acts. From observations and examinations of this man I find that he is confused, depressed, has persecutory delusions and visual hallucinations. He attempted to jump off the roof on one occasion; claims that there is someone watching him all the time.

"Physically, he has a long syphilitic history which undoubtedly has affected the central nervous system to some extent, and still has positive signs of the same at this time.

"I believe this man is suffering from dementia praecox and believe him to be insane at the time of the act for which he is now incarcerated."

All such "reports" were submitted to the trial judge before the trial of the action against defendant was commenced. During the trial, evidence was received relating to the sanity of defendant at the time when each of the alleged offenses was committed. In addition to the testimony given by each of the two physicians who, as hereinbefore set forth, formerly had reported with reference to the then present sanity of defendant, the wife of defendant gave her testimony. Without going into details, it may suffice to state that, as to the testimony thus given by the two physicians, it was in harmony with the conclusions expressed by each of them in his "report" and was to the effect that not only was defendant insane at the time when the several offenses were committed, but as well that at the time when the action against defendant was being tried, he was insane. In substance, the wife of defendant gave similar testimony, which was supported by statements which related to specific abnormal acts of defendant.

Relative to that issue, at no time prior to that when the trial of defendant occurred was evidence of any facts, or of opinion by experts, contrary to those indicated in the "reports" to which attention has been directed herein, received by the trial court; and during that part of the trial of defendant which related to the question of whether he was insane at the time when the alleged offenses were committed, the only evidence received by the trial court which in any way militated against the statements or the testimony given by the two physicians and the wife of defendant was testimony given by a policeman to the effect that in a conversation had between him and defendant, the defendant made "sensible answers" to questions which the former propounded to the latter. The fact is thus placed beyond controversy that preceding the date of the trial of the action, through or by some means not disclosed by the record herein, it had appeared to, and had been decided by, the trial court "that the defendant Carl E. Vester should be examined *as to his mental condition*"; that thereupon and following observation and examination of defendant, from at least three separate and distinct, reliable and trustworthy sources the trial court was advised that defendant was *insane*. It would seem incontrovertible, or at least so clear that thereby and therefrom a "doubt" had arisen regarding the sanity of defendant, that discussion of that point would be superfluous. The original order made by the trial court should be a sufficient indication in itself that some uncertainty existed. But when coupled with the mass of information subsequently received by the trial judge relative to the then "mental condition" of defendant, no room was left for the slightest uncertainty that a "doubt" had, or at least should have, arisen. Notwithstanding the existence of such "doubt," either in violation of, or through inadvertence to act in accord with, the statutory requirement, the trial court failed to "order the question as to his (defendant's) sanity to be submitted to a jury"; but permitted the trial of the action to proceed as though no such "doubt" had arisen.

Aside from the statutory provision to which reference has been had, by which the trial of an insane person for an alleged criminal offense is forbidden, the underlying principle, with the indicated reasons therefor, may be found in 4 Blackstone's Commentaries, 24, as follows: "The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz. in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that, 'furiosus furore solum punitur.' In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself. Also if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."

And in volume I, Chitty Criminal Law (1819), page 619 [*761], the subject-matter is thus treated: "The other cause for which the judge is bound to grant a reprieve, is the insanity of the prisoner. It has from the earliest periods been a rule, that though a man be in the full possession of his senses when he commits a capital offense, if he become non compos after it, he shall not be indicted; if, after indictment, he shall not be convicted; if, after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution. And this opinion is confirmed by the fact that a statute was passed in the reign of Henry the Eighth, to allow of execution of persons convicted of high treason, though insane, which was always thought cruel and inhuman, and was repealed in the reign of Philip and Mary. The true reason of this lenity is not that a man who has become insane is not a fit object of example, though this might be urged in his favor; but that he is incapable of saying anything in bar of execution, or assigning any error in the judgment. The judge may, if he pleases, swear a jury to inquire ex officio, whether the prisoner is really insane or merely counterfeits, and, if they find the former, he is bound to reprieve him till the ensuing session. * * *"

[6] A situation analogous to that in the instant case is disclosed in the facts and the opinion reported in the case of People v. Ah Ying, 42 Cal. 18. That case also contains a decision to the effect that *no plea of present insanity is required.* In other words, that the rights of the defendant in the premises may neither be lost nor jeopardized by his failure to make a motion to or a request of the trial court that the question of his present sanity "be submitted to a jury." In the cited case, in part the court said: "* * * *There is no plea of present insanity required.* If at any time a doubt arose as to the sanity of the defendant, it was the duty of the Court,

of its own motion, to suspend the trial or further proceedings in the case, at whatever stage the doubt arose, until the question of sanity was determined. Common humanity requires that one should not be tried for his life while insane, and counsel for the defendant cannot waive such inquiry when the doubt exists; nor can he, by interposing such a plea, compel the Court to enter upon such inquiry where no ground for such doubt exists. The fact that evidence upon the subject was allowed to go to the jury, and that they were instructed to find a verdict that the defendant was then insane if they were satisfied from the evidence that he was so, implies a doubt on the part of the Court as to his sanity."

Likewise, in People v. West, 25 Cal. App. 369, 371, 372, 143 P. 793, 795:

"It cannot be too strongly emphasized that the question presented to the court was different from that involved in the consideration whether the defendants were responsible for the alleged homicide. As to their responsibility for the crime charged, the inquiry must be whether they knew the difference between right and wrong and could distinguish the quality and consequence of their act; but here the question was *whether they were mentally competent to make a rational defense.*

* * *

"And finally, as to the showing required to make it the duty of the court to submit the question of sanity to a jury, there is no discretion left in the court when a doubt arises as to the sanity of the defendant. And ordinarily, at least, if there are statements under oath of a credible person or persons that the defendant is insane, a doubt is or should be raised as to the defendant's sanity, and the question must be submitted to a jury. The only contingency is: Does a doubt arise? If information comes, through a proper source and through proper channels, that the defendant is insane, or if, through observation and personal inspection, the information is disclosed to the court, a jury must be impaneled to pass upon the mental condition of the accused. Marshall v. Territory (1909) 2 Okl. Cr. 136, 101 P. 139; People v. Ah Ying, 42 Cal. 18; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

"We do not mean to say that the weight of the evidence and the credibility of the witnesses are not within the peculiar province of the trial judge, but we think that the circumstances here were such that *it should be held as a matter of law that a doubt was or should have been created, and that it was the court's duty to submit the question as provided in section 1368 of the Penal Code.*"

In the case of Guagando v. State, 41 Tex. 626, it was held (syllabus):

"When an affidavit is made by a respectable person that a defendant charged with crime has become insane, a jury should be impaneled to try the issue of insanity before proceeding with the cause, and this though the party making the affidavit is unknown to those in attendance on court.

"The question to be determined on a plea of insanity is, 'is the accused mentally competent to make a rational defense;' and the error in refusing to submit this issue on a plea of insanity, supported by affidavit filed before trial, *is not cured by trying the issue of insanity after trial and conviction.*"

The question here at issue was also involved in the case of State v. Reed, 41 La. Ann. 581, 7 So. 132, 133. In rendering its opinion, in part the court said: "We consider it very clear that the counsel for defendant had the right to raise the question of their client's present sanity, without special or formal plea, and to have evidence received on the point, and to have the issue determined in some proper way. * * * But, whatever be his discretion as to the mode of determination, he undoubtedly committed error in refusing to entertain the objection, or to hear evidence thereon, or to determine it in any way."

In the case of State v. Peacock, 50 N. J. Law, 34, 11 A. 270, 271, it is said: "If the court either before or during the progress of such a trial, either from observation or upon the suggestion of counsel, have facts brought to its attention which raise a doubt of the condition of defendant's mind in this respect, the question should be settled before another step is taken."

Although in the abstract the law in general is recognized to be in accord with the deciding principle announced in the case entitled In re Buchanan, 129 Cal. 330, 61 P. 1120, 50 L. R. A. 378, to wit, that if on the trial of a person accused of the commission of a criminal offense it appear that he is capable of understanding the nature and the object of such proceeding, and is able to conduct his defense thereto in a rational manner, for the purpose of being tried he should be deemed sane, notwithstanding the fact that on some other subjects his mind is deranged or unsound, it is the opinion of this court that such a rule is inapplicable to the situation presented by the facts in the instant case. From an examination of the several "reports" presented to the trial court, it will be noted that that of the superintendent of the General Hospital contained the statement that: "This man seems confused, cannot carry on a very relevant and connected conversation; is restless, cannot sleep well; says he has 'shocks' or 'explosions' in his chest; he is in a semidazed condition most of the time; gives a history of syphilitic infection eight years ago and now has a positive (4 plus) Wasserman. Diagnosis: psychosis probably of syphilitic infection." Also that included within Dr. Parkin's report was the following: "The subject is emotionally depressed, mentally confused; sustains a connected train of thought only with difficulty. * * * He is incompletely oriented—does not know the date of the week, but knows the year. His content of thought appears to be largely delusional. * * *" Furthermore, in Dr. Blank's report it is said: "In my opinion this man is of unsound mind, does not know the difference between right and wrong, nor the nature and consequences of his acts. From observations and examinations of this man I find that he is confused, depressed, has persecutory delusions and visual hallucinations. * * * I believe this man is suffering from dementia praecox and believe him to be insane at the time of the act for which he is now incarcerated." Although generally speaking, and without application to a situation wherein the capacity of the accused to distinguish "right from wrong" in respect to the act for the alleged commission of which he either is, or is about to be placed, on trial, is the point at issue (14 R. C. L. 599 et seq., and authorities there cited), as is stated in the case of People v. Willard, 150 Cal. 543, 554, 89 P. 124, 129, and as has been adopted in many different subsequent cases which have arisen and have been determined in this state, in order that insanity of a defendant in a criminal action may be available to him as a "defense" therein, "it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. If he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal, and will subject him to punishment, he must be held responsible for his conduct. Although he may be laboring under partial insanity, as, for instance, suffering from some insane delusion or hallucination, still if he understands the nature and character of his action and its consequences, if he has knowledge that it is wrong and criminal and that if he does the act he will do wrong, such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from responsibility for his criminal acts."

[7] Clearly, the statutory provisions contained in sections 1367 and 1368 of the Penal Code, which relate to the insanity of a defendant in a criminal action, must be read and construed in the light of the general definition of insanity as applied to criminal acts, as expressed in the language that appears in the authority to which reference just has been had. And until in the mind of the trial judge "a doubt arises as to the sanity of the defendant" as thus generally limited and defined, no occasion is presented by reason of which "the court must order the question as to his (defendant's) sanity to be submitted to a jury."

[8] But in the instant case, in view of the undisputed evidence presented to the trial court both preceding and during the trial of the action against defendant, it is the conclusion of this court that a "doubt" had (or at least should have) arisen as to his then present sanity, and that the substantial rights of defendant in the premises were prejudiced by the failure of the trial court to "order the question as to his (defendant's) sanity to be submitted to a jury."

It becomes unnecessary to consider other alleged errors suggested by appellant.

The judgments are, and each of them is, reversed. It is further ordered that the cause be, and it is, remanded to the superior court for a new trial thereof, subject to the statutory provisions of sections 1367 et seq. (chap. 6, of title 10, of part 2) of the Penal Code, which relate to an "Inquiry Into the Insanity of the Defendant Before Trial or After Conviction." And it is further ordered that the oral motion made by appellant in this court that it make its order for an examination of appellant "to determine his present sanity" be, and the same is, denied.

We concur: CONREY, P. J.; YORK, J.

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134 Cal.App. 726

RHODA et al. v. ALAMEDA COUNTY.

Civ. 8876.

District Court of Appeal, First District, Division 2, California.

Oct. 31, 1933.

1. Appeal and error 🔑877(1).

In action against county for damages to property from removal of bridge, county *held* not entitled to question competency of evidence for owners, on appeal from order granting owners new trial for insufficiency of evidence.

2. Eminent domain 🔑279(1).

Lease of property by life tenant as executrix to county to facilitate removal of bridge and construction of tube *held* not to estop remaindermen from claiming damages caused by such removal and construction.

3. Eminent domain 🔑285.

Remaindermen were entitled to hold county liable for damage to property from removal of bridge and construction of tube, notwithstanding removal was by order of Secretary of War, where county failed to sustain burden of proving that compliance with order necessitated damage to property.

4. Wills 🔑634(8).

Will giving property to life tenant with remainder to certain remaindermen, and, in event of death of any remainderman before life tenant, then to remainderman's issue, if any, and, if not, to other remaindermen, created contingent remainders, notwithstanding rule that remainders are to be construed as vested, if possible.

5. Remainders 🔑17(1).

Cause of action for damages to property from removal of bridge and construction of tube by county accrued to contingent remaindermen on death of life tenant, though remaindermen could not sue before (Const. art. 1, § 14).

6. Constitutional law 🔑107.

Limitation statutes affect remedy and not right, and, if reasonable time is allowed to prosecute proceeding after passage of statute establishing or shortening period for bringing action, statute is constitutional.

7. Eminent domain 🔑277.

Remaindermen *held* not entitled to damages to property from removal of bridge by county, where remaindermen whose interests vested April 30, 1931, failed to allege or prove that claim was filed as required by statute effective August 15 (Code Civ. Proc. § 338, subd. 2; Pol. Code, § 4078, and § 4075 as amended by St. 1931, p. 197).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by John W. Rhoda and others against Alameda County. Verdict for defendant, and, from an order granting plaintiffs' motion for new trial, defendant appeals.

Reversed.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakley and R. Robert Hunter, Deputy Dist. Attys., all of Oakland, for appellant.

William S. Bayless and Stanley Pedder, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

This is an appeal from an order granting plaintiffs a new trial on the ground of insufficiency of the evidence. Plaintiffs and respondents sued for damages alleged to have been done to certain property fronting on Webster street in the city of Alameda by reason of the removal of the Webster street bridge across the Oakland estuary and the substitution of a tube under said estuary by defendant and appellant, county of Alameda. The case was tried before a jury, which brought in a verdict for defendant. The trial court thereafter granted the motion for new trial, from which this appeal is taken.

Appellant urges five grounds for reversal: (1) That respondents did not file a claim in accordance with sections 4075 and 4078 of the Political Code; (2) that there was no competent evidence in the record showing damage to the property; (3) that respondents are estopped to claim damages by reason of an agreement and lease entered into by respondents' predecessor in title, as executrix of the will under which respondents inherited, whereby such executrix leased certain of said property to appellant for use during the construction of the tube complained of in this action; (4) that, since appellant removed the Webster street bridge by order of the Secretary of War acting under the paramount authority of the United States of America over navigable waters, respondents cannot hold appellant liable in damages therefor; (5) that, at the time the bridge was removed and the tube constructed, respondents were contingent remaindermen, with no vested interest in the property claimed to have been damaged, and hence were not damaged in any property right.

[1] For convenience, we shall depart from the order in which these points were made in discussing them in this opinion. We shall first take up the point that there is no competent evidence of damage in the record. It is not disputed by appellant that the property might have suffered damage from this improvement for which the owners would be entitled to compensation from appellant, and evidence was introduced which, if competent, established very substantial damage. However, this evidence was all introduced over appellant's objection, and it is appellant's claim that the evidence is not competent because it includes improper elements of damage, and in some cases was not given by the witnesses in the manner allowed by law for proving such damages. We need not pause to decide whether the evidence was competent or properly received because that question is not open to appellant on this appeal. The precise question was passed upon in Globe Grain & Milling Company v. Drenth, 41 Cal. App. 604, 183 P. 285. In that case, as in this, a motion for new trial was granted upon the ground of insufficiency of the evidence. An allegation of the answer was treated by the trial court as evidence of the fact alleged, and the jury so instructed. The appellate court held that this was error, but not error of which appellant could complain upon an appeal from an order granting a new trial; the court saying at pages 606, 607 of 41 Cal. App., 183 P. 285, 286:

"But, having been so regarded upon the trial, the defendant, upon a motion by plaintiff for a new trial, is not entitled to have this evidence disregarded. As before stated, the only ground upon which the order in this case granting a new trial can be supported is that the evidence is insufficient to sustain the judgment in favor of the defendant, and the established rule is that on an appeal by defendant from such order he cannot be heard to complain that evidence was improperly admitted in favor of plaintiff. The case upon appeal, therefore, must be considered in the light of all the evidence embraced within the record, including that improperly admitted over the defendant's objection. [Citing cases.] It follows that the allegation of defendant's separate defense above referred to, having been presented to the jury as an admission in favor of the plaintiff, although over defendant's valid objection, was properly regarded as evidence in the case by the trial court in its decision on the motion for a new trial."

To the same effect are: Rapp v. Southern Service Co., 116 Cal. App. 699, 708, 4 P.(2d) 195; Seaward v. Malotte, 15 Cal. 304, 306–307; McCloud v. O'Neall, 16 Cal. 392; Pierce v. Jackson, 21 Cal. 636; Coyle v. Lamb, 123 Cal. 264, 55 P. 901. The reason for the rule was tersely expressed by Field, C. J., in McCloud v. O'Neall, supra, at page 398 of 16 Cal.: "If the District Court had held the witnesses, Kelty and Reynolds, incompetent, by reason of interest, the defendant might have offered other evidence to the same effect, or their competency might, perhaps, have been immediately restored by the execution of proper releases. The rule for which the appellant contends, would work great injustice in its application. A party failing to produce evidence in his possession, because of the ruling of the Court upon the admissibility of that already given, would often find that he had lost the case from a subsequent change of the views of the Court, without any fault of his own."

The reason for the rule is also very clearly explained in Rapp v. Southern Service Co., supra, at pages 710, 711 of 116 Cal. App., 4 P.(2d) 195, 199.

[2] We think appellant's claim of waiver or estoppel by the execution of the agreement and lease by the executrix during the pendency of the work is not well taken. The purpose of this agreement was to facilitate the doing of the work which it is here claimed damaged the property, but nowhere in the agreement was there an express waiver of a possible future claim for damages, nor was any part of the consideration given by appellant expressed to be received by way of compensation for any damage to the property by reason of the improvement. The case on this phase is ruled by Rockridge Place Co. v. Oakland, 61 Cal. App. 791, 216 P. 64. In that case plaintiff joined in a petition that certain street work be done. Afterwards it sued for damage to its property from the doing of such work. The claim was made that it had waived the right to seek damages by its joinder in the petition. The court ruled against the claim. That case is not distinguishable in principle from this.

[3] To appellant's suggestion that, because the bridge was removed by order of the Secretary of War, respondents cannot hold appellant for damage to their property, respondents counter by pointing out that the order of the Secretary of War did not require the construction of a tube, but permitted the building of another bridge of different height and dimensions. This is true. Appellant replies that a bridge of the height and dimensions required by the Secretary of War might have required an approach of such character that it would have done greater damage to respondents' property than did the tube. Appellant offered no proof that this would necessarily or at all have followed had it elected to replace the bridge in the manner required by the Secretary of War. We cannot presume that such damage would have occurred in the absence of proof. Conceding, without deciding, that damage to property necessarily caused by compliance with the requirements of the United States of America would not be actionable, we are satisfied that the burden would be on appellant to show that such requirements could not be complied with in a practical manner without causing such damage to private property. This burden was not sustained by the evidence introduced in this case.

[4] The real property in question came to respondents under the will of Allen D. Wilson. Under the terms of this will Amelia E. S. Wilson, the wife of the testator, took a life estate in trust, with provisions that upon her death "said property shall then go to and vest in John Rhoda, Ellen Rhoda, Paul Rhoda, Wilbur Rhoda, Mabel Rhoda, Floyd Rhoda, Laurence Rhoda, Grace Rhoda and Alice Rhoda (the children of Franklin Rhoda), and Ethel Rhoda, Frederick Rhoda and Madeline Heydenfeldt (the children of Albert Rhoda), free and clear of all trusts and conditions, share and share alike." In other paragraphs the will provided: "In the event of the death of any of the aforementioned children of Franklin Rhoda or Albert Rhoda, before the death of my said wife, without issue surviving my said wife, then and in that event, I give, devise and bequeath the share of such child or children so dying without issue surviving my said wife, to the aforementioned children of Frank Rhoda and Albert Rhoda, surviving my said wife, share and share alike. * * * In the event of the death of any of the afore-

mentioned children of Franklin Rhoda or Albert Rhoda, before the death of my said wife, leaving issue surviving my said wife, then and in that event I hereby give, devise and bequeath the portion of my estate devised and bequeathed to each such child, to his issue respectively, such issue to take as by right of representation."

In spite of the rule that wherever possible a remainder will be construed as vested instead of contingent (In re De Vries, 17 Cal. App. 184, 119 P. 109), it seems clear that the remainders created by the above-quoted provisions of the will were contingent remainders. The case is not distinguishable from those presented in Estate of Washburn, 11 Cal. App. 735, 106 P. 415, and In re Shoemake, 211 Cal. 457, 295 P. 830. As succinctly said in the former of the two cases cited, at page 742 of 11 Cal. App., 106 P. 415, 418: "The uncertainty of any of the children of the class surviving Mrs. Higgins [the life tenant] renders the interest of any such contingent."

[5] However, it does not follow, as argued by appellant, that, because the remainder had not vested at the time the work complained of was completed, respondents have no cause of action. It is true that prior to the falling in of the life estate they could not sue for the damage done the property because prior to the vesting of the remainder they had no present property interest. Pavkovich v. Southern Pacific Railway Co., 150 Cal. 39, 87 P. 1097; Chesapeake & O. R. Co. v. Bradford, 6 W. Va. 220. But, if a damage was done to the remainder interest, it would seem clear that the law should not be so powerless as to deny relief to the remaindermen when the remainder became vested in them. It is appellant's theory that, since the life tenant had the only vested interest at the time the tube was completed, she would have the only cause of action for damages. If this is so, then the property of the remaindermen would be damaged without compensation being made therefor as required by the Constitution. Article 1, § 14. It is plain that the life tenant could only recover for damage to her life estate, and, if the remaindermen cannot recover for damage to the remainder when their estates vest, there can be no recovery by any one for the damage to the remainder. Such an inequitable rule should only be adopted under the compulsion of absolute necessity. No such necessity exists in a case of this character. It is sufficient to hold, not that the right of action for damages to the contingent remainder does not exist, but rather that it is postponed until the life estate falls in and the remainder vests in fee. In the analogous situation of a possessory action by a remainderman, it is well settled that, while during the life tenant's term the remainderman cannot maintain a possessory action against an intruder because he has no present right of possession, nevertheless the statute of limitations does not run against him during this period of incapacity, and upon the death of the life tenant he may then prosecute the possessory action. Thompson v. Pac. Electric R. Co., 203 Cal. 578, 265 P. 220; Newport v. Hatton, 195 Cal. 132, 231 P. 987; Akley v. Bassett, 189 Cal. 625, 209 P. 576; Pryor v. Winter, 147 Cal. 554, 82 P. 202, 109 Am. St. Rep. 162; Charleston R. Co. v. Hughes, 105 Ga. 1, 30 S. E. 972, 977, 70 Am. St. Rep. 17; Callison v. Wabash R. Co., 219 Mo. App. 271, 275 S. W. 965; New York R. Co. v. Livingston, 238 N. Y. 300, 144 N. E. 589, 34 A. L. R. 1078; McPherson v. Black, 215 Ky. 92, 284 S. W. 413, 46 A. L. R. 1424; Westcott v. Meeker, 144 Iowa, 311, 122 N. W. 964, 29 L. R. A. (N. S.) 947. In Pryor v. Winter, supra, at page 559 of 147 Cal., 82 P. 202, 204, the court said: "It would be strange indeed if during the life of the particular tenant a remainderman could be compelled to lose his estate on account of another's possession which he would be utterly helpless to interrupt." It would be equally strange if during the life of the particular tenant the contingent remainderman could lose a part of his estate, by its value being decreased by a public improvement, because at the time the damage was done his estate was not vested, and hence at that time he was powerless to sue.

In the analogous situation of a condemnation suit against the life tenant, the Supreme Court of Georgia said of the rights of a contingent remainderman in Charleston R. Co. v. Hughes, supra: "If, at the time the condemnation proceedings were had, there were two estates in the property, one a life estate and the other a contingent remainder, the fact that it was impossible to ascertain the persons who would eventually take as remainder-men upon the happening of the contingency provided for in the will would not authorize the conclusion that the interest of such remainder-men was acquired by proceedings against the life tenant, who, under no circumstances, could be held to represent them."

Our Constitution, article 1, section 14, makes no distinction between taking and damaging property. If the contingent remainderman's property cannot be taken for a public use without compensating him when the remainder vests, it cannot be damaged without making similar compensation upon the vesting of his estate. The contingent remainderman should not be remediless for the injury done to his property during the life estate. His only possible remedy in the case of a public improvement, which for reasons of public policy he should not be allowed to enjoin, is by action for damages after the vesting of his estate. We find no difficulty in holding that, while respondents were powerless to sue when this public improvement was completed, a cause of action for the damage done their fee in remainder accrued to them at the time the remainder became vested by the death of the life tenant. The life tenant died on April 30, 1931, and on that date their cause of action became complete.

[6, 7] At the 1931 session of the Legislature (St. 1931, p. 197), a paragraph was added to section 4075 of the Political Code, reading in part as follows: "All claims against any county * * * whether such claim be founded upon contract, express or implied, or upon any act or omission of the county or any officer or employee thereof * * * shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein provided and rejected in whole or in part."

The section as so amended is broad enough to require the presentation of a claim for the damages herein sued for as a condition precedent to suit. Respondents argue, however, that, since the amendment did not become effective until August 15, 1931, and since, as they claim, their cause of action accrued on October 27, 1928, and the right of action would have been barred by limitation of time on October 27, 1931 (Code Civ. Proc. § 338, subd. 2), and since, under section 4078, Political Code, the board of supervisors are given ninety days to act upon such claims, to make the section applicable to them would carry the time within which the board could reject their claim beyond the period of limitations, and automatically bar their action. Given the premise supposed, to apply the amended section to their cause of action would amount to an unconstitutional deprivation of property. The fallacy of respondents' argument lies in their assumption that the statute of limitations commenced to run against them on October 27, 1928. We have held that their cause of action did not accrue until the death of the life tenant on April 30, 1931, and the statute of limitations commenced to run on that date. This gave them ample time to file the claim required by the amendment to Political Code, § 4075. "Acts of limitation affect the remedy and not the right; therefore, the constitutionality of statutes which shorten or extend the time within which a cause of action may be asserted is beyond question. Subject always to the limitation that a reasonable time must be allowed for prosecuting a proceeding after the passage of an act establishing or shortening such a period, the power of the legislature is absolute in such matters." 5 Cal. Jur., pp. 755, 756, § 148; Doehla v. Phillips, 151 Cal. 488, 492, 91 P. 330; Davis & McMillan v. Ind. Acc. Com., 198 Cal. 631, 636-637, 246 P. 1046, 46 A. L. R. 1095.

Said the Supreme Court of the United States in the leading case of Terry v. Anderson, 95 U. S. 628, 632, 24 L. Ed. 365: "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. [Citing cases.] It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain."

As a matter of fact, the amendment to Political Code, § 4075, did not at all shorten the respondents' time to sue, but simply added a condition precedent to their right to sue, the filing of a claim; and ample time, over two and one-half years, remained to them within which to comply with this requirement before the bar of the statute of limitations would arise. That the Legislature may change the remedy for the enforcement of an existing right so long as the new remedy is adequate is a legal commonplace. 5 Cal. Jur., p. 781, § 169. The requirement of the filing of a claim by respondents as a condition precedent to suit falls well within this legislative power. There is no pleading or proof that any claim was filed, and on this ground we must hold that the evidence was insufficient to support a judgment in respondents' favor. It follows that the order granting a new trial on the ground of insufficiency of the evidence was error.

The question is not presented to us, and we do not attempt to decide, whether the judgment in this case would be a bar to a new action by respondents after the filing and rejection of a claim; but we consider it only just to the respondents, in view of the possibility of such a new action being brought, to make clear that we are reversing the order granting a new trial on the sole ground that there was no pleading or proof of the presentation and rejection of a claim as required by sections 4075 and 4078 of the Political Code.

The order granting a new trial is accordingly reversed on the single ground just mentioned.

We concur: NOURSE, P. J.; STURTEVANT, J.

135 Cal.App. 129

GRAHAM et ux. v. ELLMORE et al.

Civ. 692.

District Court of Appeal, Fourth District, California.

Nov. 6, 1933.

1. Brokers 🔑106.

Parties exchanging land worth $4,000 for land worth $1,800 above incumbrance assumed could not recover former sum from brokers as damages for fraudulent representations that latter land was not otherwise incumbered.

2. Appeal and error 🔑1008(1).

Whether statement of broker's salesman that land exchanged for other land was incumbered by only one trust deed was warranted by his information, and he had reasonable grounds for believing it true were questions primarily for trial court to determine from circumstances of particular case (Civ. Code, §§ 1709, 1710).

3. Appeal and error 🔑907(2).

Appellate court must assume that evidence, not before it, supports judgment appealed from.

4. Fraud 🔑13(2).

Judgment against broker's salesman for fraud in falsely representing that land exchanged for plaintiffs' land was incumbered by only one trust deed *held* not demanded, where trial court found that salesman knew nothing of additional incumbrance and was justified by his information in thinking that title was as represented (Civ. Code, §§ 1709, 1710).

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Charles A. Graham and wife against Ivan L. Ellmore, August Mennes, and others. From a judgment for defendants Mennes and others, plaintiffs appeal.

Affirmed.

Burke, Hickson & Burke and Daniel G. Marshall, all of Los Angeles, for appellants.

Hiram T. Kellogg, of Los Angeles, and Allen & Lyon, of Fullerton, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for fraud in a real estate transaction wherein the plaintiffs exchanged certain land in Oregon for an interest in certain land in Orange county owned by the defendant Ellmore. The defendant August Mennes was a real estate salesman in the employ of the defendant L. L. Mennes, who was a real estate broker. The defendant indemnity company had furnished a bond for the broker and salesman, under the provisions of the California Real Estate Act (St. 1919, p. 1252, as amended). The two last-named defendants had no connection with the matter out of which this case arose, other than this relationship to the salesman. It is alleged in the complaint that both the defendant Ellmore and the defendant August Mennes represented to the plaintiffs that the Orange county land was incumbered only by a deed of trust for $2,500, when in fact it was covered also by another deed of trust for about $6,000, and that this representation was then known by each of said defendants to be false, fraudulent, and untrue. The plaintiffs, having recovered judgment against the defendant Ellmore only, have appealed, on the judgment roll alone, from that portion of the judgment which was in favor of the other defendants.

It is appellants' contention that, in view of the findings made, judgment must be entered against all of the defendants. The court found that Ellmore and August Mennes each represented that the property was subject only to a deed of trust for $2,500, when in fact it was subject also to another for $6,000; that Ellmore knew at the time that the property was subject to the additional incumbrance; that August Mennes did not know this fact; that, when he made the representation, August Mennes believed it to be true; and that the representation made by August Mennes was the same representation which had been made to him by Ellmore. The court further found that L. L. Mennes had nothing to do with the transaction, except for the fact that August Mennes was in his employ; that appellant Charles A. Graham is himself engaged in the real estate business, and is experienced in the transfer of real property; that he was not negligent, however, in failing to investigate the title records; that the Oregon property traded by the appellants was worth $4,000; and that the value of the Orange county land at the time of the exchange was $1,800 over and above the $2,500 incumbrance which was to be assumed.

[1] Incidentally, the appellants argue that they are entitled to judgment against the real estate agents in the sum of $4,000, being the amount of the judgment entered against the owner. While this matter is not important here, under the view we take of the case, it may be observed in passing that such an amount would give the appellants more than twice what they would have received had the representation made been true, and, in so far as these respondents are concerned at least, we see no reason why the judgment, if entered against them at all, should not be based upon the usual and es-

tablished measure of damages. Hines v. Brode, 168 Cal. 507, 143 P. 729.

[2-4] The main point urged is that judgment must be entered also against a real estate salesman when both he and the owner have made a false representation, even though the salesman believed the statement made to have been true, and even though the same representation had been made to him by the owner. The appellants rely upon Stirnus v. Adams, 50 Cal. App. 730, 195 P. 955; Spaulding v. O'Connor, 87 Cal. App. 82, 261 P. 766, and Muller v. Palmer, 144 Cal. 305, 77 P. 954, 957. These cases are not decisive of the question before us. In Stirnus v. Adams, supra, an action for money had and received, it would seem that the agent alone made the misrepresentations and that each of the defendants had received part of the money paid. In any event, the agent knowingly participated in the fraud. In Spaulding v. O'Connor, supra, the agents were acting for an undisclosed principal. In Muller v. Palmer, supra, the defendants misrepresented their own title, it being held that such a matter was one within their own knowledge. The appellants particularly rely upon certain language quoted in the last-named case to the effect that it is a false representation if a party asserts that as true which he does not know to be true, and it is argued that the only question that may be considered here is whether the information given concerning this title was true or untrue. While expressions similar to the one referred to may be found in other opinions, such expressions should not thus be separated from their context. Fraud cases vary greatly as to their facts, and each case should be considered with reference to its particular circumstances. In the case last referred to the court also said: "Actual fraud is committed where one, with intent to induce another to enter into a contract, makes a positive assertion, in a manner not warranted by the information of such person, of that which is not true, even though he believes it to be true."

This statement is based upon sections 1709 and 1710 of the Civil Code, which sections, in so far as they apply here, impose a liability for "the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." In Andrew v. Bankers & Shippers Ins. Company, 101 Cal. App. 566, 281 P. 1091, 1095, the court said: "When a cause arises out of an alleged false representation, the plaintiff, in order to prevail, must ordinarily show that the representation was as to a material fact; that such fact was false and known to be false by the party making it, or else recklessly made, or without reasonable grounds for believing its truth. * * *"

In Maxson v. Llewelyn, 122 Cal. 195, 54 P. 732, 734, it is said: "Where a man makes a representation in the reasonable belief that it is true, fraud will not be imputed to him if it afterwards be shown to be untrue; but there must be reasonable grounds for his belief. 2 Pom. Eq. Jur. § 880; Kerr, Frauds, p. 57."

While in the instant case the court found that the statement made by the salesman was untrue, it was also found that he believed it to be true, that he did not know of the existence of the other incumbrance, and that he had been told by the owner that only one incumbrance existed. From all its findings, the court drew the conclusion that the respondents were not liable. There is an implied finding that the salesman had reasonable grounds for believing the statement made to be true. Whether such statement was warranted by his information, and whether he had reasonable grounds for believing the same to be true, depend upon all the circumstances of the particular case, and are questions, primarily, for the trial court. Not only is there an implied finding that the salesman had reasonable ground for believing the statement true, but, the evidence not being before us, we must assume that in all respects it supports the judgment. The facts in connection with the condition of this title were peculiarly within the knowledge of the owner, the salesman was as much deceived by the owner as was the other party to the transaction, and in one sense it was no more unnatural or unreasonable for the salesman to fail to examine the records than for the respondents to make the same error. In effect, the court found that, while the agent made the statement and that it was false, it was neither willfully made nor fraudulent so far as he was concerned, since he knew nothing of the other incumbrance, and since he was justified by his information in thinking the title was as represented. Also, in effect, the court found that the appellants relied upon statements innocently made by the salesman and wrongfully and knowingly made by the owner. While it may be true as a general proposition that an agent who is equally guilty with an owner is also liable for any damage caused, we think the trial court was justified in holding that under the circumstances of this case the salesman was neither equally guilty nor equally liable, especially where the respondents concluded the deal directly with the principal. In our opinion, a judgment against the respondent is neither demanded by the general principles of equity and justice nor compelled by the findings made.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

135 Cal.App. 158

In re CALLAWAY'S GUARDIANSHIP.

CALLAWAY et al. v. BARNES.

Civ. 1437.

District Court of Appeal, Fourth District, California.

Nov. 6, 1933.

1. Judgment ⚷386(3).

Judgment or order void on face may be set aside at any time.

2. Judgment ⚷386(4).

Order or judgment may be set aside where jurisdiction is wanting, but invalidity does not appear from judgment roll or record, if application therefor is made within six months from entry.

3. Guardian and ward ⚷13(8).

It will be presumed, in support of order appointing guardian for minor, that proper proof has been made of facts sufficient to excuse giving of notice to minor's parents (Code Civ. Proc. § 1747).

4. Guardian and ward ⚷13(3).

Order that no notice of application for guardianship of minor need be given to minor's mother or grandmother, even if order was part of judgment roll, *held* not to show court was without jurisdiction to grant letters of guardianship so as to authorize revocation of letters (Code Civ. Proc. § 1747).

5. Guardian and ward ⚷8.

Court's jurisdiction to grant letters of guardianship of minor depends on facts shown, not on whether any order made sets forth facts on which it is based (Code Civ. Proc. § 1747).

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

In the matter of the guardianship of Anna May Callaway, a minor. From an order refusing to revoke letters of guardianship granted to Guy Barnes, Grace Edith Callaway and another appeal.

Affirmed.

Will H. Light, of Los Angeles, for appellants.

Swing & Swing, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

On July 15, 1931, an order was entered in the superior court of San Bernardino county appointing the respondent as guardian of the person of Anna May Callaway, a minor child, and letters of guardianship were duly issued. The petition in the matter alleged that the said minor had been in the custody of petitioner and his wife since about April 2, 1927; that the parents of said child had relinquished her to the petitioner and his wife; that there were no relatives of the minor residing in San Bernardino county; and asked that the court cause such notice to be given as upon inquiry was deemed reasonable. Attached to the petition was a consent and waiver of notice signed by the petitioner's wife. On the same day another order to the effect that no notice of the time and place of hearing the petition be given was filed.

On November 18, 1932, on application of the mother and grandmother of the child, a citation was issued requiring the respondent to show cause why these letters of guardianship should not be revoked. This application was based upon the ground that the court had no jurisdiction to make the original order appointing a guardian, since no notice of the proceeding was given to the mother or grandmother of the child. Affidavits of the mother and grandmother were filed in which they alleged that the grandmother had resided continuously at a certain address in Venice, Cal., for a period of eight years; that this fact and this address were known to the respondent; and that the respondent at all times knew that the mother of the child could be reached by communicating with the grandmother at that address. After a hearing, an order was entered denying the application to vacate and set aside the appointment of a guardian and from this order this appeal is taken.

The appellants concede that the original order appointing a guardian, which does not purport to recite any facts or acts upon which the jurisdiction of the court depended, would be sufficient and conclusive upon the matter of jurisdiction if it stood alone. It is contended, however, that the additional order to the effect that no notice be given conclusively shows that no notice was in fact given, and that it affirmatively appears therefrom that the court entirely disregarded the statute requiring notice to the parents and therefore had no jurisdiction.

[1, 2] It is well settled that a judgment or order void on its face may be set aside at any time, and that an order or judgment may be set aside where jurisdiction is in fact wanting but where the invalidity does not appear from the judgment roll or record, if application therefor is made within six months from the date of its entry. In re Dahnke's Estate & Guardianship, 64 Cal. App. 555, 222 P. 381; In re Estate of Eikerenkotter, 126 Cal. 54, 58 P. 370. The application here in question, made approximately sixteen months after the original order was entered, came too late unless the original order is void upon its face or in other words, unless its invalidity

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

appears from an inspection of the judgment roll.

[3, 4] There has been some doubt as to just what constitutes a judgment roll in a guardianship proceeding. In re Dahnke's Estate & Guardianship, supra. Assuming that the order to the effect that no notice need be given is a part of the judgment roll, we are unable to view that order as disclosing that the court was without jurisdiction to act in this matter. Section 1747 of the Code of Civil Procedure, as then existing, read in part as follows: "In all cases notice must be given to the parents of the minor or proof made to the court that their addresses are unknown, or that, for other reason, such notice cannot be given." That provision does not require the giving of notice to the parents of a minor in all cases, but permits the omission of such notice upon proof of certain facts. Where such proof is offered, it is the duty of the court to pass upon its sufficiency. Where such evidence is considered sufficient by the court, but no separate order is made with reference thereto, it will be presumed, in support of the order of appointment, that proper proof has been made of facts sufficient to excuse the giving of notice. We are unable to see why a different situation exists if a court affirmatively finds and orders that no further notice need be given. The making of such an order would indicate that proper proof had been made rather than that the court was disregarding the statute and refusing to comply therewith. The order having been made by a court of general jurisdiction, all presumptions are in its favor.

[5] In Re Estate of Eikerenkotter, supra, the court said: "But in this case, from an inspection of the record * * * we find nothing showing the order of appointment to be void as beyond the power of the court to make. The fact of service, and not the proof of service, gives a court jurisdiction to hear and determine. Here there is nothing in the record to disprove the fact of service of the notice upon the person having the custody of the minor. Lack of jurisdiction must be affirmatively shown by the record." Nothing in the record before us shows that proof was not presented to the court which justified a finding and an order that no further notice need be given. The jurisdiction of the court depends upon the facts shown and not upon whether or not any order made sets forth the facts upon which it is based. In our opinion, the order appointing the respondent as guardian of this minor is not void upon its face and no invalidity appears from an inspection of the judgment roll.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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135 Cal.App. 26

LOS ANGELES COUNTY v. METROPOLITAN CASUALTY INS. CO. OF NEW YORK.*

Civ. 8115.

District Court of Appeal, Second District, Division 2, California.

Nov. 3, 1933.

As Amended On Denial of Rehearing Dec. 1, 1933.

Hearing Denied by Supreme Court Dec. 30, 1933.

1. Action ⚷61.

A cause of action does not "accrue" until the party owning it is entitled to begin and prosecute action thereon.

Applied to a cause of action, the term to "accrue" means to arrive, to commence, to come into existence, to become a present enforceable demand.

[Ed. Note.—For other definitions of "Accrue; Accrued," see Words & Phrases.]

2. Limitation of actions ⚷47(3).

Forfeiture is prerequisite to action on bail bond, hence limitation on time for instituting action runs from time of forfeiture, and not from time principal in bond fails to appear for trial (Pen. Code, §§ 1305, 1306).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by Los Angeles County against the Metropolitan Casualty Insurance Company of New York. Judgment for plaintiff, and defendant appeals.

Affirmed.

Henry L. Knoop, of Los Angeles, for appellant.

Everett W. Mattoon, County Counsel, and Robert A. Cushman, Deputy County Counsel, both of Los Angeles, for respondent.

CRAIG, Justice.

A suit upon an undertaking furnished on behalf of a person charged with felony having been decided by the superior court in favor of the plaintiff, the defendant appealed.

The appellant states that the question presented is as to whether upon the record the period of limitation began to run upon accruing of the cause of action or of the right to the remedy. The facts are not disputed. A complaint was filed on June 24, 1925, against one Eli Stanton, who, on July 1st, was held to answer to the superior court, posted said undertaking on July 3d, was informed against on July 24th, and was arraigned on July 27th, at which time the date of trial was set for the 14th day of September, following.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 27 P.(2d) 914.

On August 22, 1930, owners of securities hypothecated moved to exonerate the said bond, which motion was denied, and the same was forfeited. He having failed to appear, and his undertaking remaining unpaid, suit was commenced by the county December 1, 1930, thereon.

It is insisted by the appellant that the cause of action arose, and the limitation upon the time within which an action could be instituted thereon, when Stanton failed to appear for trial. The undertaking provided that the defendant would "appear and answer the charge * * * mentioned in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof, or if he fails to perform either of these conditions, then we will pay," etc. By section 1305 of the Penal Code, a forfeiture of bail is required "if, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court is lawfully required. * * * But if at any time within ninety days after such entry in the minutes, the defendant and his bail appear and satisfactorily excuse his neglect, and show to the satisfaction of the court that the absence of the defendant was not with the connivance of the bail, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just." Section 1306 provides that: "When any bond is forfeited, if the court which has declared the same forfeited has civil jurisdiction to render judgment in an action arising upon a contract of similar nature and amount ninety days after such forfeiture, if same has not been set aside, it shall enter a summary judgment against each bondsman. * * *" From the foregoing, the surety was obligated to pay the agreed amount upon failure of the defendant without satisfactory excuse to appear and answer the charge, or to comply with conditions requiring that he be amenable to orders and process of the court; but the law allowed him a period of ninety days within which to offer such excuse. By its complaint the respondent alleged that on August 22, 1930, "said court ordered the said bail forfeited, and said forfeiture was then duly entered upon the minutes of said court and said order of forfeiture has not been set aside."

[1] Applied to a cause of action, the term to "accrue" means to arrive, to commence, to come into existence, to become a present enforceable demand. Eising v. Andrews, 66 Conn. 58, 33 A. 585, 50 Am. St. Rep. 75. "A cause of action accrues from the time the right to sue for the breach attaches." Walker v. Bowman, 27 Okl. 172, 111 P. 319, 320, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912B, 839. A cause of action does not "accrue" until the party owning it is entitled to begin and prosecute an action thereon. It accrues at the moment when he has a legal right to sue on it, and no earlier. Jocque v. McRae, 142 Mich. 370, 105 N. W. 874. Many other cases might be cited to the same effect. Amy v. Dubuque, 98 U. S. 470, 25 L. Ed. 228; McGuigan v. Rolfe, 80 Ill. App. 256; Port Arthur Rice M. Co. v. Beaumont Rice Mills, 105 Tex. 514, 143 S. W. 926, 148 S. W. 283, 150 S. W. 884, 152 S. W. 629; In re Hanlin's Estate, 133 Wis. 140, 113 N. W. 411, 17 L. R. A. (N. S.) 1189, 126 Am. St. Rep. 938.

[2] The statute directs that if the principal shall neglect to appear for arraignment, trial, or judgment, or upon any other occasion when his presence in court is lawfully required, his bail must be forfeited. It places no limitation upon the time within which such forfeiture shall be entered. Until then he may appear with or without his surety, or he may appear within ninety days thereafter and with satisfactory excuse have his surety exonerated. Any attempt at enforcement of the undertaking prior to forfeiture would be futile. As was stated in an early case: "'The law requires no man to do a vain thing,' is a familiar maxim, and certainly it would be vain to require a party to surrender to an officer having no power to detain him." Allen v. Breslauer, 8 Cal. 552. It has, on numerous occasions, been held in other jurisdictions that forfeiture is a prerequisite to an action upon such undertakings. Peacock v. People, 83 Ill. 331; People v. Race, 2 Ill. App. 563; Baldwin v. State, 126 Ind. 24, 25 N. E. 820; State v. Gorley, 2 Iowa, 52; State v. Smith, 83 Kan. 240, 111 P. 184. It cannot be said from the language of section 1306 of the Penal Code that such obligation becomes actionable until established by the procedure therein prescribed. What has been said herein must be held to apply to other undertakings included in the action and presenting the same facts.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

135 Cal.App. 242

BACIGALUPI et al. v. WESTERN MACHINERY CO. et al.

Civ. 4955.

District Court of Appeal, Third District, California.

Nov. 8, 1933.

1. Mines and minerals ⚷55(3).

Instrument whereby vendors agreed to sell mine and machinery to be paid for in installments and whereby deed was left with bank to be delivered on payment of purchase price, *held* conditional agreement of sale, not lease.

> Agreement provided that vendors agreed to sell mine with attached machinery, equipment, fixtures, and improvements for certain sum to be paid in specified installments within period of four years; that 15 per cent. of gross output of ore extracted should remain property of vendors; and that deed should be deposited with bank with instructions to deliver it to purchasers when purchase price was fully paid. Agreement also provided for forfeiture of all moneys paid on purchase price in event of breach of abandonment of contract by purchasers.

2. Fixtures ⚷31.

When owner agrees to sell mine without specifically authorizing removal of machinery permanently attached by purchaser on abandoning mine or forfeiting contract, purchaser cannot remove such machinery (Civ. Code, § 661).

3. Fixtures ⚷31.

Equipment permanently attached and bolted to concrete foundations of mine by purchaser *held* "improvements" which purchaser could not remove on forfeiting contract requiring surrender of improvements placed on premises (Civ. Code, § 661).

[Ed. Note.—For other definitions of "Improvement," see Words & Phrases.]

4. Trover and conversion ⚷40(6).

In action for conversion of mining machinery, evidence *held* sufficient to support finding of damages in sum of $750.

5. Judgment ⚷235.

In action for converison, defendants could not complain that judgment for certain plaintiffs did not definitely determine that other plaintiffs had no interest in property, since they were precluded from asserting any title in future (Code Civ. Proc. § 578).

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by Louie Bacigalupi and others against the Western Machinery Company and others. From a judgment in favor of plaintiffs Louie, John, and Ernest Bacigalupi, defendants Western Machinery Company and Sam Hamilton appeal.

Affirmed.

C. Huntington Jacobs and Arthur P. Shapro, both of San Francisco, for appellants.

Rowan Hardin, of Sonora, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment in favor of the plaintiffs Louie, John, and Ernest Bacigalupi, for the sum of $750 as damages for the dismantling, removal, and conversion of certain mining machinery, fixtures, and improvements. The judgment was rendered against the defendants Western Machinery Company, H. & H. Mining Corporation, Sam Hamilton, and H. Hollanby. No judgment was entered against the defendant Jno. L. Witney Company. From the judgment which was rendered against them, the defendants Western Machinery Company and Sam Hamilton, only, have appealed.

The appellants contend that the machinery in question was removed from the mine by the lessee thereof pursuant to the terms of the lease which authorized its removal at the termination thereof, and that the respondents therefore had no title to said property; that the machinery, for the conversion of which the judgment was rendered, includes the value of one electric motor, the title to which is conceded to be in a stranger to this action. It is also asserted the court erred in its construction of the document upon which the title to the machinery in question depends, and that the findings and judgment are not supported by the evidence.

The plaintiffs Louie, John, and Ernest Bacigalupi own the Wallace Quartz Mining Claim in Tuolumne county, together with certain mining equipment, fixtures, and improvements attached thereto. The machinery upon the property was affixed thereto by means of bolts secured in concrete foundations. The rails, cars, electric hoist, compressor, cables, belts, blower, pipes, drills, dies, jacks, and other equipment and tools were used in connection with the operation of the mine. July 23, 1930, the owners executed and delivered to the defendant H. & H. Mining Corporation, an agreement to sell to it this mine with its attached machinery, equipment, fixtures, and improvements, for the sum of $50,000, to be paid in specified installments within a period of four years from the date thereof. This agreement requires the purchaser to take immediate possession of the property, make all necessary improvements, employ and pay workmen, and operate the mine in a practical and workmanlike manner, extracting and promptly marketing all ore therefrom. It is specifically provided that 15 per cent. of the gross output of all ore extracted from the mine shall remain the property of the vendors, and that the proceeds from the sales of all ore shall be paid to the First National Bank of Sonora, and 15 per cent. thereof shall be credited to the vendors as a part of the purchase price of the property. The document provides for the execution and deposit of a deed of conveyance to the property with the First National Bank of Sonora, with instructions to deliver it to the H. & H. Mining Corporation, when the purchase price is fully paid. The instrument, which is therein frequently termed an "agreement," refers to the execution and delivery of the deed of conveyance in the following language:

"This contract shall be executed in triplicate, and a good and sufficient deed of conveyance shall be executed by the said first party conveying said premises to the said second party, which said deed, together with a copy of this agreement and the abstract of title shall be deposited in the said First National Bank of Sonora, as soon as the first parties shall have received $500 under the provisions of this contract, to be held by said bank subject to the terms and conditions of written instructions which said instructions shall provide that upon the full payment to the said first party of the sum of $50,000.00, such deed, abstract of title and contract shall be at once delivered to the said second party, or to such person or persons as they may direct in writing. Time is of the essence of this agreement."

Paragraph IX of this agreement provides for the forfeiture of all money which is paid upon the purchase price of the property, in the event of a breach or abandonment of the contract by the purchasers. It also provides for the surrender and restoration to the owners of the mining property together with all machinery, equipment, and improvements, in the event of such breach or abandonment. This paragraph reads in part:

"In the event that the said second party shall at any time decide and determine to cease their mining operations upon said premises, then and in that event they hereby agree to surrender possession of said premises to the said first party * * * and to deliver to the said first party all equipment and improvements received by them under and by the terms of this agreement in as good condition as when said premises were taken over, except as the same may have deteriorated by use thereof and the said second party agrees to surrender to the said first party any and all improvements placed upon said premises by said second party. * * *

"In case any payment or payments be made under the provisions of this agreement and then for any reason said second party fails to keep the covenants herein all such payments so made shall forever be the property of the said first parties and in such case considered as rental for the detention of said mining premises."

Pursuant to this agreement, the H. & H. Mining Corporation took immediate possession of the property and operated the mine for a period of about fourteen months. It does not appear what quantity of ore was extracted, or what payments were applied to the purchase price of the mine. There is no controversy over the forfeiture of these payments. In November, 1931, it appears that a quantity of ore was sold by the H. & H. Mining Corporation without accounting to the owners for their 15 per cent. of the proceeds therefrom as required by the contract. Some difficulty arose over this breach. The purchaser of the mine ceased operations therein and abandoned the mine and the contract of purchase thereof, about December 6, 1931. The following day the H. & H. Mining Corporation, in consideration of the sum of $500, sold, transferred by bill of sale, and delivered to Western Machinery Company all the mining machinery, equipment, fixtures, and tools which had been received from the respondents under the terms of the contract. With full knowledge on the part of the Western Machinery Company and Sam Hamilton, its agent, that the respondents claimed to be the owners of all said property, they entered the mine, removed and appropriated all the machinery, equipment, fixtures, and tools, separating from their concrete foundations such fixtures as were permanently attached thereto. This machinery and property, against the protest of the respondents, was carried away in trucks. The property which was appropriated did include one thirty horse power electric motor which does not belong to the respondents.

This suit was then commenced for damages for the dismantling of the mine and appropriation of the machinery, fixtures, and tools. The court adopted findings and rendered a judgment of $750 against the appellants. All the material allegations of the complaint were found to be true. Among other facts determined, the court found that the Bacigalupi brothers owned the mine in question, together with the machinery, fixtures, tools, and improvements attached thereto; that certain machines were attached to concrete foundations, and the balance of the tools and equipment were used in the operation of the mine; that the agreement to purchase the mine and machinery, heretofore referred to, was executed by the respective parties thereto; that the H. & H. Mining Corporation took possession and proceeded to operate the mine pursuant to the provisions of the agreement of purchase and sale thereof; that the terms of the contract were subsequently breached by the purchaser, and that the mine and the operation thereof were abandoned by the purchaser on December 6, 1931; that the purchaser wrongfully sold the machinery, fixtures, and tools belonging to the plaintiffs; that the Western Machinery Company and Sam Hamilton, with full knowledge of plaintiffs' claim of ownership of the machinery, fixtures, and tools, entered the mine, detached the fixtures, and removed and appropriated all the machinery, fixtures, and tools mentioned in the complaint; that the fixtures which were attached to concrete foundations constituted "improvements" as that term is used in the contract; and that "the reasonable value of said fixtures in place upon said property as a working unit with which to work and operate said property as mining property and which was so destroyed and removed as aforesaid by defendants, was * * * of the reasonable value in place upon said property of the sum of Seven Hundred and Fifty Dollars ($750.00)".

[1] The record contains ample evidence to support the findings and judgment of the court. From a careful consideration of all the terms of the instrument which the appellants designate as a lease, we are persuaded that it must be construed to be a conditional agreement of purchase and sale of the Wallace Quartz Mining Claim, together with the machinery, fixtures, improvements, and tools connected therewith.

The appellants contend that paragraph IX of the contract requires the purchaser, in the event of abandonment of the mine, to return to the owners only such machinery and equipment as was delivered to the purchaser by the owners thereof, and, upon the contrary, that they are not required to also deliver such machinery or equipment as was subsequently installed by the purchaser after taking possession of the mine. That paragraph provides that in the event of abandoning the mine, the purchaser shall "surrender possession of said premises * * * and deliver * * * all equipment and improvements received by them under and by the terms of this agreement, * * * and all improvements placed upon said premises by said second party."

The contract for purchase of the mine contained no provision authorizing the vendee to remove any equipment or machinery acquired at the time of the execution of the agreement or such as was subsequently installed by the vendee as a part of the mining equipment. The controversy in the present case is over the right of the vendee to remove from the mine equipment which was supplied by it for the operation of the mine pursuant to contract, and which was permanently attached and bolted to concrete foundations.

[2, 3] It is settled as the law of this state that when an owner contracts to sell a mine, without specifically authorizing the removal of machinery, fixtures, or improvements which are installed by the vendee and which are permanently attached thereto, in the event of abandoning the mine or forfeiting the contract, such fixtures become a part of the realty and may not be detached or removed by the vendee. Civ. Code, § 661; Conde v. Sweeney, 16 Cal. App. 157, 116 P. 319; Pomeroy v. Bell, 118 Cal. 635, 50 P. 683; Southern Pacific Land Co. v. Kiggins, 110 Cal. App. 56, 293 P. 708; Wooton v. McAdoo, 110 Cal. App. 48, 293 P. 694; Brush v. Bohan & Co., 102 Cal. App. 457, 283 P. 126. But the appellants contend that since paragraph IX of the contract, in the event of a breach thereof, requires only the surrender of "all equipment and improvements received by them under and by the terms of this agreement," and on the contrary, requires the surrender of only "all improvements placed upon said premises by said second party," it was not required to deliver to the vendor, machinery or equipment which was subsequently installed by the vendee. It is asserted this language specifically authorized the removal of any machinery or equipment which was installed by the vendee for the reason that mining equipment and machinery may not be deemed to be in the nature of "improvements."

We are of the opinion the contract may not be so construed. There may be conditions under which a distinction should be drawn between "improvements" to real property on one hand, and machinery and equipment upon the other hand. That distinction, however, does not apply to the construction of the contract under the circumstances in the present case. Where the equipment is permanently attached and bolted to concrete foundations which are installed on the real property, it is reasonable to construe the term "improvements" to include such machinery or equipment. Bemis v. First National Bank, 63 Ark. 625, 40 S. W. 127, 128. Under the foregoing authority we are satisfied the equipment in question is a part of the realty and that the vendee was not authorized by contract to detach or remove it.

[4] Finally the appellants contend that the evidence is insufficient to support the finding of damages in the sum of $750, for the reason that one thirty horse power electric motor was included with the property which was removed. We think the evidence is adequate to support the judgment even when the value of the electric motor is excluded. The suit is not for the mere value of the machinery which was removed. It is a suit for damages for the dismantling, detachment, and removal of the equipment and machinery. The court found that the value of the

fixtures "in place upon the property as a working unit" was the sum of $750. This contemplates the inclusion of an item of damages which might be incurred by restoring similar machinery "in place upon the property as a working unit." Disregarding the value of cables, rails, pipe, forge, and other miscellaneous tools and accessories, which were taken by the appellants, Mr. Howe, who was called as a witness in behalf of the defendants, testified that the hoist was worth $250, the compressor was worth $300, the jackhammer was worth $125, and that in addition thereto it was reasonably worth $50 each to install the motor and the compressor. The value of the three items of equipment, plus the cost of installation, thus exceeds the full amount of the judgment. The findings and judgment are therefore adequately supported by the evidence.

[5] The appellants may not complain that the judgment fails to definitely determine that the coplaintiffs, Rundell and Scanavino, had no interest in the property in question. Section 578, Code Civ. Proc. The court does find that the quartz mine and the machinery, fixtures, and tools which were taken by the appellants were "owned entirely by the plaintiffs. Louie Bacigalupi, John Bacigalupi and Ernest Bacigalupi." Since the other plaintiffs were parties to the action, this precludes them from asserting any title thereto in the future.

The judgment is affirmed.

We concur: PLUMMER, J.; PULLEN, P. J.

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135 Cal.App. 122

ZELLER v. KNAPP et ux.

Civ. 680.

District Court of Appeal, Fourth District, California.

Nov. 6, 1933.

1. Trusts ⚷81(2).

Husband, who purchases property with money which is part of separate estate of his wife and takes title in his own name, holds property as resulting or express trust for wife; presumption being that property continues to be separate estate of wife (Civ. Code, § 164; St. 1927, p. 826).

2. Fraudulent conveyances ⚷95(2).

Judgment creditor *held* not entitled to set aside deed from debtor to his wife on ground that conveyance in 1926 was made in fraud of creditors, where husband had bought property with wife's separate estate and held title as trustee (Civ. Code, § 164).

3. Evidence ⚷474(19).

In action to set aside debtor's deed on ground that it was made in anticipation of insolvency, debtor could testify as to value of his stock to show his solvency.

4. Witnesses ⚷128.

In action to set aside deed because made to defraud creditors, evidence regarding transaction wherein debtor stated to deceased that debtor was sole owner of land *held* improperly excluded, since statute prohibiting parties in action against estate of deceased from testifying as to matters occurring before death did not apply (Code Civ. Proc. § 1880, subd. 3).

5. Evidence ⚷230(5).

In action to set aside deed, evidence of statements, made by debtor after delivery of deed to his wife, that he had protected himself against creditors, *held* admissible.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Bessie Zeller against D. A. Knapp and his wife. Judgment for plaintiff, and defendants appeal.

Reversed.

Daniel A. Knapp, of Los Angeles, for appellants.

A. S. Goldflam, of Los Angeles, for respondent.

MARKS, Justice.

On February 27, 1929, plaintiff recovered judgment against D. A. Knapp in the sum of $6,000 and costs. This judgment has been affirmed on appeal. Zeller v. Knapp, 115 Cal. App. 486, 1 P.(2d) 1071. The complaint in that action was probably filed prior to November 12, 1927. An abstract of judgment was recorded in Orange county on February 24, 1930. An execution was issued and returned wholly unsatisfied.

The complaint in this action was filed on July 17, 1930. It is alleged that after contracting the debt upon which the first judgment was rendered, and on November 12, 1927, in contemplation of insolvency, D. A. Knapp transferred to Myra C. Knapp, his wife, the property here in question without any consideration and with the intent upon his part to hinder, delay, and defraud his creditors. It is not alleged that Myra C. Knapp committed any fraud or had any notice of the fraud of D. A. Knapp, her grantor.

The answer admits the transfer; denies that it was in contemplation of insolvency or without consideration, and denies that it was made by D. A. Knapp with any design to hinder, delay, or defraud any of his creditors. A separate defense alleges that the property in question was purchased with the separate funds and property of Myra C. Knapp, and that title was placed in D. A. Knapp as trustee for her, and that he at no time had any other interest in the property than as trustee for his codefendant.

The trial court found that the allegations of the complaint were true, and that the allegations of the special defense were untrue. The findings of particular interest here are that the transfer was not made for a valuable consideration; that it was made in contemplation of the insolvency of the defendant D. A. Knapp; that the deed was made and delivered for the purpose and with the intent of D. A. Knapp to hinder, delay, and defraud his creditors, especially the plaintiff; that the property was not purchased with the separate funds of Myra C. Knapp; and that D. A. Knapp did not hold title to the property as trustee for Myra C. Knapp.

By a grant deed dated May 18, 1926, E. A. Whitlock conveyed to Myra C. Knapp, a married woman, property near Costa Mesa in Orange county. "Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." Section 164, Civil Code, prior to amendment of 1927 (St. 1927, p. 826); Shaw v. Bernal, 163 Cal. 262, 124 P. 1012. Concerning this purchase Myra C. Knapp testified as follows:

"Q. What was the consideration for it? A. There was part money paid for that deed, and services, and part of the deed was given to me by Mr. Whitlock as an old family friend.

"Q. Was any of the money paid for that deed, paid by Mr. Knapp? A. No."

Both defendants testified that the money paid for the property was from the separate estate of Mrs. Knapp. There is no contradictory evidence in the record.

The Costa Mesa property was conveyed by Mr. and Mrs. Knapp to Corinne Clement by a deed dated March 4, 1927, and recorded March 19, 1927. Mrs. Knapp testified that she received $2,864.04 for the property and deposited this money in the Pan American Bank of California on March 21, 1927. Other deposits in this account, all made between April 26 and September 7, 1927, inclusive, total $2,299.83. No attempt was made to show the source of these other deposits, or the name or names in which this account stood other than in the opening statement of counsel for appellants where he said: "Mrs. Knapp prior to that time had deposited in her account in the Pan American Bank in Los Angeles, an account (she was in the boarding house, I was in the law office), she therefore made it joint, but joint in name only because all of the checks were made out either by myself or her, only with her permission." Several checks drawn on this account are in evidence, some signed by D. A. Knapp and others by Myra C. Knapp.

By a deed dated May 26, 1927, and recorded May 28, 1927, Hazel G. Doughty conveyed the property in question here, located in the city of Huntington Beach, to D. A. Knapp for a cash consideration of $567.59. It appears that other considerations were given. Both defendants testified that the money paid was that of Myra C. Knapp and part of that received by her from the sale of the Costa Mesa property. In connection with this conveyance Hazel Doughty and D. A. Knapp executed what was called "Contract of Trustee." This instrument recited that an execution had been levied upon the property and that Mrs. Doughty had paid $225 on the judgment; that the balance of $567.79 was paid by Knapp; that either out of the rents, issues, or profits from the property, or its sale, or both, (1) Knapp should be repaid the money advanced by him with interest; (2) that the $225 and interest should be repaid to Mrs. Doughty; (3) that the overplus, if any, should be equally divided between them. This was modified by an agreement dated August 30, 1927, which provided that Mrs. Doughty released all interest in the Huntington Beach property for the sum of $1,000, to be paid by Knapp, $260 to be in cash and the balance in instalments of $55 per month. Mrs. Knapp testified she made all the payments on this second contract and that Mr. Knapp had no money invested in the property in question.

Under date of December 3, 1927, Knapp executed an instrument which was entitled "Notice of Lien." It recited that he was "the sole owner" of the property in question; that H. G. Slater had loaned him the sum of $900 and attempted to give Slater a lien on the property to secure the loan.

Under date of November 12, 1927, Knapp executed a deed to Myra C. Knapp to this Huntington Beach property. The deed was probably delivered after the 3rd day of December, 1927, and was not recorded until November 21, 1928.

There is evidence in the record to the effect that Knapp told two witnesses who were in financial difficulties that the way to preserve property and save it from the creditors of a husband was to put it in the name of the wife; that he had done so.

We have read the record numerous times and have studied it carefully and are left with the impression of fraud on the part of the defendants. There are suggestions in the testimony of both of them, which, if followed on cross-examination by the plaintiff, might have developed the fact that neither the Costa Mesa property, nor the money in the Pan

American Bank of California, was the separate property of Myra C. Knapp. Plaintiff did not avail herself of the opportunity of pursuing these lines of investigation. She rested her case solely upon the record evidence. We are, therefore left with nothing to refute the presumption that the property conveyed by Whitlock to "Myra C. Knapp, a married woman," was her separate property, and the testimony of both defendants that the Costa Mesa property and the money in the bank were the separate property of Mrs. Knapp, and that the Huntington Beach property was purchased with the separate funds of Mrs. Knapp. Therefore, the only evidence now before us discloses that the Costa Mesa property was the separate property of Myra C. Knapp; that she received $2,864.04 in cash when it was sold; that this money was deposited in the Pan American Bank of California on March 21, 1927, and was used exclusively for the purchase of the Huntington Beach property, title to which was placed in the name of D. A. Knapp, her husband.

[1, 2] Where a husband purchases property with money which is part of the separate estate of his wife and takes title in his own name, equity regards the purchase as made in trust for the wife. From such facts alone there is no presumption of a gift from the wife which would change the status of the property to that of the community, the presumption being that it continues to be the separate property of the wife held in trust for her by her husband. Shaw v. Bernal, supra; Harris v. Hensley, 83 Cal. App. 283, 256 P. 832. The trust would be either resulting or express, depending upon the circumstances of its creation. Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360. Therefore, in the instant case we must consider from the evidence before us that D. A. Knapp held the legal title to the property in question as trustee for the use and benefit of Myra C. Knapp.

Situations factually similar to the instant case were before the courts in the case of Breeze v. Brooks, 71 Cal. 169, 9 P. 670, 11 P. 885; Murphy v. Clayton, 113 Cal. 153, 45 P. 267; and Bank of Cottonwood v. Henriques, 91 Cal. App. 88, 266 P. 836. In each case the trustee had conveyed the legal title to real estate to his cestui que trust, and a creditor of the insolvent trustee sought to avoid the conveyance as a fraud upon creditors. In the last-cited case it is said, at pages 94 and 95 of 91 Cal. App., 266 P. 836, 838:

"The facts are undisputed, and the court found, that, when the property was purchased on November 17, 1917, the intervener, Frank R. Henriques, paid the whole purchase price, and that the conveyance by the seller, M. B. Connell, to William R. Henriques, was made at the request of Frank R. Henriques upon the understanding and agreement that William R. Henriques would take title to the property as trustee, for the use and benefit of Frank R. Henriques, and William R. Henriques would have no title or interest in said property other than as trustee.

"The rule is well settled that, when land is purchased, for which one party pays the consideration and another party takes the title, a resulting trust immediately arises in favor of the party paying the consideration, and the other party becomes the trustee. It is equally well settled that the party setting up the trust must show the money was paid by him at or before the execution of the conveyance. [Citing cases.]

"It follows, therefore, that William R. Henriques was not the owner of the property in question, but was only the trustee for Frank R. Henriques, the real owner, and that William R. Henriques had no interest in the lands in question, to which the lien of appellant's judgment could attach. The law is also well settled that a bankrupt may continue to discharge his duties as a trustee, and trust property in his possession does not go to his assignee or to his creditors. Hayford v. Wallace, 5 Cal. Unrep. 476, 46 P. 293; Perry on Trusts, § 346. Therefore, William R. Henriques, having no interest in the lands to which appellant's judgment could attach, it is wholly immaterial whether he was solvent or insolvent, or contemplated insolvency, when he made the deed of the trust property to his sister, Marie E. Henriques."

Mrs. Knapp testified that part of the purchase price of the Costa Mesa property was paid in services. There is nothing to show the value of these services or whether they were performed before or after the marriage of the defendants.

This case may be tried again, and if the evidence is fully developed on the questions we have been discussing it may be determined that the Costa Mesa property was not the separate property of Myra C. Knapp and that the Huntington Beach property was not paid for out of her separate property and that no trust existed. If that should happen, the question of the solvency or insolvency of D. A. Knapp at the time of the transfer to his wife will become important.

[3] In the trial in the court below Knapp tried to introduce evidence of his solvency. He proved that he owned stock in two corporations but was prevented from testifying as to the market value of this stock by the objections of the plaintiff, which were sustained. It has long been the rule in California that the owner of property can testify as to its value. In Hood v. Bekins Van & Storage Co., 178 Cal. 150, 172 P. 594, 595, it was said, quoting from Wigmore on Evidence: "'The owner of an article whether he is generally familiar with such values or not, ought cer-

tainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury.' "

[4] The defendants sought to introduce evidence concerning the transactions of D. A. Knapp with H. G. Slater. This was excluded on the ground that Slater was dead. The provisions of subdivision 3 of section 1880 of the Code of Civil Procedure do not apply to the situation here presented.

[5] The defendants maintain that the trial court erred in admitting evidence of statements of Knapp made after the delivery of the deed to his wife to the effect that he had protected himself against his creditors by putting his property in his wife's name. It is held that such evidence is admissible where the issue is fraud. Southwick v. Moore, 61 Cal. App. 585, 215 P. 704.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

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135 Cal.App. 29

BOLD v. BOARD OF MEDICAL EXAMINERS.

Civ. 7682.

District Court of Appeal, Second District, Division 1, California.

Nov. 6, 1933.

1. Physicians and surgeons 🔑11(3).

Rules of evidence and pleading established for criminal trials *held* inapplicable in proceedings for revocation of physician's license (Gen. Laws 1931, Act 4807, § 14).

2. Physicians and surgeons 🔑11(3).

In proceedings for revocation of physician's license because of alleged abortion committed, evidence of physician's acquittal on criminal charge of murder based upon abortion *held* properly excluded (Gen. Laws 1931, Act 4807, § 14).

> Evidence of acquittal on trial of murder was properly excluded, since proceedings for revocation of physician's license did not constitute second criminal trial for same offense and plea of former jeopardy could not have been interposed and rule of res judicata did not apply.

3. Physicians and surgeons 🔑11(3).

Verification, merely on information and belief, of complaint in proceedings for revocation of physician's license *held* sufficient (Gen. Laws 1931, Act 4807, § 14).

4. Physicians and surgeons 🔑11(3).

Any fraud in connection with verification of complaint in proceedings for revocation of physician's license availed physician nothing, because it could not be characterized as extrinsic fraud, since affidavit bore directly on charges considered by medical board (Gen. Laws 1931, Act 4807, § 14).

5. Physicians and surgeons 🔑11(3).

Where there was sufficient testimony not inherently improbable to warrant findings of board of medical examiners revoking physician's license, order of revocation was properly affirmed (Gen. Laws 1931, Act 4807, § 14).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Certiorari proceeding by Francis James Bold against the Board of Medical Examiners of the State of California to review an order of respondent revoking the license of petitioner to practice medicine and surgery. From a judgment affirming the order of revocation, petitioner appeals.

Affirmed.

See, also, 23 P.(2d) 826.

William T. Kendrick, Jr., William T. Kendrick, Sr., and Caryl Warner, all of Los Angeles, for appellant.

Otto J. Emme, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This appeal is taken from a judgment of the superior court of Los Angeles county, by which under certiorari proceedings an order of the board of medical examiners of the state of California revoking the license of appellant to practice medicine and surgery in this state was affirmed.

The appellant had been the holder of a "physician and surgeon certificate," authorizing him to practice his profession, issued by the board of medical examiners under the provisions of the "Practice of Medicine Act of 1913." See Stats. 1913, p. 722, as amended; Deering's Gen. Laws, 1931 Ed., Act 4807. Section 14 of that act provides that "Whenever any holder of a certificate herein provided for is guilty of unprofessional conduct, as the same is defined in this act, and the said unprofessional conduct has been brought to the attention of the board granting said certificate, in the manner hereinafter provided * * * it shall be the duty of the board and the board shall have power to suspend the right of the holder of said certificate to practice for a period not exceeding one year or to place the holder of said certificate upon probation or suspend judgment in such cases or revoke his certificate, or take such other action in relation to the punishment of the holder of said certificate as in its discretion it may deem proper. * * * No such suspension or revocation shall be made unless such holder is cited to appear" before the board on the filing of a sworn complaint charging the holder of the certificate with having been guilty of unprofessional conduct. Among the items of "unprofessional conduct" specified in section 14 we find the following: "First—The procuring or aiding or abetting or attempting or agreeing or offering to procure a criminal abortion. * * * Fifth—Conviction of any offense involving moral turpitude in which case the record of such conviction shall be conclusive evidence."

The complaint filed with the board charged that since the issuance to appellant of its certificate of license to practice he had been guilty of unprofessional conduct as defined under the first subdivision of section 14 of the Act of 1913, as amended, and more particularly that on or about September 10, 1929, appellant "did, in the county of Los Angeles, State of California, procure aid and abet, and attempt agree and offer to procure a criminal abortion upon a pregnant woman," naming her. Issue was joined upon the answer filed by appellant, denying generally and specifically all charges of unprofessional conduct set out in the complaint.

As a further separate and distinct defense appellant alleged: "That he has once been put in jeopardy by reason of the said charge contained in plaintiff's complaint, and duly acquitted of the said charge. That on or about the 25th day of November, 1929, the said Superior Court duly made and gave its judgment acquitting the said Bold of the charge set forth in plaintiff's complaint; that is to say, the charge set forth in plaintiff's complaint was included in the charge in the said action last mentioned, and a verdict of not guilty was rendered thereon."

As a further defense appellant alleged that the board had "no jurisdiction of the matters and things alleged in plaintiff's said complaint by reason of the fact that the said petition is not verified by anyone competent to verify same."

At the close of a hearing before the board upon the matters charged against appellant, at which various witnesses, including appellant, testified, the following motion was carried by the affirmative vote of all nine members of the board present at the hearing, namely, "that we, the Board of Medical Examiners of the State of California, do find that the evidence adduced in the matter of the application for the revocation of the license of Francis James Bold to practice medicine and surgery in the State of California be deemed sufficient to sustain the allegations of the complaint filed with this Board on December 11, 1929, and that he be adjudged guilty as charged therein." The president of the board then announced: "Francis James Bold is found guilty as charged." Immediately thereafter by the affirmative vote of the nine members present the license theretofore issued to appellant to practice as a physician and surgeon in the state of California was ordered revoked and written notice of the revocation served by the secretary-treasurer of the board on the appellant then personally present at the hearing.

The grounds of appeal from the decision of the superior court on the certiorari proceedings are three: First, that the board of medical examiners lacked jurisdiction to revoke the license because of its refusal to admit "proper evidence" adduced before the board in support of his plea of a former acquittal of the charges contained in the complaint; second, that the complaint was not a "sworn complaint," and the man who signed it had, on his own testimony, no knowledge of the matters therein mentioned; third, that the court had no jurisdiction to revoke the license because of a lack of evidence to support the allegations of the complaint that appellant procured, aided, or abetted, or attempted or agreed or offered to procure a criminal abortion upon a pregnant woman, therein named.

[1, 2] As to the first ground, we note that section 14 above referred to provides that the board "shall hear such proper evidence as may be adduced before it," and we immediately inquire whether the board was justified in sustaining the objection made to the proposed introduction of evidence that appellant, on being tried for the murder of the woman involved, was acquitted by a jury; the respondent board admitting that the murder charge was based on the theory that deceased came to her death by reason of an abortion performed by the appellant. The objection was that such evidence would be incompetent, irrelevant, and immaterial. Counsel for appellant argues that the question of his client's guilt was determined in his favor, once and for all, in the criminal proceeding, and is res judicata so far as the board's inquiry is concerned, therefore that the board should have admitted the record of acquittal and, applying the rule contended for, would have found itself without jurisdiction to proceed.

He places his chief reliance upon the case of Coffey v. United States, 116 U. S. 436, 6 S. Ct. 437, 440, 29 L. Ed. 684, where, after Coffey had been acquitted upon the criminal charge of defrauding the United States in relation to revenue taxes upon distilled liquors, the government undertook, in a civil action in rem, to confiscate certain apparatus and liquors, property of Coffey, which had been seized as subject to forfeiture. "The question, therefore," says the court, "is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of opinion that it is." Examining the case we find that the information contained three counts, founded on as many separate sections of Revised Statutes, variously charging tax frauds in connection with manufacturing, concealing, and possession of commodities subject to tax. One of the sections, No. 3257 (26 USCA § 261), is typical: "Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits * * * found in the distillery and on the distillery premises, and shall be fined not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than three years."

It will be noted that this criminal statute provides triple punishment, or perhaps we should say, punishments of three different kinds for the one offense; confiscation, fine, and imprisonment. A man found guilty upon such a charge must respond in all three ways; there is no alternative and each is distinctly and, of itself, a punishment. This is no less true because one of the punishments, confiscation, must be imposed through the bringing of an auxiliary civil suit to condemn the personal property for the public treasury.

We see no similarity between a prosecution under such a statute with its varied means, criminal and civil, of exacting compound punishment, and a trial for murder under our statute, which provides solely a penitentiary or death sentence as punishment. If the appellant in this case had been found guilty of murder by a jury, such a finding would not have worked a revocation of his license, for there is no provision in our statutes as there is elsewhere (see State v. Lewis, 164 Wis. 363, 159 N. W. 746) for such action on the part of the court when a practitioner is convicted of a crime committed in the course of his professional conduct. Before appellant here could have been deprived of his right to practice, even after a verdict of guilty rendered in a criminal court, it would have been necessary for the board of medical examiners to file a complaint and, unless default were entered upon failure to answer, to proceed to hear and decide the matter, as they did on abortion charges, or under subdivision five of section 14, which we have quoted above; conviction of an offense involving moral turpitude.

We think it is clear, from the foregoing, as well as for other reasons, that proceedings before the board of medical examiners, instead of being criminal in character, are designed, rather, to protect the public by eliminating from the ranks of practitioners those who are found by members of their own profession to be dishonest, immoral, or disreputable. As was said in the Matter of Newell Smith, 10 Wend. (N. Y.) 449, quoted by the learned trial judge, in his memorandum decision upon the writ of certiorari: "The trial and acquittal of the defendant upon the indictment for producing the abortion was no bar to this proceeding; they are entirely distinct and independent proceedings, having different objects and results in view; the one having regard to the general welfare and criminal justice of the state; the other simply and exclusively to the respectability and character of the medical profession, and the consequences connected with or necessarily flowing from it. It is immaterial, therefore, in my judgment, whether the offence mentioned in the charge was indictable or not, and whether the indictment was disposed of upon its merits, or upon some matter of form." See, also, State v. Lewis, supra; Case of Barach, 279 Pa. 89, 123 A. 727; Lanterman v. Anderson, 36 Cal. App. 472, 478, 172 P. 625; In re Vaughan, 189 Cal. 491, 496, 209 P. 353, 24 A. L. R. 858.

It may be said, also, that our review earlier in this opinion of the proceedings and methods employed by the board in reaching its conclusions was intentionally somewhat detailed for the purpose of showing that they were not carried out as a criminal investigation would have been; the rules of evidence and pleading established for criminal trials not obtaining in proceedings of this sort. Suckow v. Alderson, 182 Cal. 247, 187 P. 965; Lanterman v. Anderson, supra. Since the proceedings before the board did not constitute a second criminal trial for the same offense, it is our opinion that a plea of former jeopardy could not have been interposed, and that the rule of res judicata did not apply; therefore the proposed offer to show an acquittal on the criminal charge of murder based upon the claimed abortion was properly rejected.

[3, 4] This brings us to the second contention set up as a ground of appeal; namely, that the hearing did not proceed upon a sworn complaint. The record does not sustain this contention, for we find attached to the complaint the following affidavit made by an investigator of the board of medical examiners under oath before a notary public whose name and seal are affixed thereto: "State of California, County of Los Angeles —ss. Albert Carter, being first duly sworn, deposes and says: That he is the complainant in the above entitled matter and that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on his information

and belief, and as to those matters that he believes it to be true. Signed, Albert Carter."

Referring to the complaint we note that none of the allegations therein contained are made upon information and belief. However, Albert Carter testified under cross-examination that he had no personal acquaintance with appellant or with deceased, and was not a witness to any of the facts in connection with the charge against appellant, and that of his own knowledge he knew nothing about it. On direct examination this witness testified as follows: "Q. I will ask you to refer particularly to paragraph 3 of said complaint, and ask you whether or not the allegations therein contained are based upon information given to you by a person or persons while you were acting in the representative capacity which you have stated as investigator for the Board of Medical Examiners of the State of California? A. Based on information and belief *as referred to in the affidavit.*" (Italics ours.)

It appears from this that the complainant, when he swore to the charges, was under the impression that he was verifying the complaint on information and belief, and we are not prepared to say that a document so verified is not as definitely a sworn complaint in the case of a board examining the conduct of a doctor as in case of another body considering charges in disbarment proceedings. Section 291 of the Code of Civil Procedure, approved by both the majority and dissenting opinions in Herron v. State Bar, 212 Cal. 196, 298 P. 474, as a proper and sufficient form of verification, reads as follows: "The accusation must state the matters charged, and be verified by the oath of some person, to the effect that the charges therein contained are true, *which verification may be made upon information and belief when the accusation is presented by an organized bar association.*" The words which we have italicized were added to the section in 1921, thereby rendering the authorities upon which appellant relies (In re Hotchkiss, 58 Cal. 39 [1881]; In re Hudson, 102 Cal. 467, 36 P. 812 [1894]) out of date and uncontrolling for the purpose of his present argument.

The Practice of Medicine Act provides for the filing of "a sworn complaint" not requiring, as did the original statute, section 291 of the Code of Civil Procedure, that the verification in disbarment cases must be upon the personal knowledge of the affiant, and it seems clear that the requirement of this "Medical Practice Act," as it is generally known, is met when the verification is merely on information and belief. Further, if a fraud was committed in connection with this verification it avails appellant nothing, under the rule referred to in Pico v. Cohn, 91 Cal. 129, 133, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, for it cannot be characterized as extrinsic fraud, since the affidavit bears directly on the charges considered by the respondent board. It follows from the foregoing considerations that appellant's second ground of appeal must fail.

[5] As to the remaining ground, insufficiency of the evidence to support the allegations of the complaint, we find from a complete review of all the evidence, not insufficiency, but merely a conflict in the evidence. Since there was, in our opinion, sufficient testimony not inherently improbable in its nature to warrant the findings reached by respondent board, we hold that there is no merit in this third ground of appeal.

Judgment affirmed.

We concur: CONREY, P. J.; YORK, J.

135 Cal.App. 37

TRAXLER v. BOARD OF MEDICAL EXAMINERS.

Civ. 7702.

District Court of Appeal, Second District, Division 1, California.

Nov. 6, 1933.

1. Criminal law ⚿163.

Proceeding for revocation of license of physician for alleged abortion was not of criminal nature so that physician's acquittal on charge of crime of abortion did not bar proceeding (Gen. Laws 1931, Act 4807, § 14; Pen. Code, § 1016, subd. 3).

2. Physicians and surgeons ⚿11(3).

Proceedings for revocation of license of physician are not governed by strict rules of evidence or procedure that obtain in court trials (Gen. Laws 1931, Act 4807, § 14).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Certiorari proceeding by Paul S. Traxler against the Board of Medical Examiners of the State of California to review the proceedings of respondent board in a proceeding for the revocation of the certificate issued to petitioner to practice medicine and surgery. From a judgment affirming the board's action revoking the license, petitioner appeals.

Affirmed.

Ray L. Morrow, of Glendale, and Oliver Clark, Raymond L. Haight, and Walter L. Bruington, all of Los Angeles, for appellant.

Richard M. Lyman, Jr., of San Francisco, and Otto J. Emme, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This case, in certain of its aspects, is similar to the case of Bold v. Board of Medical Examiners, 26 P.(2d) 707, this day decided by us. Here, as there, the board of medical examiners of this state revoked the certificate which it had previously issued to a physician and surgeon authorizing him to practice his profession, and on the same ground, unprofessional conduct as defined in the first subdivision of section 14, "Practice of Medicine Act of 1913" (see Stats. 1913, p. 722, as amended; Deering's Gen. Laws, 1931 Ed., Act 4807), the complaint against appellant particularly charging that he procured, aided and abetted, and attempted, agreed, and offered to perform a criminal abortion upon a pregnant woman, therein named. As in the Bold Case, all members of the board who attended the hearing voted to sustain the charges and to revoke the license certificate. The superior court here, as in the Bold Case, reviewing under certiorari the proceedings of the board, affirmed its action. The licentiate in each case has appealed to this court from the superior court judgment.

In the instant case the appeal is grounded upon the claim that the proceedings of respondent board are void for want of jurisdiction; first, because appellant was denied due process of law by the board's rejecting as a defense the fact that appellant had been acquitted by the superior court of Los Angeles county of the only charge contained in the complaint upon which his hearing before the board proceeded; second, that the board based its decision solely upon improper evidence which it admitted; third, that the board received, presented, and considered evidence offered outside appellant's presence and from persons not sworn.

[1] The first contention is in effect that the respondent board should have permitted appellant to enter the plea known in some jurisdictions as "autrefois acquit" and in California provided for by subdivision 3, § 1016, Penal Code, "A former judgment of conviction or acquittal of the offense charged." If the hearing before the Board of Medical Examiners had been a criminal proceeding such a plea might properly have been received, and, being received, would have barred further proceedings. But, so far as we know, the courts have never held that an inquiry into the professional conduct of a practitioner in medicine or at the bar, is of a criminal nature. See Lanterman v. Anderson, 36 Cal. App. 472, 478, 172 P. 625; In re Newell Smith, 10 Wend. (N. Y.) 449; In re Vaughan, 189 Cal. 491, 496, 209 P. 353, 24 A. L. R. 858. In Case of Barach, 279 Pa. 89, 123 A. 727, 729, a disbarment proceeding, we find the following: "It is further urged that the court was without power to proceed in the present case because of Barach's acquittal on the conspiracy charge in the United States District Court, the evidence presented in the disbarment proceeding being largely the same as there offered. * * * We are asked to say that the finding of the jury in the federal court renders the entire controversy res adjudicata, and the state tribunal is concluded thereby, but we cannot agree with this view. The proceeding referred to was criminal, in the name of the government, and that for disbarment was of a civil nature. Rules of procedure vary in the two classes of cases, and evidence necessary to convict, and that to justify an order of suspension, are measured by different standards. In the former, the defendant was entitled to a jury trial, in the latter, it is not a matter of right. Balogh v. Jackson, 272 Pa. 482, 116 A. 377, 22 A. L. R. 1497; Smith's Appeal, 179 Pa. 14, 36 A. 134. The defendant charged with crime cannot be compelled to testify, but the contrary is true in a case such as this. Vaughan's Case, 189 Cal. 491, 209 P. 353, 24 A. L. R. 858, and note."

Counsel for appellant say in their opening brief: "Proceedings for disbarment of an attorney for criminal practices have been held to be criminal in nature. (Bar Association of San Francisco v. Sullivan, 185 Cal. 621, at page 623, 198 P. 7 [1921]; Disbarment of Houghton, 67 Cal. 511, at page 517, 8 P. 52 [1885].)" In the Houghton Case we cannot find language at page 517 of 67 Cal., 8 P. 56, or elsewhere which in our minds warrants the conclusion drawn by counsel; as to the San Francisco Bar Association Case, it is sufficient to say that at page 623 of 185 Cal., 198 P. 7, 8, appears the following statement: "A disbarment proceeding is not a prosecution for crime." The cases, Thurston v. Clark, 107 Cal. 285, 40 P. 435, and Kilburn v. Law, 111 Cal. 237, 43 P. 615, cited by appellant, do not concern inquiries such as we have before us, but decide that actions prosecuted in court under section 772 of the Penal Code are criminal in their nature. Appellant quotes at length from Coffey v. United States, 116 U. S. 436, 6 S. Ct. 437, 29 L. Ed. 684, a case in which acquittal on a criminal charge was held to bar a subsequent civil action in rem. In the eyes of appellant's counsel this is "an exactly analogous case," but it does not seem so to us for reasons we mention in the Bold decision, among them the fact that the civil action to condemn goods claimed as forfeited, for violation of the revenue laws of the United States, is in its nature auxiliary to the original criminal action, under a statute which provides confiscation as one of three forms of punishment prescribed for the offense. It follows that if the offense is not proven on the criminal trial the auxiliary action to enforce the penalty should not be permitted, being in reality a disguised criminal action. This was the consideration that governed the decisions of the court in the many cases (all of which we have read) cited by counsel where the rule of the Coffey Case was invoked.

[2] As to the claim that the board based its decision solely upon improper evidence which it admitted, it may be said, first, that proceedings of this character are not governed by the strict rules of evidence or procedure that obtain in court trials (Suckow v. Alderson, 182 Cal. 247, 251, 187 P. 965; Lanterman v. Anderson, supra); second, having read the transcript, and having in mind the essential elements of the crime of abortion, we believe that there was before the board sufficient testimony properly admissible to support the finding that was made. This conclusion as to the second ground of appeal disposes adversely also of the third ground, that the board considered evidence offered outside the appellant's presence and from persons not sworn.

Judgment affirmed.

We concur: CONREY, P. J.; YORK, J.

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134 Cal.App. 713

REIDY v. COLLINS et al.

Civ. 8934.

District Court of Appeal, First District, Division 1, California.

Oct. 30, 1933.

1. Mortgages 🔑378.

Purchase of property at trustee's sale by holder of second trust deed thereon, pursuant to agreement with trust deed grantor that property should be held as security for money expended until grantor could repay, destroyed security of grantee under third trust deed given to secure part of purchase price.

2. Contracts 🔑10(1).

Contracts unilateral at first are sustained upon execution of the optional consideration.

3. Mortgages 🔑28.

Agreement that grantor in trust deed under which payments were in default would convey property to third party as security for funds expended if third party would acquire trust deed, sell property at trustee's sale, and buy it in, created an equitable mortgage to third party when she fulfilled agreement.

4. Mortgages 🔑28, 151(4, 5).

Equitable mortgages are enforceable against original contractor, his heirs, executors, administrators, voluntary assigns, purchasers and incumbrancers with notice, and generally prevail over liens of subsequent attachments and judgments.

5. Fraudulent conveyances 🔑74(3).

Any transfer or incumbrance of property made or given voluntarily or without a valuable consideration by insolvent party or in contemplation of insolvency is void as to existing creditors, regardless of intent of transferrer (Civ. Code, § 3442).

6. Fraudulent conveyances 🔑26(3).

Transfer of property duly recorded intended merely as security for money expended for benefit of debtor, *held* not invalid as to creditors because absolute in form; absent fraudulent intent (Civ. Code, § 3442).

7. Fraudulent conveyances 🔑81.

Good-faith mortgage to secure future advances is not fraudulent in law as against creditors of mortgagor, notwithstanding total amount of advances is not stated (Civ. Code, § 3442).

8. Fraudulent conveyances 🔑76(2).

Transfer for valuable consideration is not invalid because it is voluntary and renders debtor insolvent (Civ. Code, § 3442).

9. Fraudulent conveyances 🔑76(2).

Loan or advancement of money constitutes "valuable consideration," as respects transfer allegedly made in fraud of creditors.

[Ed. Note.—For other definitions of "Valuable Consideration," see Words & Phrases.]

10. Fraudulent conveyances 🔑76(1).

Where plaintiff acquired note and trust deed and purchased property at trustee's sale pursuant to agreement with grantor under trust deed, good consideration existed for conveyance by grantor to plaintiff of property as security for money expended by plaintiff in performing agreement (Civ. Code, § 3442).

11. Appeal and error 🔑1010(1).

Trial court's findings cannot be disturbed where not unsupported by evidence, even though another finding could have been made.

12. Fraudulent conveyances 🔑61.

Insolvency of debtor is not conclusive on question of fraud in alleged fraudulent conveyance (Civ. Code, § 3442).

13. Pleading 🔑237(2).

Where variance of evidence from complaint does not mislead defendant prejudicially, court may direct facts to be found according to evidence, or in its discretion order immediate amendment of complaint (Code Civ. Proc. §§ 469, 470).

14. Affidavits ⚷18.

Affidavit supporting new matter in amended complaint *held* inadmissible, since unauthorized by statute (see Code Civ. Proc. § 2009).

15. Mortgages ⚷151(1, 5).

Where mortgagee makes optional advances, his lien for such as are made after actual notice of junior incumbrance or judgment lien will be postponed to that of the owner of junior incumbrance or judgment lien.

16. Pleading ⚷252(1).

In suit to quiet title, defendant claiming judgment lien *held* entitled to further hearing where plaintiff amended complaint after submission of issues to introduce new issues material to defendant's rights.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action to quiet title by Marion Reidy against Alice M. O. Collins and Mary Brantzel Rose, also known as Mary M. Rose, in which second-named defendant filed a cross-complaint. From the judgment, the second-named defendant appeals.

Affirmed in part, and reversed and remanded in part.

O. C. Sattinger and J. W. Kearby, both of Los Angeles (Frank M. Gunter, of Los Angeles, of counsel), for appellant.

William Ellis Lady, of Los Angeles, for respondent.

PER CURIAM.

Plaintiff brought this action to quiet the title to two parcels of real property in Los Angeles county. The first is referred to in the briefs as the St. Andrews property, and the second as the Rampart property. Situated on the Rampart property was an apartment house, in which certain furniture and fixtures, bought under a conditional sale contract, were installed by defendant Collins. On or about April 6, 1928, defendant Rose and her husband, who is now deceased, were the owners of the Rampart property. About that date the same was sold to defendant Collins, who placed three incumbrances thereon. The first and second were deeds of trust to the Guardian Investment Company to secure loans of $25,000 and $10,000, respectively; the third was a deed of trust to defendant Rose and her husband to secure the payment on April 6, 1929, of a note for $12,800, which represented the balance of the selling price of the property. Defendant Rose succeeded to her husband's interest in these instruments. Default occurred in the payment of interest due on the second incumbrance on August 16, 1928, and a notice of default was recorded by the investment company on November 19, 1928. On the same date Mrs. Collins conveyed to her sister by deed of gift the St. Andrews property and other parcels, not including the Rampart property. On November 19, 1928, she entered into an agreement with plaintiff and P. M. Reidy, by which the latter agreed, in consideration of the transfer to them of the St. Andrews property, to reconvey the same to Mrs. Collins within one year from date, together with the Rampart property for $15,400 plus all moneys advanced by them, including costs, taxes, interest and other charges, but subject to the first lien on the Rampart property. It was further agreed that if the Reidys could not acquire title to the Rampart property within said period they would reconvey the St. Andrews property to Mrs. Collins without consideration. This agreement was acknowledged by the latter and recorded on November 27, 1928.

As stated, there had been a default in the payment of interest on the second incumbrance on the Rampart property; and it was the understanding between the parties that the Reidys should purchase this incumbrance and continue the foreclosure proceedings and bid in the property at the trustee's sale. In the meantime Mrs. Collins had procured a reconveyance of the St. Andrews property from her sister, and conveyed the same to Mrs. Reidy pursuant to the agreement.

[1] The Reidys purchased said second incumbrance for $7,500; and on March 23, 1929, the property was sold pursuant to the trust deed and purchased in the name of plaintiff for $5,000. The effect of this sale so far as plaintiff was concerned was to destroy the security of the deed of trust held by defendant Rose. Ferry v. Fisk, 54 Cal. App. 763, 202 P. 964.

On March 27, 1929, defendant Rose brought suit on the note held by her, no part of which had been paid. An attachment issued and was levied on Mrs. Collins' interest in the St. Andrews property and upon another parcel not involved in this action. Judgment was entered on March 15, 1930, and an abstract of the same recorded in Los Angeles county.

Defendant Rose filed an answer to plaintiff's complaint in the present action, together with a cross-complaint, alleging the insolvency of Mrs. Collins, that the conveyance to plaintiff was without consideration, and that the purpose and intention of the transaction described was to defraud cross-complainant and delay and hinder the col-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

lection of her judgment. She asked a decree adjudging her judgment to be a lien on the property prior to any claims of the other parties to the suit. At the conclusion of the trial plaintiff was permitted to amend her complaint to conform to the proof. Under this pleading she alleged with respect to the transaction between herself and Mrs. Collins that the second incumbrance on the Rampart property being in default, it was the understanding that she should advance the sums necessary to acquire said incumbrance and cause the same to be foreclosed; further that she should assume and pay the amount due on the furniture hereinbefore mentioned, and purchase such additional furniture as might be necessary to properly furnish the apartment house on the Rampart property, and that said sum should be repaid by Mrs. Collins without interest; that as security for repayment the St. Andrews property was conveyed to plaintiff, and that she also acquired title to the Rampart property by the foreclosure proceedings mentioned subject to the first incumbrance thereon; that the transaction was for the use and benefit of Mrs. Collins, and that pursuant thereto plaintiff paid out the sum of $21,326.01, but collected $8,884.92 as rents and profits from the properties, leaving a balance unpaid of $12,441.09, with interest thereon. This was alleged to constitute an equitable mortgage on the properties having priority over the Rose judgment, and a decree was asked accordingly.

The court found the allegations of the amended complaint to be true, and the allegations of fraudulent intent and want of consideration in the cross-complaint to be untrue. It was found, however, that Mrs. Collins, aside from the two parcels of real property described in the amended complaint, had insufficient property to satisfy the Rose judgment. A decree was entered adjudging the amounts claimed by plaintiff to be a first lien upon the property, that the same be sold, and that the proceeds, after deducting the expenses of sale, be first applied to the payment of the amount found to be due plaintiff with her costs, and the balance upon the Rose judgment, and that any overplus be paid to Mrs. Collins and another. It was also decreed that if the proceeds should prove insufficient to satisfy plaintiff's claim a deficiency judgment should be entered against Mrs. Collins.

Mrs. Rose, who has appealed from the judgment, contends that the findings against the allegations of fraud are unsupported, and that the court erred in permitting an amended complaint to be filed; also that the court erroneously took an accounting, and based its findings in that respect upon an affidavit filed by plaintiff.

[2] Although the Reidys did not obligate themselves to acquire the Rampart property it was provided that if they did, then both properties should be held by them as security for the amounts paid out. However, contracts unilateral at first are sustained upon the execution of the optional consideration. Marin Water Co. v. Sausalito, 168 Cal. 587, 143 P. 767.

As respects the repayment of these sums by Mrs. Collins, while the contract refers to an option to require the Reidys to reconvey both properties to her, it also contains the provision that the St. Andrews property was conveyed to them as security for "the exercising of said option and that second party (Mrs. Collins) will exercise the within option."

[3, 4] It is not contended that the sale under the trust deed was invalid. Consequently appellant had not the right of redemption, and she alleged the loss of her security as a ground for the suit on the Collins note, wherein a personal judgment was recovered against the latter; nor, in the absence of the agreement in question, would Mrs. Collins have had further rights in the property. Contracts for extending the right of redemption where it exists, or for the purchase of an incumbrance upon property for the benefit of the debtor upon the sale thereof, are not invalid. In the latter case the transaction as between the debtor and the purchaser will be regarded as an equitable mortgage to the latter. Jones on Mortgages (8th Ed.) § 228, p. 268, and cases cited. The transfer of the St. Andrews property; Mrs. Collins' promise to repay the amounts advanced by the Reidys, and the fact that the latter purchased the Rampart property, rendered the agreement enforceable; and the transfer and purchase being made as security for the performance of an obligation, the contract will be regarded in equity as a mortgage regardless of its form. Campbell v. Freeman, 99 Cal. 546, 34 P. 113; Finnell v. Finnell, 159 Cal. 535, 114 P. 820. Such liens are enforceable not only against the original contractor, but his heirs, executors, administrators, voluntary assigns and purchasers and incumbrancers with notice. Title Insurance, etc., Co. v. Cal. Development Co., 171 Cal. 173, 152 P. 542. As a rule they prevail over the liens of subsequent attachments and judgments. Handley v. Pfister, 39 Cal. 283, 2 Am. Rep. 449; Matzen v. Shaeffer, 65 Cal. 81, 3 P. 92; Bank of Ukiah v. Petaluma Sav. Bank, 100 Cal. 590, 35 P. 170; Huff v. Sweetser, 8 Cal. App. 689, 97 P. 705; Motor Acceptance Co. v. Finn, 124 Cal. App. 766, 13 P.(2d) 761.

Appellant contends that regardless of this rule the contract was made with intent to hinder and defraud creditors, and that Mrs. Collins was insolvent when the same was executed. The court found, however, against the allegations of fraud and fraudulent intent.

[5-10] The statute makes any transfer or incumbrance of property made or given voluntarily or without a valuable consideration by a party insolvent or in contemplation of insolvency fraudulent and void as to existing creditors, and the intent of the transferrer is immaterial. Civ. Code, § 3442; Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947; Tobias v. Adams, 201 Cal. 689, 258 P. 588. Secret agreements which give the grantor the right to purchase have been held in some jurisdictions to be conclusively, and others presumptively, fraudulent. 27 Cor. Jur., Fraudulent Conveyances, § 358, p. 611. Where the agreement is secret, and the grantee takes steps to obtain title at a sale by a sheriff, trustee, or the like, the same rule applies. 27 Cor. Jur., Fraudulent Conveyances, § 360, p. 612. Here the agreement was duly recorded; and in the absence of a fraudulent intent the validity of the transaction was not affected by the absolute form of the transfer, though intended merely as security. Broughton v. Vasquez, 73 Cal. 325, 11 P. 806, 14 P. 885. So, also, a mortgage made in good faith to secure future advances is not fraudulent in law as against creditors of the mortgagor; nor does the fact that the total amount of such advances is not stated change the rule. 27 Cor. Jur., Fraudulent Conveyances, § 219, p. 531; Bondurant v. Tally, etc., 191 Ky. 202, 229 S. W. 377; Alexandria Savings Institute v. Thomas, 29 Grat. (Va.) 483; Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102; Wood v. Franks, 67 Cal. 32, 7 P. 50; Tapia v. Demartini, 77 Cal. 383, 19 P. 641, 11 Am. St. Rep. 288; Frank H. Buck Co. v. Buck, 162 Cal. 300, 122 P. 466. Nor is the validity of a transfer for a valuable consideration affected by the fact that it is made voluntarily and renders the debtor insolvent. Security Trust Co. v. Silverman, 210 Cal. 578, 292 P. 636. A loan or advancement of money constitutes a valuable consideration, 13 Cor. Jur., Contracts, § 155, p. 320; and when the Reidys acquired the note and deed of trust and purchased the Rampart property at the trustee's sale this removed any objection to the validity and binding effect of the contract as respects either consideration or mutuality. Marin Water Co. v. Sausalito, supra.

[11, 12] Appellant claims that the testimony shows beyond reasonable question that the transaction was fraudulent, and that it was the intention to hinder, delay, and defraud creditors. As is usual in cases of this character there were circumstances from which this conclusion might have been drawn. However, this was not the necessary effect of the evidence, and the court's findings to the contrary are not unsupported. Where this is true the findings cannot be disturbed on appeal (Atkinson v. Western Development Syndicate, 170 Cal. 503, 150 P. 360), even where another finding could have been made on the issue. Ryder v. Bamberger, 172 Cal. 791, 158 P. 753; Johnston v. De Bock, 198 Cal. 177, 244 P. 330. Nor is insolvency conclusive on the question of fraud as a fact. Hasenjeager v. Voth, 91 Cal. App. 394, 267 P. 146.

[13] Appellant cites numerous cases wherein the acts of transferrers were held sufficient to support a finding of fraudulent intent. The circumstances in many of the cases cited were similar to the case at bar, but, as stated, there the trial court drew the inference of fraud, while here its conclusion was to the contrary.

Appellant further complains that after the case was submitted for decision the court allowed the filing of an amended complaint to conform to the proofs. While plaintiff in the first instance sought to quiet her alleged title to the property, as shown by the evidence she had but a lien thereon. The facts are similar to those in Wilson v. Anderson, 109 Cal. App. 467, 293 P. 627, where it was held that such an amendment was proper and that such judgment might be entered as the equities of the case required. As respects the theory of plaintiff's case, the variance cannot reasonably be said to have misled appellant to her prejudice in maintaining her action or defense on the merits; and where this is true the court may direct the fact to be found according to the evidence or may order an immediate amendment without costs. Code Civ. Proc. §§ 469, 470. The allowance of such amendments is largely within the discretion of the trial court, and its action will not be disturbed in the absence of an abuse of discretion. Armstrong v. Lassen, etc., Box Co., 204 Cal. 529, 269 P. 453. See Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038. As stated, the change in theory of plaintiff's complaint was not such as to prejudice appellant; but the amended complaint presented other matters. Upon these appellant claims that she was given no opportunity to be heard.

[14] The amended complaint alleged the amounts which plaintiff claimed to have been advanced and the credits received; further, that certain payments were made upon the furniture mentioned. None of these issues was presented in the original complaint, although the record contains testimony referring thereto. In support of this portion of the amended complaint plaintiff, after the case was submitted, filed an affidavit setting forth a statement of her account covering these items, but otherwise no hearing was had or evidence taken.

Affidavits may not be used in evidence except where permitted by statute (See Code Civ. Proc. § 2009). Lacrabere v. Wise, 141

Cal. 554, 556, 75 P. 185, Estate of Paulsen, 35 Cal. App. 654, 656, 170 P. 855.

[15] In this connection the court found that as part of the agreement mentioned plaintiff agreed to pay the amounts due upon the furniture, and purchase such additional furnishings as might be necessary to operate the apartment house. However, the only clause in the agreement, which in any way tends to support that conclusion, is the provision that the two parcels of property should be reconveyed to Mrs. Collins upon payment of the amount mentioned "plus any and all moneys advanced by the parties of the first part for taxes, costs, interest or personal, as evidenced by promissory notes"; but, according to the testimony of plaintiff's husband, who arranged the deal, it was not the intention to provide in the contract for the payment of the furniture. Moreover, the question when the several advances were made was material to appellant, and she should have been given an opportunity to be heard thereon. Her judgment was entered and an abstract thereof was filed in March, 1930; and it appears to be well settled that where a mortgagee makes advances which it is optional with him to make his lien for such as are made after actual notice of a junior incumbrance will be postponed to that of the latter. And judgment liens are within the same rule. 17 Cal. Jur., Mortgages, § 184, p. 899; Jones on Mortgages (8th Ed.) §§ 452, 453, p. 583; Schmidt v. Hedden (N. J. Ch.) 38 A. 843; Kramer v. Trustees, etc., 15 Ohio, 253, 260; Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621.

[16] The question of notice was not an issue under the original pleadings, nor does it appear to have been considered at the trial. The same is true of the other question mentioned although, as stated, evidence with respect thereto was adduced in another connection. We are satisfied that appellant's contentions were in these respects well founded, and that she was entitled to a further hearing before judgment was entered.

As to the other matters which have been considered, the conclusions of the trial court are in accord both with the evidence and the law and should not be disturbed.

The judgment in so far as it affects appellant Mary Brantzel Rose (also known as Mary M. Rose) is accordingly reversed, and the cause remanded for a determination of the amounts advanced by plaintiff, of the question of their priority over appellant's judgment, whether the payments, if any, on the purchase price of the furniture were a lien on the real property, or any portion thereof, and, if so, whether such lien has priority over appellant's judgment.

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135 Cal.App. 134

RANCHO SANTA MARGARITA v. SAN DIEGO COUNTY.

Civ. 1066.

District Court of Appeal, Fourth District, California.

Nov. 6, 1933.

Rehearing Denied Nov. 24, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. Taxation 🔑466.

County board of equalization cannot assess or reassess property on tax roll, but had power in 1930 to increase or lower any assessment so as to equalize assessments therein and make particular assessment conform to true money value of property after hearing (Pol. Code, § 3673).

2. Taxation 🔑40(7).

Equality of assessment, as well as tax rate, is necessary to secure equality in taxation.

3. Taxation 🔑543(7).

To recover taxes paid because of illegal increase of assessments by county board of equalization, plaintiff need not establish actual fraud or design to oppress by imposing higher taxes on plaintiff's property than on similar property in county, but something akin to fraud must be established, as by evidence that assessments were discriminatory and not uniform.

4. Appeal and error 🔑1012(1).

Appellate court cannot reverse judgments of county board of equalization and trial court in action to recover taxes paid because of preponderance of evidence against their conclusions, but must affirm judgments, if supported by material, competent evidence.

5. Taxation 🔑485(2).

Board of tax equalization is not bound by ordinary rules of evidence, but may hear affidavits or unsworn testimony, without giving opportunity for cross-examination, and, generally, admit and act on any evidence directly bearing on question before it, in absence of statute prescribing kind of evidence it may hear.

6. Taxation 🔑485(2).

Transcript of proceedings before board of equalization to raise tax assessment *held* properly introduced in evidence at following year's hearing before it, in view of evidence that there was no material change in physical condition or value of property assessed (Pol. Code, § 3676).

7. Taxation 🔑543(7).

Order of county board of equalization, increasing tax assessment after hearing at which transcript of preceding year's proceedings, resulting in increased assessment of same land, was introduced, but not read in evidence, *held* conclusive that board acted on necessary evidence, in absence of evidence that transcript was not read or considered by individual members of board (Pol. Code, § 3676).

8. Appeal and error 🔑1011(1).
Judgment, supported by any material, competent evidence in record, cannot be disturbed on appeal because of conflicting evidence.

9. Taxation 🔑347.
Values of two properties, rather than differences in use thereof, should control in comparing them for tax assessment purposes.

10. Taxation 🔑543(7).
Evidence of location, fitness for farming, available water supply, ownership, use, etc., of two tracts of land *held* to justify comparison of assessed and market values thereof by board of equalization in proceedings to increase tax assessment on one of them.

11. Appeal and error 🔑900.
Presumption on appeal is in favor of regularity of judgment of court or judicial body.

12. Appeal and error 🔑931(5).
Presumption on appeal is that board of equalization acted on evidence before it in increasing tax assessment.

13. Appeal and error 🔑1010(1).
Trial court's finding that equalization board's increase of tax assessments was not result of plan and design of all its members before hearing cannot be disturbed by appellate court, unless there is no evidence or reasonable inferences therefrom to support finding.

14. Taxation 🔑543(7).
Evidence in action to recover taxes paid *held* not to show that board of equalization carried out preconceived plan or design to raise assessments to same amounts as those to which it raised preceding year's assessments.

15. Taxation 🔑485(2).
Tax assessment books, map books, statements and military roll, required by statute to be delivered by county assessor to county clerk for use by board of equalization, are competent evidence in hearing before board (Pol. Code, § 3654).

16. Appeal and error 🔑931(5).
Appellate court must presume that contents of assessment books, etc., delivered to county clerk by assessor for use by board of equalization, were considered by board in arriving at decision to increase assessments, in absence of affirmative contrary showing (Pol. Code, § 3654).

17. Taxation 🔑490.
Marked inequality between assessed valuations of adjoining parts of taxpayer's lands following increase in assessment of one part by board of equalization did not invalidate increased assessment not exceeding value of such part or average percentage of value in county assessments.

18. Taxation 🔑543(7).
Evidence *held* not to show that increased assessment of lands by board of equalization on basis of comparison with values of similar properties was so unfair and discriminatory as to indicate something akin to fraud.

19. Taxation 🔑40(7).
Mathematically exact equality of tax assessments is not required.

20. Taxation 🔑543(8).
Trial court's refusal to find on affirmative defense in action to recover taxes paid that plaintiff paid no more than fair proportion of year's taxes in county *held* not error, in absence of evidence of total taxes paid or total assessed valuation of property therein.

21. Trial 🔑396(4).
Finding on issue is unnecessary, where there is no material evidence to support it.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Rancho Santa Margarita, a corporation, against the County of San Diego. Judgment for defendant, and plaintiff appeals.

Affirmed.

See, also, 14 P.(2d) 588, 126 Cal. App. 186.

Hunsaker & Cosgrove, of Los Angeles, for appellant.

Thomas Whelan, Dist. Atty., Frank T. Dunn, Chief Deputy Dist. Atty., and Edward W. Goodman, Deputy Dist. Atty., all of San Diego, for respondent.

MARKS, Justice.

The appellant corporation is the owner of approximately 131,000 acres of land in the county of San Diego. This was originally a Spanish grant which had never been officially surveyed and divided into sections. In 1927 appellant caused a survey to be made dividing the real property into sections, which were numbered with townships and ranges to conform to a general official survey of adjoining sectionized property. A map was made and filed with the assessor of San Diego county, who used it in making the subsequent assessments of the property.

The board of supervisors of San Diego county employed a corporation known as Tax Factors, Inc., to make a survey and appraisement of all of the real property in San Diego county. R. B. Hunt, an employee of Tax Factors, Inc., had charge of the valuations of all rural properties in the county, including that of appellant. In September, 1929, he was appointed deputy county assessor, and continued to act as such during all times material to this action.

The method employed by Tax Factors, Inc., in arriving at its valuations of real property may be briefly summarized as follows: Airplane photographs were made from an elevation of about 2,000 feet. The shadows on these photographs showed the different kinds of soil formations in the ground below. The developed pictures were taken onto the land by engineers who were soil experts. After investigation they recorded the various characters of soils actually found. The names used for the various soils were those adopted and established by a department of the United States government. The photographs were then returned to the offices of Tax Factors, Inc., and what is referred to as "Red Line Maps" were prepared from them. These maps each usually show a complete section or fractional section. The results of the photographs, together with the investigation of the actual soil conditions, were reproduced on these red line maps so that each area of a particular soil was definitely marked. Also such additional data as washouts, bluffs, creeks, marsh and overflow lands were equally faithfully recorded. The area of each individual tracing showing soil or other condition mentioned was determined and entered upon each red line sheet.

The red line sheets were then used for the preparation of what is called "classification sheets." These sheets contained a detailed description of each section. For convenience in illustration and to show the minute care with which the work was done, the material part of one is reproduced as follows:

Rural Classification
Owner—Rho Santa Margarita, A Corp.
Description: Rho Santa Margarita
All of Sec. 24, t. 9S, R 7W, containing 547

	Soil Types			Utility	No. Acres	Value per Acre	Total value
1.	R.B.			Br	7	2	14
2.	L F S L	#2	Gt. Roll	Open	10	70	700
3.	L F S L	#2	Gt. Roll	Imp	5	70	350
4.	D S L	#1	Irrig	Imp	180	278	27800
5.	D S L	#1		Open	10	200	2000
6.	D S L	#1	Irrig	Imp	10	281	5339
7.	Y S L	#1	Irrig	Imp	37	281	10397
8.	Y S L	#1		Br	8	150	1200
9.	Creek				45	5	225
10.	Y S L	#2		Imp	16	100	1600
11.	Y S L	#6		Br	10	5	50
12.	Y C L	#1	Irrig	Imp	25	278	6950
			Total Basic Value		305		56628

The designations for soil types, in the order in which they appear, are incorporated in the record as follows: (1) Rough, broken; (2) Los Flores Sandy Loam #2, gently rolling; (3) Los Flores Sandy Loam, #2, gently rolling; (4) Dublin Sandy Loam #1, irrigation; (5) Dublin Sand Loam, #1; (6) Dublin Clay Loam #1, irrigation; (7) Yolo Sandy Loam #1, irrigation; (8) Yolo Sandy Loam #1; (9) Creek; (10) Yolo Sandy Loam #2; (11) Yolo Sandy Loam #6; (12) Yolo Clay Loam #1, irrigation.

The values of the different kinds of land, as given above, and of all others, were determined by committees, and the same values were intended to apply to all lands of similar character in San Diego county, with allowances made for location, beach influences, water supplies, highways, and other similar considerations.

In making the 1929 assessments the county assessor of San Diego county accepted the valuations on the classification sheets of the Tax Factors, Inc., and assessed the various lands within San Diego county at 40 per cent. of these valuations. He again did this in his assessments of 1930.

The board of supervisors of San Diego county, sitting as a board of equalization, in July, 1929, served notice upon appellant requiring it to show cause why the assessment on its lands in San Diego county should not be raised. After a hearing, a resolution was passed raising the assessments on approximately forty sections of land belonging to appellant, being all of its lands bordering the Pacific Ocean between the Orange county line and the northerly limits of the city of Oceanside, excepting two sections and two fractional sections, and also lands near the city of Fallbrook. Appellant paid its taxes under protest and brought suit against the county for the recovery of a portion of the taxes thus paid. The action resulted in a judgment in favor of appellant, which was affirmed by this court. Rancho Santa Margarita v. County of San Diego, 126 Cal. App. 186, 14 P.(2d) 588.

In July, 1930, the board of equalization of San Diego county again summoned appellant to show cause why its assessments for the fiscal year 1930–31 should not be raised. A hearing was had which resulted in a horizontal raise of the assessments of twenty-nine sections, or fractional sections, of appellant's lands lying between the Pacific Ocean on the west and the low-lying hills on the east, the dividing line between Orange and San Diego counties on the north, and the northerly limits of the lands riparian to the Santa Margarita river on the south, being northerly from the northerly city limits of the city of Oceanside, excepting two fractional sections. The easterly boundary is a serrated line with points varying in distance from about one-half to one and three-quarters miles from the ocean. The figures to which the assessments of these sections were raised may be obtained by multiplying each 1930 assessment of the assessor by 2.3, and changing the last two figures of each result to zero, ten, or its nearest multiple. Appellant again paid its taxes under protest and brought this action to recover the sum of $15,627.11, which it alleged it was compelled to pay by reason of the illegal action of the board of equalization in raising the assessments on the twenty-nine sections in question. The trial court made findings in favor of respondent and entered judgment accordingly, from which this appeal is taken.

Appellant states the questions to be considered here as follows: "First, was the evidence before the Board of Equalization sufficient to justify the increase in the assessments? Second, did the Board arbitrarily reassess the plaintiff's lands without attempting to equalize the assessments of the Assessor? Third, did the Board's increases in the assessments destroy the uniformity of the Assessor's valuations and result in inequalities and discriminations? Fourth, did the trial court err in refusing to make a finding on the affirmative defense pleaded that the tax paid by the plaintiff, was not more than a fair and just proportion of the taxes assessed and levied for the fiscal year 1930-1931 which plaintiff should have paid on said property."

[1, 2] It is not questioned that the board of equalization acts in a judicial capacity and can only change the values on evidence given before it. Southern Pacific Land Company v. San Diego County, 183 Cal. 543, 191 P. 931. The board has no power to assess or reassess the property on the roll prepared by the assessor. In July, 1930, the board had the power to increase or lower any assessment "so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value of such property in money" after a hearing and on evidence produced before it. Section 3673, Pol. Code, as in effect in 1930; Baldwin v. Ellis, 68 Cal. 495, 9 P. 652. To secure equality in taxation, it is necessary that there be an equality of assessment as well as an equality of the tax rate. Birch v. County of Orange, 186 Cal. 736, 200 P. 647.

[3] In actions of this kind it is not necessary for the plaintiff, in order to recover, to establish actual fraud on the part of the members of the board of equalization, or to prove a design to oppress by imposing a greater burden of taxation upon its property than is levied on other property in the county of similar character and value. However, something akin to or in the nature of fraud must be established. This may be done by evidence showing that the assessments are discriminatory and lacking in uniformity. It has been said that this kind of fraud may arise from gross error or negligence and may be proved by the circumstances of the case. Mahoney v. City of San Diego, 198 Cal. 388, 397, 245 P. 189; Birch v. County of Orange, supra; Wores v. Imperial Irrigation District, 193 Cal. 609, 628, 227 P. 181.

[4] The first two questions presented by appellant are so closely interrelated that much space can be conserved by considering them together. The arguments advanced in their support may be divided into four subdivisions: (1) That there was no material and competent evidence presented before the board of equalization at the hearing in July, 1930, upon which it could legally base its resolution raising the assessment on appellant's property 230 per cent.; (2) assuming that the transcript of proceedings before the board of equalization at the hearing in July, 1929, was properly received in evidence over appellant's strenuous objection, it was neither read in evidence to the board, nor was it read by its members, and was not considered as evidence by them; (3) that if it was so considered, it, with the evidence introduced at the 1930 hearing, furnished no sufficient basis for the raise of the assessments; (4) that the raise of assessments was actually made as a result of a preconceived plan and design of all the members of the board, and their judgment was a result of this plan and design, and not of the evidence presented, but in disregard of such evidence.

It should be observed that the evidence in the record is sharply conflicting. We have read and studied the voluminous transcript and the numerous exhibits and have endeavored to carefully analyze the evidence both before the board of equalization and before the trial court. As a result of our study we can say without hesitation that had either of those tribunals reached a contrary conclusion we could easily affirm such a judgment. No such problem confronts us. We have the judgments of two judicial bodies before us for review. We cannot reverse either because of what might seem to be a preponderance of the evidence against the conclusions there reached. We are bound by the time-honored rule that we must affirm a judgment if there is material and competent evidence in the record supporting it.

The proceedings before the board of equalization in 1929 were taken down in shorthand by a reporter and transcribed, as were those of 1930. At the second hearing, the transcript of the first was admitted in evidence over the objection of appellant. The objection made and urged both below and here goes to the right of the board to consider the evidence on the second hearing.

[5] Counsel have been diligent in their search for and citation of authorities, but have cited none from California in which the precise question has been decided. The general rule concerning the admissibility of evidence produced before a board of equalization is stated in 61 C. J. 825, as follows: "If the statute prescribes the kind of evidence which the officer or board may hear, or on which his or its decision shall be based, it must be strictly obeyed; but otherwise the officer or board is not bound by the ordinary rules of evidence, and may hear affidavits or unsworn testimony without giving an opportunity for cross-examination; and, generally, it may admit and act upon any evidence which has a direct bearing on the question before the board or tends to prove the fact in issue. Competent evidence bearing on the question of value is admissible. Evidence as to the value of the property should be confined to its value at the time of the assessment complained of, and evidence of its value at some former time is not admissible except as a starting point from which to estimate subsequent appreciation or depreciation."

In the case of People ex rel. Gibson v. Board of Assessors of Town of Pulteney (Sup.) 101 N. Y. S. 176, 177, the only evidence presented before a board of equalization seems to have been in the form of affidavits. In commenting on the situation, the court said: "When the defendants received the affidavit of the petitioner and considered the matter, they were acting judicially, and had a right to take into consideration, not only the petitioner's affidavit, but also any other information received by them upon inquiry made as to who was the owner or occupant of the property in question. They were not foreclosed by the affidavit of the petitioner. When they rendered that decision, acting judicially, they had a right to take into consideration all the information they had on the subject, including the affidavit in question, and from all of the information they had, and the facts and circumstances surrounding the case, they made up their judgment and decided that the assessment was properly made."

In the case of Western Union Telegraph Co. v. Dodge County, 80 Neb. 18, 113 N. W. 805, 807, in discussing a similar question of evidence it is said: "Assessors and equalization boards must act [upon] the best and most reliable information at their command. Poor's Manual is resorted to by the commercial world as an authority upon the amount and value of the stocks and bonds of the several leading corporations in this country, and whatever is good evidence for those dealing in such stocks and bonds cannot be regarded as either immaterial or incompetent for the taxing authorities to act upon. Boards of equalization are not governed in their investigation of the values of taxable property by the strict rules of evidence applied by courts of law in the trial of ordinary cases."

In the early case of Patten v. Green, 13 Cal. 325, 329, in discussing proceedings before a board of equalization, the Supreme Court said: "We are not disposed to hold these tribunals to any great strictness of procedure." This rule was again announced in Spring Valley Water Works v. Schottler, 62 Cal. 69, and Hagenmeyer v. Board of Equalization of Mendocino County, 82 Cal. 214, 23 P. 14, 16.

In People v. McCreery, 34 Cal. 432, at page 445, the Supreme Court substantially approved the reception of what must have been hearsay evidence to some of the members of the board of equalization. It was there said: "Section two of the Act of 1862 (page 509) provides that the Board 'shall meet on the first Monday in June in each year for the correction of errors in the assessment of personal property, and shall continue in session from time to time until all such errors brought to their notice shall be corrected; provided, however, they shall not sit after the third Monday in June.' The Board met on the first and the third Mondays of June. Between those days, as we infer from the record, a committee of the Board received applications for the correction of the assessment, and perhaps took the testimony, if any was offered. We see no objection to such a course, calculated as it was to facilitate the dispatch of business. The Board, as was necessary and proper, finally acted on the applications and ordered the corrections to be made on the assessment roll."

[6] It appears from the record that in 1929 appellant was represented before the board of equalization, was afforded ample opportunity to cross-examine adverse witnesses and

present evidence in its own behalf. There was evidence at the 1930 hearing that there was no material change in either the physical condition of the property or its value in the year intervening between the two hearings. Under these conditions and the relaxed rules of evidence prevailing in hearings before boards of equalization we have concluded that the transcript of the 1929 hearing was properly introduced in evidence at the 1930 hearing. Section 3676, Pol. Code; Wolfskill v. City Council of City of Los Angeles, 178 Cal. 610, 174 P. 45.

[7] It is admitted that the transcript of the 1929 proceedings was not read in evidence before the board of equalization at the 1930 hearing. There is no evidence that it was not read by the individual members, or that it was not considered by them in reaching their decision at the second hearing. "The record does not show by affirmative proof that the board did not act upon evidence before it. Therefore its order in the premises is conclusive that it did act upon such evidence as was necessary. Humboldt County v. Dinsmore, 75 Cal. 604, 607, 608, 17 P. 710." Hagenmeyer v. Board of Equalization of Mendocino County, supra.

[8] It would extend this opinion to an unnecessary length to attempt to detail the mass of evidence on the question of whether or not the evidence at the hearing of the board of equalization in July, 1930, furnished any sufficient basis for the raise in the assessment then made. This contention may be properly restated: That the resolution in question, in effect a judgment in a judicial proceeding, raising the assessment on the twenty-nine sections of appellant's land, is without evidentiary support. Here, again, we must advert to the time-honored rule that if there is any material and competent evidence in the record supporting a judgment it cannot be disturbed on appeal because of conflicting evidence.

Those lands of appellant which are involved extend from the northerly San Diego county line, the dividing line between Orange and San Diego counties, about sixteen miles southerly along the Pacific Ocean, to near the northerly limits of the city of Oceanside. It is uninhabited except for a few isolated dwellings.

Comparisons of values and assessments were made principally with property near the subdivision of La Costa Downs. This property fronts the Pacific Ocean and lies between Oceanside and the town of Encinitas. We will refer to these lands as the La Costa Downs property.

Appellant maintains that the La Costa Downs properties "were not, by comparison with plaintiff's lands, like lands similarly situated," and therefore could not be compared with its lands either as to actual or assessed valuations. If this contention is correct, respondent's case must fail for lack of any evidence to support the judgment.

The evidence discloses that the two tracts have certain features in common and other marked dissimilarities. Both lie on what is described as a coastal plane rising from the Pacific Ocean easterly towards a range of low-lying hills which, generally speaking, parallel it. Both contain considerable mesa land fit for dry farming. Both are bisected by the state highway and the Santa Fé railroad, which furnish means of ingress and egress and for transportation of crops. The climatic conditions are the same and the "view," if by any stretch of the imagination it could be considered in fixing the value of property used principally for dry farming, pasture, or allowed to lie idle, is of the same Pacific Ocean, varying only in the particular waters which are visible. While the evidence on an available water supply is hopelessly conflicting, there is evidence which, if believed, would lead to the conclusion that there is not much difference in the prospects of bringing a supply of water onto the two tracts. Appellant introduced evidence, which in our opinion preponderates in weight, to the effect that its water supply is fully developed and is in fact failing and indicating the impossibility of bringing water on large sections of its land so that its future utility will by this fact be confined to its present use. It also presented evidence from which the reasonable conclusion might be drawn that the La Costa Downs property had available a water supply for future use. At least one witness for respondent testified that an undeveloped source of an additional and considerable water supply existed for appellant's land. This evidence was evidently accepted by the board of equalization as true, and was undoubtedly believed by the trial judge who commented upon it in a written opinion. There is also evidence offered by respondent that there is actually no available water supply for considerable portions of the La Costa Downs property. Thus we have in the record either of two theories that support the conclusion that the water supplies of the two areas are similar. The first is pictured in appellant's testimony that it has available no additional water and that much of its land is thus not subject to future development, and respondent's evidence that in the La Costa Downs area an adequate water supply is not actually available and that a like condition will exist. The second theory is developed by respondent's evidence that there is available for development a considerable water supply for appellant's land, and the testimony of appellant's witnesses that water can be furnished on the La Costa Downs property.

The incidents of dissimilarity are also numerous. Appellant's property is held in a single ownership and is used by itself or by tenant farmers, while the La Costa Downs property is divided into comparatively small tracts separately owned. Appellant's property contains within its boundaries much larger areas of untillable and waste ground. It is farther from the proven and established line of march of settlement by home and farm owners in San Diego county. These and other differences that might be mentioned would more properly indicate that appellant's land should receive a lesser valuation than that the values of the two areas could not be compared for the purpose of assessment.

[9] It should be common knowledge that no two considerable areas in southern California possess exactly similar characteristics because of different soils and conditions. The values of two properties should control in permitting comparison for assessment purposes so that the owners of properties of nearly equal values should bear a similar proportion of the cost of government. Values furnished the important factor and difference in use should not prohibit a comparison of properties of equal values. Wild Goose Country Club v. County of Butte, 60 Cal. App. 339, 212 P. 711, 713.

[10] We shall have occasion to consider the evidence of the comparative values of appellant's and the La Costa Downs properties under appellant's third specification of error, and will not repeat it here. It is sufficient to say here that we are satisfied that a comparison of the assessed and market values of property in the two tracts was permissible under the conditions shown by the record.

[11-13] Appellant next contends that the raise of the assessments of its property was actually made by the board of equalization, not upon a consideration of the evidence presented at the hearing, but as a result of a preconceived plan and design of all of its members, and that the matter had been prejudged by them before the hearing, and their final action was a result of this plan and design.

In approaching this question we are met by the presumption in favor of the regularity of the judgment of a court and a judicial body and the further presumption that a board of equalization acted on the evidence before it. Hagenmeyer v. Board of Equalization of County of Mendocino, supra. The trial court found in accordance with these presumptions and against the contention of appellant. Therefore, unless there is an entire lack of evidence or reasonable inferences to be drawn from it supporting the finding, we cannot disturb it. We need detail only such evidence as supports the finding.

[14] When the board of equalization received the assessment records from the assessor in 1930, its members discovered that the assessor had placed the same assessed valuations on appellant's property that he had used in 1929, and had paid no attention to the increases made by that body in 1929. Instructions were given to cite appellant to show cause why its assessments should not be raised. There is little doubt that the board members then entertained the idea that assessments on the property here involved should be raised in an amount equaling the raise of the previous year. One of the members of the board who testified in the court below seemed to entertain the idea at the time of the trial that such a result had been accomplished by the resolution of July, 1930. There is nothing to show that the other members were under a similar mistaken impression.

R. W. Miller was employed by Tax Factors, Inc., and assisted in the valuation of appellant's property, as well as other rural properties in the county. He later became a deputy county assessor, which office he held in July, 1930. At that time he was acting as a member of the appraisal department of the board of equalization.

The letter summoning appellant to appear before the board of equalization on Saturday, July 19, 1930, was dated July 11, 1930. Miller testified that at some time between those dates he received the following instruction from a member or members of the board: "I was told to supply a list of the sections that had been raised by the board of equalization last year, including two sections that had not been raised of that area lying outside of the riparian boundaries of the Santa Margarita, and to supply the figures on the assessed valuation as fixed on the basis of the Tax Factors' report, and also the figures as they had been raised by the board of equalization last year."

He prepared a list of the twenty-nine sections in question with the assessed valuations as fixed by the assessor for the fiscal years 1929–30 and 1930–31 and the amounts to which the assessments of twenty-seven of them had been raised by the board of equalization in 1929. Sections 32 and 33 in township 10 south, range 6 west, S. B. M., had not been included in the 1929 raise but he computed what the raise would have been had the same method of increase been employed as was used in the raise of the other sections. He then made various computations to arrive at a means whereby a total increased assessed valuation of the twenty-nine sections would equal the total increased assessed valuations of the twenty-seven sections raised by the board of equalization in 1929, plus the increased valuation of the two omitted sections. He multiplied the assessed valuation of each section, as fixed by the assessor, by the following figures: 2.72, 2.39 and 2.38. Finally, he hit upon 2.375, and by multiplying the assessor's valuation by these figures a result was reached approximating, within a few hundred dollars, that which he understood was desired by the members of the board of equalization. The hearing was not completed on Saturday, July 19, 1930, but was continued until the afternoon of the following Monday, at which time the resolution was passed. As we have indicated, the final figures of the increase are approximately obtained by multiplying the assessor's valuation of each section by 2.3. The valuations of the assessor, the raises by the board of equalization in 1929 and 1930, together with the decrease or increase of the assessed value of each section by the board in 1930 below or above its 1929 increase, and the totals, are shown in the following table:

Sec.	Twp.	R. SBM	Assessor 1929–30 1930–31	Board of Equalization 1929–30	Board of Equalization 1930–31	Board of Equalization 1930 decrease under assessment 1929–30	Board of Equalization 1930 increase over assessment 1929–30
13	9S	7W	6790	10759	15620		4861
14	9S	7W	39910	56785	91790		35005
15	9S	7W	2790	7872	6420	1452	
23	9S	7W	7600	14257	17480		3223
24	9S	7W	29080	53253	66880		13627
19	9S	6W	9210	18556	21180		2624
29	9S	6W	3760	6150	8650		2500
30	9S	6W	12120	22340	27880		5540
32	9S	6W	9420	22370	21670	700	
33	9S	6W	7270	17270	16720	550	
2	10S	6W	600	2394	1380	1014	
3	10S	6W	17200	34768	39560		4792
4	10S	6W	11330	20992	26060		5068
10	10S	6W	19660	34384	45220		10836
11	10S	6W	28240	53490	64950		11460
12	10S	6W	1330	12644	3060	9584	
13	10S	6W	19420	48258	44670	3588	
14	10S	6W	22520	39306	51800		12494
23	10S	6W	280	1292	640	652	
24	10S	6W	14980	37524	24450	3074	
25	10S	6W	1320	4076	3040	1036	
18	10S	5W	9180	35404	21110	14294	
19	10S	5W	4810	33010	11060	21950	
20	10S	5W	1840	20926	4230	16696	
29	10S	5W	11870	41312	27300	14012	
30	10S	5W	12600	39740	28980	10760	
31	10S	5W	6270	17814	14420	3394	
32	10S	5W	15580	43686	35830	7856	
33	10S	5W	2560	32800	5890	26910	
			329540	783432	757940	137522	112030

It will be observed that whatever may have been the original intentions of the members of the board of equalization as to raising the assessments to equal those it made in 1929, the results finally accomplished show a wide departure from such intention, if it were entertained. The 1930 valuation of each section is materially different from the valuations of 1929 and the totals are separated by more than $25,000. An entirely different basis of increase was employed in 1930 from that used in 1929. See Rancho Santa Margarita v. San Diego County, 126 Cal. App. 186, 14 P.(2d) 588. At the hearing on July 21, 1930, Miller testified that he prepared the figures used in the resolution passed by the board of equalization that morning "on order of the board, or request of the board."

With these facts before us we cannot conclude that the board of equalization carried out a preconceived plan or design to raise the assessments of the sections involved to the same amounts as its raise in 1929. The different results reached and the different method used in arriving at the amount of the increase of the assessments relieve us of the necessity of considering the effect of the decision in Rancho Santa Margarita v. County of San Diego, supra, on the judgment in this case.

We are somewhat aided in arriving at this conclusion by the case of Farmers', etc., Bank v. Board of Equalization of Los Angeles, 97 Cal. 318, 32 P. 312. The notice to the plaintiff cited it to show cause why its assessment on solvent credits should not be increased from $2,774, to $275,000. It was actually increased to $270,774. The notice on its face showed that the members of the board entertained an opinion on the approximate amount of the increase to be made by them, and the increase made was sustained by the courts. See, also, Security, etc., Co. v. Board of Supervisors of Los Angeles County, 4 Cal. Unrep. 222, 34 P. 437.

Appellant urges that the increases in the assessment of its property in 1930 destroyed the uniformity of the assessor's valuations of rural property in San Diego county and resulted in inequalities and discriminations against it in the assessments of this class of property. It confidently cites testimony concerning the Tax Factors, Inc., valuations that similar qualities of land were given a uniform basic value all over the county; that zones were uniformly established where the special influences which we have already noted changed the valuations which were raised or lowered in accordance with a uniform rule applied all over the county. It produced the assessor and some of his deputies as witnesses before the board of equalization, who testified that any raise in the assessed valuation of the twenty-nine sections in question would throw their assessments out of line with those of all other similar property in the county. There is much force to this argument. However, we are confronted with the judgments of two judicial bodies wherein conclusions in direct opposition to this contention were reached. If there is any material and competent evidence in the record supporting these judgments we cannot disturb them on appeal because of a conflict in the evidence, even though we might have reached a different conclusion had we been sitting in the place of the original trial tribunal.

The evidence on the proposition we are considering falls naturally into two classes: First, a comparison of the actual and assessed valuations of the twenty-nine sections with other property of appellant to the east; and, second, with the La Costa Downs property.

It should be observed that the assessment rolls were not introduced in evidence at either the hearing before the board of equalization or the trial in the superior court; counsel evidently being satisfied with the red line maps and classification sheets prepared by the Tax Factors, Inc. However, we experience no difficulty in arriving at assessed valuations from this evidence as it is undisputed that the assessor fixed his valuations at 40 per cent. of the Tax Factors, Inc., valuations on the classification sheets.

[15, 16] Section 3654 of the Political Code provides that the assessor shall deliver the assessment books, map books, statements and military roll to the county clerk for use during the session of the board of equalization. It is therefore presumed that this board had these records before it during its 1930 session. They became competent evidence to be considered during any hearing. In the absence of any affirmative showing that the contents of these records were not considered at the hearing in question we must presume that they were considered in arriving at a decision in the proceeding here involved.

[17] Appellant produced undisputed evidence that its own property bounding the twenty-nine sections in question on the east was so entirely similar in character that the dividing line between the properties could not be determined upon the ground. It cannot be disputed that the increase in assessed valuation of the sections adjoining this line on the west by 2.3 times, created a marked inequality between the assessed valuations of these sections and the assessed valuations of the sections adjoining this line on the east. The troublesome question presented by this state of the record is answered for us in the case of Wild Goose Country Club v. County of Butte, supra, in which a hearing was denied by the Supreme Court. There the plaintiff's lands were in 1919 and 1920 assessed at $50 an acre. Exactly similar adjoining lands were in 1919 assessed at from $10 to $15 an acre and in 1920 at from $25 to $40 an acre. The court upheld the assessment, holding that as plaintiff's land was not assessed at more than its value and not more than the average percentage of value prevailing in assessments in Butte county, the mere fact of the inequality shown did not render the plaintiff's assessment void. In its opinion the court said: "If the inequality complained of be conceded, and even if it be assumed, contrary to the fact, that the plaintiff offered to prove such inequality before the board, there is high authority to sustain the conclusion that the failure of the board to raise the assessment on surrounding lands in 1919, under the circumstances stated, did not constitute fraud or 'something equivalent to fraud.'" In an opinion denying a rehearing it was said (page 347 of 60 Cal. App., 212 P. 711, 714): "The members of the board had a choice of three courses: (1) To reduce plaintiff's assessment to that of the adjoining lands, thus relieving plaintiff of a large part of its just share of taxes, at the expense of all other taxpayers whose lands were assessed at the same relative value as plaintiff's. (2) To make a horizontal reduction in the assessment of all property except that which was undervalued. (3) To let the assessment stand, as they did, and correct the inequality the following year. The burden of proof was on the plaintiff to show fraud or its equivalent, and it cannot be said, under the evidence, that the action of the board, in adopting the third rather than either of the other courses open to it, constituted fraud or the equivalent of fraud."

[18, 19] We must again advert to a comparison between the assessed valuations and the actual valuations of appellant's twenty-nine sections and those of the properties which we have designated as La Costa Downs. We have analyzed the figures on the various classification sheets with the following results which are not mathematically correct, but only approximations for the purpose of illustration. It would require too great detail to exactly compare the soil classifications used.

	Rancho Santa Margarita Properties		La Costa Downs Properties	
	Per acre Tax Factors Valuations	Per acre Board of Equalization Assessment 1930	Per acre Tax Factors Valuations	Per acre Assessed Valuations 1930
Character of soils Kimball Loams #1 all kinds tillable	$120.00	$110.00	$250.00 to $800.00	$100.00 to $320.00
Kimball Loams #2 all kinds tillable	$ 80.00	$ 73.60	$115.00 to $800.00	$ 46.00 to $320.00
Los Flores Loams #2 tillable	$ 25.00 to $ 40.00	$ 23.00 to $ 36.80	$ 40.00 to $ 70.00	$ 16.00 to $ 28.00
Los Flores Loams #3 tillable	$ 25.00	$ 23.00	$ 35.00	$ 14.00
Bluffs called sea cliffs in La Costa Downs property	$ 2.00	$ 1.84	$800.00	$320.00
Rough, broken lands, marsh and creeks, nontillable	$ 2.00 to $ 5.00	$ 1.84 to $ 4.60	$ 5.00 to $200.00	$ 2.00 to $ 80.00

It should be observed that the very few acres of Kimball Loams #2 in La Costa Downs property are valued at less than $200 per acre and assessed at less than $80 per acre. The bluffs or sea cliffs and the nontillable, rough, broken land, marsh and creeks in La Costa Downs property are of very limited area. The Kimball Loams seem to prevail there. Roughly speaking, the percentages of soils there are as follows: Kimball Loams, 72.4 per cent; other loams, 10.5 per cent; other land, 17.1 per cent. If the estimates of the Tax Factors, Inc., as to the actual values of the La Costa Downs properties be accepted as fair, the assessments placed on appellant's property by the board of equalization do not seem so unfair and discriminatory as to indicate that something akin to fraud actuated that body in making its raise in 1930. Mathematical exactness in equality of assessments should not be required and would be extremely difficult to obtain because of the lack of exactness of similarity of properties to be compared.

If we have been correct in saying that it is really the market values of properties that should be compared for assessment purposes, we must turn our attention to the evidence before us, other than that furnished by the Tax Factors, Inc., as to the values of the properties in question.

Appellant relied chiefly on the reports of the Tax Factors, Inc. Respondent produced many witnesses on the question of values. Some of them seemed to view appellant's property through the eyes of the enthusiastically optimistic promotional subdivider. One of them was so confident of the tremendous growth of the locality and its subdivision into "view lots" occupied by the villas of those able to spend their declining years in the peace and beatitude of that most charming country, that he placed a substantial front foot value on all the sixteen miles of the property that would fix its actual market value at a number of million dollars. If we reject this vision as too remote of probable realization to form any sound basis of present valuation, there remains ample testimony in the record which would support the conclusion of the board of equalization and the trial court that the actual values of appellant's properties were not so much less than that of the La Costa Downs area as to make the increase of the assessments by the board of equalization so unequal and discriminatory as to be proof of something akin to fraud in the action of the board of equalization in July, 1930, in question here.

[20, 21] The answer of respondent set up as an affirmative defense that the tax paid by appellant was not more than a fair and just proportion of the taxes assessed and levied for the fiscal year 1930–31, which it should have paid on its property. The trial court refused to find on this defense and appellant assigns this as reversible error.

We have searched the record and can find no evidence upon which a finding could be based. We have studied this defense in the answer and while it is couched in uncertain language we assume that it was intended to allege that the taxes paid by appellant bear no greater proportion to all the taxes paid in San Diego county than the assessed valuation (or the valuation) of its property bears to the total assessed valuation (or the valuation) of all the property in the county. There is nothing in the record showing either the total taxes paid or the total assessed valuation (or the valuation) of the property in San Diego county. A finding is not necessary upon an issue where there is no material evidence in the record to support such a finding if it were made. New Blue Point Mining Company v. Weissbein, 198 Cal. 261, 244 P. 325, 45 A. L. R. 781.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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135 Cal.App. 195

CHORN v. PACIFIC GAS & ELECTRIC CO.

Civ. 4848.

District Court of Appeal, Third District, California.

Nov. 7, 1933.

Rehearing Denied Dec. 7, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. Appeal and error ⚿979(1).

On motion for new trial, credibility of witnesses and weight of evidence are for trial judge, subject only to exercise of sound discretion.

2. Appeal and error ⚿979(1).

On motion for new trial following verdict for street railroad sued for injuries to boy who, while crossing street after alighting from car, was caught in space between cars passing in opposite directions, and run down by automobile after running around car in front of him, whether boy exercised reasonable precaution *held* for trial judge.

3. New trial ⚿68.

Granting new trial for motormen's negligence, following verdict for street railroad sued for injuries to boy who, while crossing street after alighting from car, was caught in space between cars passing in opposite directions, and run down by automobile after running around car in front of him, *held* not abuse of discretion.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Suit by Eugene Chorn, a minor, by G. E. Chorn, his guardian ad litem, against the Pacific Gas & Electric Company. Verdict for defendant. From an order granting a new trial, defendant appeals.

Affirmed.

Thos. J. Straub and C. F. Stanley, both of San Francisco, and W. H. Hatfield, of Sacramento, for appellant.

Sheridan Downey, of Sacramento, for respondent.

Mr. R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from an order granting a new trial, after a jury had rendered a verdict in its favor. By the sudden change of traffic signals at the intersection of streets, a pedestrian, who was a ten year old school boy, while crossing one of the streets, was caught in a three-foot space between two street cars which were passing in opposite directions. Both cars stopped, blocking his way. At the command of the motorman to get out of there, the boy ran around the car which stood in front of him and was run down and injured by a passing automobile.

The appellant contends the record shows its freedom from negligence as a matter of law, and that the court therefore abused its discretion in granting the new trial. The respondent asserts the motorman was negligent in failing to observe the boy and stop his car in time to permit him to safely cross the street, and in ordering the boy from a place of comparative safety without warning him of the danger of an approaching automobile.

The defendant operates an electric street car system in the city of Sacramento. This system includes a single track extending out Twenty-First street, which runs in a northerly and southerly direction. It crosses Y street, where the accident occurred, at right angles. These streets are paved and are sixty feet in width. Double tracks are maintained across Y street and for considerable distance on either side thereof to enable the cars to pass. These tracks cross Y street at a distance of six feet apart. This leaves a space of about three feet between the cars as they pass. These streets are busy thoroughfares at this intersection. Traffic is controlled at this intersection by means of red and green electric signals which alternate automatically at short intervals.

⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Just prior to the accident two street cars which were approaching Y street from opposite directions were stopped by the flashing of the red light. The plaintiff and three companions, who were riding in the south-bound car, got out and proceeded to cross Twenty-First street, traveling along the pedestrians' pathway. The other boys succeeded in crossing the street. The plaintiff was the last of the quartet to alight from the car. Just before he reached the center of the street the traffic signals changed, and both street cars resumed their respective courses. The motorman of the north-bound car was engaged in making change for a passenger who boarded his car at the southerly line of Y street. He did not notice the predicament of the plaintiff until his car reached a point within a few feet of the boy. Bewildered by the sudden change of signals and the resumption of traffic across Y street, the boy stopped at the point where the pedestrians' pathway crosses the intervening space between the street car tracks. This was but a three-foot space between passing cars, but it was comparatively safe. When the motorman of the north-bound car observed the boy in the center of the street, he suddenly applied the emergency brake and stopped. About the same time, the outbound car also stopped. This left the boy between the two cars. The motorman on the north-bound car opened the window of his car and in a gruff tone of voice ordered the boy to "get the hell out of there." The plaintiff testified in that regard:

"After I got off the street car I walked around here (indicating on map). Then I looked up, and my conductor, he waved me on, he went like this (indicating). * * * When I was about that far, when I looked down ahead, I saw this signal that said * * * 'stop,' then as I———

"Q. (Interposing) * * * You state that the motorman waved you across, is that correct? A. Yes, sir. * * *

"Q. Whereabouts were you when you first noticed it (the changed signal), Eugene? A. Right here (indicating).

"Q. You hadn't yet gotten on the track? A. No sir. * * * I took a couple of steps and stepped right up here on the button, I was right by the button then. * * * After I saw it (the northbound car) coming over,—I stood still there for a minute or two, then when this street car was coming up, then it was pretty close to me, then it was about three feet from me, then this (southbound) car started up about to,—then stopped quick, then that made it about there (indicating on board). * * * After the two cars stopped, and I was in there, I just didn't know what that man, that conductor said, he either said, he told me to get the hell out of there, or, get the hell across, then I walked across (in front of the northbound car), and as I walked across this Mr. Benetti was coming along (in an automobile) and hit me right there. * * * When I was standing there, he (the motorman) was waving at me like that."

At the command of the motorman, the plaintiff ran around in front of the north-bound car and attempted to complete his passage across Twenty-First street. His view of the easterly portion of the street was obscured by the street car as it stood blocking the pedestrian's pathway. No warning of the approaching automobile was given by the motorman, or by any one else. The boy emerged from behind the street car just in time to be struck down by an automobile which was passing the street car on its course northerly along Twenty-First street. The plaintiff was injured as a result thereof. Suit for damages was brought against the street railway company. The cause was tried before a jury, which rendered a verdict in favor of the defendant. Upon motion of the plaintiff, the court awarded a new trial. From this order the defendant has appealed.

The appellant contends the evidence shows, as a matter of law, that it was free from negligence which contributed to the accident; that the motorman had no authority to direct traffic, and no further responsibility for the plaintiff's safety since he was no longer a passenger on defendant's street car. It is therefore asserted the court abused its discretion in granting a new trial.

[1] It is conceded by respective parties that the granting of a new trial is addressed to the sound discretion of the trial judge, and that his ruling upon that motion will not be disturbed on appeal except for a clear abuse of discretion. On a motion for new trial, the credibility of witnesses and the weight and sufficiency of the evidence are questions which are to be determined by the trial judge, subject only to the exercise of a sound discretion on his part. 20 Cal. Jur. p. 27, § 13; 2 Cal. Jur. p. 905, § 533; Petroff v. Nunes, 123 Cal. App. 614, 11 P.(2d) 648.

Since the record contains substantial evidence which may indicate a lack of ordinary care on the part of the motormen of the passing cars which may reasonably have contributed to the accident, the discretion exercised by the trial court in granting a new trial may not be disturbed on appeal, and the order should, therefore, be affirmed.

It may be conceded as the appellant contends, based upon the authority of Boa v. San Francisco-Oakland Terminal Railways, 182 Cal. 93, 187 P. 2, that its liability as a common carrier of passengers ceased when the plaintiff left the street car and became a pedestrian attempting to cross the street. But this does not mean that a street car company is exempt from liability for ordinary negligence resulting in injury to a pedestrian who afterward attempts to cross the street along which the car line extends, merely because the pedestrian may have previously been a passenger on one of defendant's cars. The obligation to exercise ordinary care in the operation of its street cars so as to prevent injury to pedestrians is separate and distinct from its common carrier duty toward passengers.

[2, 3] In the present case, while there is a conflict of testimony regarding the affair, substantial evidence exists from which it may be assumed the trial court believed the motormen of both street cars saw the plaintiff attempting to cross the street in the pedestrian's pathway at the very time the signal lights changed. Both cars promptly resumed their respective courses without giving the boy an opportunity to complete his journey across the street or it may be assumed the motorman of the north-bound car was absorbed in making change for the passenger who boarded his car at the southerly border of Y street, and that he therefore failed to perceive the predicament of the plaintiff as he stood at the center of the street, until his car had nearly reached the point where the boy stood. The trial court had a right to assume, from the circumstances, that the motorman failed to exercise due diligence in running his car across a busy thoroughfare without first observing the condition of the traffic. It may be reasonably assumed the motorman of the north-bound car, by the exercise of due care, should have seen the plaintiff in time to have stopped his car and to have afforded a safe, unobstructed crossing. The doctrine of the last clear chance appears to be applicable to the circumstances of this case. Moreover, it is not unreasonable to conclude that both motormen started their respective cars too hastily, upon the change of traffic signals, to enable those who were then engaged in crossing the street to safely reach the opposite side. Surprised at the sudden change of signals, and bewildered by the instant resumption of traffic and the proximity of street cars on both sides of him, the boy stopped and remained in the intervening space between the tracks, which was a place of comparative safety. Whether this conduct was an exercise of reasonable precaution on the part of a ten year old boy, under such circumstances, was a problem for the determination of the trial judge on the motion for a new trial. Shannon v. Central-Gaither Union School District (Cal. App.) 23 P.(2d) 769. Considering the youthful appearance of the boy, it is not unreasonable to assume the motorman was guilty of a lack of adequate precaution in commanding him to get out of his position of comparative safety, without first observing and warning him of the danger of an approaching automobile. The motorman could have seen the approaching machine, but the boy could not. The motorman said he thought the boy would return in the direction from which he had come. But he acknowledged that: "You can't judge what a child will do. * * * Nobody else can't." Moreover, the south-bound car had already crossed the pedestrians' pathway, where it also stopped, barring his way to return. The boy may reasonably have believed he would be struck by the car behind him if he attempted to cross its pathway in retracing his steps, or that he would be run down by automobiles traveling southerly beyond the street car from which he had just alighted. At least, obedient to the harsh command of the motorman, and ignorant of the danger of approaching machines, he rushed out from behind the car into the very pathway of the north-bound automobile and was struck and injured thereby. Of course, the motorman sought to protect the boy from the danger of the perilous position in which he stood. It may be assumed he should have reasonably anticipated the boy, at his command to get out from between the cars, would blindly rush out across the street from behind the car, and that he should therefore have first looked for approaching automobiles and warned him before he ordered him out from that place. But regardless of whether it may be deemed to constitute negligence for the motorman to have ordered the boy out from between the street cars without first observing and warning him against approaching machines, still, we are of the opinion there is adequate evidence of negligence on the part of the motorman in failing to observe the plaintiff in his perilous position in time to have slackened the speed of his car or to have stopped it at a distance which would have afforded the boy an opportunity to have safely completed the crossing of the street unobstructed by the intervening street car. This furnishes sufficient evidence, under the established rule of law, to support the order granting a new trial.

The order is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

135 Cal.App. 65

CLARK et al. v. BAUER.

Civ. 4860.

District Court of Appeal, Third District, California.

Nov. 6, 1933.

Rehearing Denied Dec. 6, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. Appeal and error 🔑110.

Denial of motion for new trial is not appealable.

2. Appeal and error 🔑1010(1).

Finding that damages to hay crop were caused solely by plaintiff's own negligence cannot be disturbed on appeal where supported by evidence.

3. Judgment 🔑586(2).

Judgment for defendant, in action for actual and exemplary damages for loss of hay injured by rain because of defendant's alleged willful misconduct in taking hay fork, barred second action for same damages, though taking of different hay fork was alleged.

4. Judgment 🔑719.

A point is "in issue," within rule that judgment is conclusive of all questions directly "in issue," when an issue concerning such point is directly tendered and accepted by pleadings, or when it is fairly within scope of pleadings, irrespective of actual contest at trial if it was included in and settled by decision, unless judgment went off on preliminary question.

[Ed. Note.—For other definitions of "In Issue," see Words & Phrases.]

5. Judgment 🔑725(1).

In absence of proof that particular issue was actually tried and determined in arriving at former judgment, such judgment is conclusive by way of estoppel only as to facts without existence and proof or admission of which it could not have been rendered.

6. Courts 🔑120.

Superior court *held* without jurisdiction of action involving right to possession of hay fork whose value did not exceed $25.

7. Judgment 🔑589(1).

Absolute identity of form of action is not required to support estoppel by judgment.

Appeal from Superior Court, Mendocino County; M. H. Iversen, Judge.

Action by Mary L. Clark and Peter Clark against George C. Bauer. From a judgment for defendant, and from an order denying motion for new trial, plaintiffs appeal.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

A. L. Wessels, of Ukiah, and J. W. Henderson, of Eureka, for appellants.

Hale McCowen, Jr., of Ukiah, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

[1] Judgment went for the defendant in this action, from which judgment and the denial of a motion for a new trial the plaintiffs appeal. As no appeal lies from the denial of a motion for new trial, that portion of the appeal may stand dismissed without further consideration.

[2, 3] This action was prosecuted by the plaintiffs in the trial court to secure a judgment against the defendant for and on account of damages to a certain hay crop belonging to the plaintiffs, having been caused by the negligence and wrongful acts of the defendant; and also, exemplary damages are prayed for upon the ground that the defendant's actions were not only illegal and oppressive, but were the result of wanton and careless disregard of the plaintiffs' rights in the premises.

The record shows that the cause now pending before us is a second action covering in most particulars the facts and circumstances involved in a preceding action numbered 11355, and will hereafter be referred to as action 11355. The judgment in action numbered 11355 went in favor of the defendant, and is pleaded by the defendant in this action both as an estoppel and as a bar to the right of the plaintiffs to recover in this action.

The complaint in the action now pending sets forth in substance that from on or about April 1, 1924, the plaintiffs were the owners of a certain cable used in harvesting hay, and that the United States government, as the owner of a certain "Jackson" hayfork, had loaned it to the plaintiffs for their exclusive use; that during the same time the defendant was the owner of a certain other "Jackson" fork; and that the parties, by agreement, had exchanged these forks, but that neither party should have both forks at the same time if the other had any use for one of them.

The complaint further alleges that from on or about the 15th day of May, 1929, the plaintiffs had a certain crop of hay ready for harvest, and had use for one of the forks; that the defendant had possession of the fork belonging to the plaintiffs; that the plaintiffs had possession of the defendant's fork, and on or about the 1st day of June, 1929, offered to exchange the respective forks so that the defendant would have possession of the fork belonging to him, and the plaintiffs would have possession of the fork belonging to them, or loaned to them by the United States government, or, rather, the officers who had

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

charge of the fork and authorized to loan the same; that the defendant refused to exchange forks, and on or about the 1st day of June, 1929, took possession of the fork then in the possession of the plaintiffs, and retained the same until on or about the 22d day of June, 1929; that without the use of the Jackson hayfork, the plaintiffs were unable to harvest their said crop of hay prior to the coming of a rain which damaged 74.15 tons of hay of the value of $942.30; that 33 tons of hay had to be subsequently moved from one barn to another, by reason of not having a Jackson fork for use in unloading the hay in the first instance, at an extra cost of $165; that the extra cost of harvesting the hay which was harvested by the plaintiffs and hauled and placed in barns without the use of the Jackson fork amounted to the sum of $102.50. Exemplary damages are asked in the sum of $2,500.

The answer of the defendant specifically denied the different allegations of the complaint, and pleaded as an estoppel and bar to this action, the judgment of the court in action numbered 11355. The complaint in action numbered 11355 prosecuted by the plaintiffs against the defendant in this action, and also one P. G. Potter, constable in and for Round Valley township, county of Mendocino, after alleging the possession of a certain cable, trip-rope, and hayfork, set forth that in an action of claim and delivery begun by the defendant George C. Bauer against Peter Clark and Lafayette Clark, a certain Jackson hayfork, wire cable, and trip-rope were taken from the possession of the plaintiffs on or about the 1st day of June, 1929, and detained by the defendant Bauer until on or about the 22d day of June, 1929. The complaint further alleged in said action numbered 11355 that the United States government was, and for a long time prior thereto had been, the owner of said hayfork, and had loaned the same to the plaintiffs for their use in harvesting hay; that on the 21st day of June, 1929, the plaintiffs had a crop of hay on their lands and premises then and there farmed, used, and occupied by them; that the hay was ready for harvest, and that they had use for said hayfork; that by reason of the taking possession of said hayfork by the defendant Bauer, the plaintiffs were unable to harvest their crop until the same was damaged by rains, to their loss in the sum of $483.68. The complaint in said action also asks for $1,500 exemplary damages by reason of the alleged fact that the defendant Bauer had willfully, maliciously, and wantonly deprived the plaintiffs of the use of the hayfork.

The answer in said action denied the allegations of the complaint, and alleged that the defendant Bauer was the owner of the hayfork referred to. At the conclusion of the trial in action numbered 11355, the court found that the defendant Bauer was entitled to the possession of the Jackson hayfork involved therein. The court also further found as follows: "That some hay of plaintiffs was damaged by rain, but said damage was not caused or contributed to, either directly or indirectly, by anything done by said defendants, or either of them, but was the result of the negligence, carelessness and lack of ordinary diligence on the part of the plaintiffs." Also: "That the cost of hauling and storing said hay in the barn was no greater without the derrick fork in question than it was with it." And also further found: "That none of the acts of the defendants, or either of them were malicious, and that neither of the defendants had any malice against the plaintiffs, or either of them." The conclusions of law were to the effect that the plaintiffs were not entitled to judgment and costs were awarded to the defendants.

At the conclusion of the trial of the present action the court found that in the previout action, findings had been made as we have stated, and also further found as follows: "That the plaintiffs were careless, negligent and lacking in diligence in handling said hay crop; that it was not hauled within a reasonable time after it was cut, and that all damages suffered by the plaintiffs were caused solely by their own negligence and lack of proper degree of prudence on their part." Also: "That none of the damages suffered by the plaintiffs was the natural, reasonable or proximate result of any act committed by the defendant, or of the omission by the defendant of any act which he should have performed."

While the appellant alleges that the court erred in making the findings just referred to, our attention is not called to anything indicating that the testimony introduced upon the present trial was or is insufficient to support such findings. That being true, we do not feel it incumbent upon the court to set out in this opinion the testimony appearing in the record warranting such findings, but will simply state that a reading of the transcript shows that the court might very properly make such findings, although it may be that a preponderance of the testimony is contrary thereto.

The record does show that within about 10 or 12 days after the 1st day of June, 1929, the plaintiffs did have the use of a certain other fork which enabled them to handle a considerable quantity of hay; and it also appears in the record that the cost of a new fork and cable would not have exceeded the sum of $25.

It appears from the record that there were two Jackson hayforks, one a trifle larger than the other, and that in action numbered 11355, so far as the forks were concerned, the testimony related to one of the forks, and in the pending action, to a certain other fork.

The hay involved in both actions was the same. In neither action was the recovery of the value of the forks sought, but both actions sought damages for the loss of the hay injured by rain, and also exemplary damages. On the part of the plaintiffs it is contended that different forks being involved in the respective actions, the adjudication in the prior action is not either an estoppel or a bar to the recovery of damages in the pending action.

On the part of the defendant in the pending action, the contrary theory is advanced. A reading of the transcript shows that while separate forks were involved in the respective proceedings, the causes of action were to all intents and purposes identical, to wit, the recovery of damages for the loss of hay injured by rain, and also exemplary damages on account of the alleged willful misconduct of the defendant.

While the two findings in the present action, which we have set forth, are sufficient to sustain the judgment, we are of the opinion that the findings and judgment in action numbered 11355 were properly held to be an estoppel and a bar to recovery by the plaintiffs in the pending action. The pleadings in both actions tendered the issue of damages. All the pleadings related to a particular hay crop, the plaintiff alleging in both actions that the action of the defendant Bauer caused the damage to their crop. The answer in both actions denied these allegations and put the question of damages in issue in both actions. The court specifically found on the question of damages in action numbered 11355, and likewise in the pending suit. In both actions the court found that the damages suffered by the plaintiffs on account of the rain falling upon their hay crop was due to their own negligence in not expeditiously hauling and placing the same in barns. The court in both cases found that no act of the defendant Bauer had resulted in any damage to the hay crop belonging to the plaintiffs, and likewise held in both cases that the defendant was not actuated by any willful or malicious motives.

[4, 5] While it is true, as stated in the case of McDuff v. McDuff, 45 Cal. App. 53, 187 P. 37, 38, that "in the absence of findings, only those issues which were actually and necessarily included in the judgment, or necessary thereto, are deemed adjudicated." Citing a number of cases, including, also, section 1911, Code Civ. Proc. In the case at bar the court made specific findings upon all the questions tendered by the pleadings in action numbered 11355, which included the damages covered by the pleadings in the present action. Thus, as said in 34 Cal. Jur. 920, 921: "Within the general rule that a judgment is conclusive, for the purposes of a second action between the same parties or their privies, of all facts, questions or claims which were directly in issue and adjudicated, whether the second suit is upon the same or a different cause of action, a point or question is 'in issue' when an issue concerning it is directly tendered and accepted by the pleadings in the case, or when it is fairly within the scope of the pleadings, unless the judgment went off on a preliminary question," etc. And further: "Where the matter was 'in issue' in this sense, it is not essential to the conclusiveness of the judgment that it should have been actually contested at the trial, if it was included in, and settled by the decision in the case," etc. And as further stated in the same volume, page 927: "In the absence of proof that a particular issue actually was tried and determined in arriving at a former judgment, it is conclusive by way of estoppel only as to those facts without the existence and proof or admission of which it could not have been rendered; in other words, it is conclusive evidence of whatever it was necessary for the court or jury to have found in order to warrant the decision or verdict in the former action, and no further." In the instant case proof appears of what was actually litigated and determined in the prior action, to wit, the question of damages to the hay crop. Likewise, the alleged right to exemplary damages.

[6] It is true that the right to the possession of the particular Jackson fork involved in action numbered 11355 might have been litigated without tendering any issue as to damages. However, such right could not have been litigated in the first instance in the superior court because the value of a new hayfork, cable, and trip-rope is shown by the record to have been only the sum of about $25, which would not have given the trial court jurisdiction. In other words, the question of damages had to be tendered by the pleadings in order to bring the case within the jurisdiction of the superior court.

In Estate of Clark, 190 Cal. 354, 212 P. 622, 625, the rule which we are considering is thus stated: "That judgment is binding, not only in proceedings upon the same, but also upon a different cause of action in so far as it settles and determines questions of fact. 23 Cyc. 1288–1290. It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court." Citing a number of authorities. And further: "A matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law, in chancery, in probate or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided in the first suit cannot be disputed." Citing, Bigelow on Estoppel, pp. 110-112; Rauer v. Rynd, 27 Cal. App. 556, 150 P. 780. See, also, 15 Cal. Juris., p. 97, § 166.

[7] The language found in the opinion in the case of Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387, 390, is pertinent here, to wit: "Moreover, it is immaterial under the peculiar facts of this case whether the causes of action be the same or not. Appellants in this connection cite Freeman on Judgments (5th Ed.) pp. 1416, 1417, as follows: '* * * A former adjudication may be used for two different purposes, namely, either as a complete bar to the relitigation of the same cause of action, or as conclusive evidence of some fact or issue common to different causes of action.'" This is true in the instant case. It is sought to relitigate the question of damages. In the opinion in the Price Case it is further held that causes of action cannot be split up. The same relief is sought in both actions in the instant case, to wit, damages to the hay crop and exemplary damages. True, different forks are referred to, but everything alleged and contained in the pleadings in the pending action was known to the plaintiffs at the time of filing their complaint in action numbered 11355. The testimony in this case shows that they knew all about the respective forks. As said in Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 103 Am. St. Rep. 66, absolute identity of form of action is not required to support an estoppel. We quote from the syllabus: "The estoppel of a former judgment of a court of competent jurisdiction, upon the same matter directly in question in another court, is not limited to an action identical in form, or where the same parties are plaintiff and defendant, but may be invoked by parties in privity with them. The determination in the former action of an issue presented by the defendant by way of counterclaim, recoupment, or cross-complaint is res judicata as fully as if determined in a separate action by the defendant against the plaintiff."

An almost similar case to the one at bar is that of Cincinnati, N. O. & T. P. Ry. Co. v. McGuire, 169 Ky. 711, 185 S. W. 93, 94. In that case an action for damages was begun against the company and an engineer by the name of Lenehan, who operated an engine numbered 720, after an action had been begun against the company, prosecuted, and tried, alleging the same damages, by an engineer by the name of Sullivan, operating engine numbered 300. The contention was made that the former action was neither an estoppel or bar to the second proceeding. The court held as follows: "The trouble with the foregoing argument is that it overlooks entirely the well-established rule that an adjudication is final and conclusive, not only as to a matter actually determined, but also to every other matter which the parties might have litigated, and have decided as incident thereto or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both as to matters of claim and defense (Wren v. Cooksey, 155 Ky. 620, 159 S. W. 1167; Bement v. Ohio Valley B. & T. Co., 99 Ky. 109, 35 S. W. 139, 18 Ky. Law Rep. 37, 59 Am. St. Rep. 445; Sumrall v. Maninni, 124 Ky. 67, 98 S. W. 301, 30 Ky. Law Rep. 299; Jefferson v. Western Nat'l Bank, 144 Ky. 64, 138 S. W. 308; Francis v. Wood, 81 Ky. 16), or, as stated in Elswick v. Matney, 132 Ky. 294, 116 S. W. 718, 136 Am. St. Rep. 180: 'No doctrine is better settled than that a judgment of a court of competent jurisdiction upon the merits of a case is conclusive between the parties in a subsequent action upon the same cause, not only as to all matters actually litigated, but as to every ground of recovery or defense which might have been presented or determined therein, either at law or in equity.' We have also held that a judgment for the defendant in an action against a railroad company to recover damages for personal injuries alleged to have resulted from defendant's negligence is a bar to a subsequent action against the same defendant to recover damages for the same injuries, although the specific acts of negligence alleged in the two petitions are different (McCain v. L. & N. R. R. Co., 97 Ky. 804, 22 S. W. 325, 15 Ky. Law Rep. 80), and that the entire claim arising out of a civil transaction whether in the nature of a contract or tort, cannot be divided into separate and distinct claims and each form the basis of an action (Cole's Adm'x v. I. C. R. R. Co., 120 Ky. 686, 87 S. W. 1082, 27 Ky. Law Rep. 1087)."

In view of the cases which we have cited, the pleadings tendering issues in the two cases, and the findings in the second action which we have set forth, we conclude that the judgment should be affirmed on both grounds. And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

135 Cal.App. 81

LAMBERT v. WESTERN PAC. R. CO. et al.

Civ. 4857.

District Court of Appeal, Third District, California.

Nov. 6, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. Pleading 🔑214(2).

For purpose of testing question of law, all facts well pleaded in complaint must be taken as true.

2. Explosives 🔑8.

Complaint in action for injuries to boy by explosion of dynamite caps abandoned by railroad construction crew *held* to state cause of action sufficiently to present issue for jury.

3. Negligence 🔑32(1).

Generally, landowner is under no obligation to keep premises in condition safe for trespassers or licensees, but owes trespassers only duty to abstain from willfully or wantonly injuring them.

4. Negligence 🔑23(1).

One placing dangerous contrivance in place frequented by children, with knowledge or reason to believe that they will be attracted thereto, owes duty to exercise ordinary care to prevent injury to them.

5. Negligence 🔑134(1).

To establish negligence, duty of party charged must be shown.

6. Negligence 🔑32(2).

While landowner owes no duty to trespasser or licensee, except to refrain from willful injury, invitation to go on land may be implied.

7. Negligence 🔑32(4).

Landowners are liable for maintenance of traps or concealed dangers, into which they may reasonably anticipate that others may fall, on their premises, though children injured thereby may be trespassers.

8. Negligence 🔑32(1).

Landowner, who might have avoided injury to one of whose presence on land he knew or should have known by use of ordinary care, cannot escape liability for negligence merely because injured person was trespasser.

9. Negligence 🔑39.

Trespass alone is insufficient to bar recovery from landowner for injuries to children going on unguarded premises because of attractive nuisance.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Raymond Lambert, a minor, by and through Harvey N. Lambert, his guardian ad litem, against the Western Pacific Railroad Company and another. From a judgment of dismissal, plaintiff appeals.

Reversed.

Ware & Ware, of Chico, for appellant.

C. W. Dooling and Edwin V. McKenzie, both of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the Court.

This is an action for personal injuries suffered by plaintiff.

To the complaint defendants interposed general demurrers which were sustained with leave to amend. Plaintiff declined so to do, and judgment of dismissal was entered, from which plaintiff appeals. It is, therefore, as to the sufficiency of the complaint that we now direct our attention.

From the allegations of the complaint it appears that Raymond Lambert, at the time the injuries were received, was a boy of normal intelligence, 12 years of age, living in the camp of the Utah Construction Company about 500 feet from the north portal of tunnel No. 7 on the line of construction of the Western Pacific Railroad Company in Plumas county. Construction work was still in progress. No regular trains were running; a telephone pole line had just been erected along the right of way and over the tunnel. In the construction of the pole line, the defendants used dynamite for blasting the pole holes, and exploded the dynamite with fuses and caps.

At a point on the right of way of the railroad company and immediately adjacent to the top of the north portal of the tunnel, it is alleged that defendants carelessly and negligently left two empty wooden boxes and some loose dynamite caps scattered upon the ground. The complaint also alleged that the caps were abandoned and left behind by the construction crew of the defendants, and the defendants knew of the dangerous compound of which the caps were made; that they were extremely dangerous to the life and limb of any one who might handle them.

The point at which the dynamite caps and empty boxes were abandoned, so it is alleged, was on an open side of a hill, in view for a long distance of any one walking along the right of way, which right of way was open and public and commonly used by all persons in the construction camp and by the general public, with the knowledge and consent of the defendants and without warning or prohibition. Plaintiff and other children of the camp were accustomed to play upon the right of way and about the portal of the tunnel with the consent and knowledge of the defendants, and the empty boxes and dynamite caps scattered on the ground constituted attractive and enticing objects for attention and play. The boxes and caps were in no way concealed or safeguarded, and were known to defendants to be attractive to and would arouse the curiosity of children, and tended to invite and induce children of plaintiff's age to go upon the premises and examine the objects there lying. Plaintiff had previously never seen, examined, or played with dynamite caps, nor had he been warned of their injurious nature.

The complaint then alleges that all of the facts and things done by the defendants were done carelessly and negligently and without due regard for the safety of plaintiff, and that defendants knew the attractiveness and injurious nature of dynamite caps, and that they abandoned them in a place frequently resorted to by many people, and that they were scattered about and were an invitation for plaintiff to pick them up. The foregoing, very briefly, is the gist of the cause of action, as alleged in the complaint. Do they, when taken as true, state facts sufficient to constitute a cause of action?

It is the contention of respondents that plaintiff was in law and in fact a trespasser, or, at best, only a licensee, and, as such, defendants owed him no duty whatever as to care; and in any event, that he was guilty of a tortious, if not a criminal act, in taking up and carrying away the dynamite caps.

Respondents, in support of the ruling of the trial court sustaining the demurrers, have filed comprehensive briefs, and have fully argued the issues as to the obligations owing by a landowner to trespassers, licensees, and invitees, and have fully discussed the doctrine of "attractive nuisances."

[1] For the purpose of testing a question of law, all facts in the complaint well pleaded must be taken as true. In the light of that well-known rule, we must measure the complaint.

[2] We find it alleges therein: The right of way was open and public and was commonly used by the general public; that it was unfenced and was generally frequented and open and used by the general public with the knowledge and consent of the defendants; that plaintiff and other children were accustomed so to play about the tunnel mouth with the knowledge and consent of the defendants; that from the fact that the blasting operations had moved to another and further section and from the way in which the dynamite caps had been left behind, and from the fact empty and apparently worthless containers were lying on the ground, plaintiff believed that said caps and all of the objects there had been abandoned; that loose caps were, in fact, abandoned and left behind by the construction crew of defendants; that defendants knew of their explosive and dangerous nature; they were not concealed nor safeguarded; these caps were known to be attractive to children in their play and tended to invite and induce children to go upon the premises and experiment therewith, together with allegations of a similar nature.

We believe, as a matter of law, that a cause of action has been sufficiently stated to present an issue for the jury.

[3, 4] It is true, as a general rule, that a landowner is under no obligation to keep his premises in a condition safe for trespassers or licensees. Such persons enter at their own risk, and the only duty owing a trespasser is to abstain from willfully or wantonly injuring him. 19 Cal. Jur., p. 616. To that rule is an exception, however, defined as follows:

"One who places a dangerous contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owes the duty of exercising ordinary care to prevent injury to them, and this because he is charged with knowledge of the fact that children are likely to be attracted thereto and are usually unable to foresee, comprehend and avoid the danger into which he thus allures them. One theory upon which this rule seems to be predicated is that the attractiveness of the dangerous contrivance raises an implied invitation to children to go upon the property, and that the owner owes to them the duty which is owing to an ordinary invitee. Another and more generally accepted theory is that, although the children are trespassers, they come within that exception to the general rule that an owner owes no duty to trespassers which imposes liability upon an owner who maintains a trap or concealed danger upon his premises into which he might reasonably anticipate that others may fall." 19 Cal. Jur. 624.

Counsel for both sides, by their able presentation of the issues, have been able by the elimination of extraneous matters to focus the attention of the court upon the real points of difference. They have agreed that there is no issue as to the allegations of the complaint, nor the respective inferences drawn therefrom, as matters of fact; that there is no issue as to the general law as to trespassers nor the exceptions thereto; that if contributory negligence sufficient to bar recovery is revealed by the complaint, that point can be raised by general demurrer; and that the cases, particularly of Nicolosi v. Clark, 169 Cal. 746, 147 P. 971, L. R. A. 1915F, 638; Bradley v. Thompson, 65 Cal. App. 226, 223 P. 572; and Hale v. Pac. Tel. & Teleg. Co., 42 Cal. App. 55, 183 P. 280, are binding, if applicable, to the facts in issue.

Let us examine the three cases above referred to. In Hale v. Pac. Tel. & Teleg. Co., supra, the defendant was engaged in the construction of a telephone line. For its use as a storage room for supplies and materials required in the construction work, it occupied an uninclosed cottage in the rear of which was a lattice porch. Upon this porch was a shelf about 3 feet above the floor, upon which was placed a wooden box, in which beneath some excelsior packing was placed a tin box containing dynamite caps. The top of the wooden box was covered by a board, one end of which was nailed and the other lightly tacked. On a Sunday, while all of the employees of the defendant were absent, a boy entered upon the porch and, seeing the wooden box, pried off the cover, raised the excelsior, and took some of the dynamite caps from the tin container. Some of these he gave to another boy of seven, plaintiff therein, who attempted to use them in a cap pistol, causing the caps to explode, whereby he was permanently injured. The jury awarded damages to him, from which an appeal was taken, and the judgment was reversed by the Supreme Court. This case is distinguishable from the case in issue. The court in its opinion emphasizes the fact that the boy, who abstracted the caps from the box, "knew the nature of his act and the moral turpitude thereof, namely, that he was engaged in the surreptitious taking of property which did not belong to him; in short, that he was engaged in the theft of defendant's property, which he knew was wrong." The court also pointed out, "the facts disclose no element of allurement"; whereas, in the present case, such facts are fully alleged.

In Bradley v. Thompson, supra, a general demurrer to the complaint was interposed and an order sustaining the same was upheld on appeal. In that case, defendant had used some dynamite caps in blasting holes for planting orchard trees, and the unused caps were placed in a small metal box, and the box placed upon a cross-arm of a shed about 3 feet above the ground and a few feet from a public road. Plaintiff, while traveling along the public road for the purpose of delivering a newspaper to defendant, was attracted by the metal box, took some of the caps, and, in the course of his play, caused one of the caps to explode, to his injury.

There was, as the court says, more than a mere technical trespass, and the injury was the result of the surreptitious taking of the property. The court also points out that the complaint did not allege that plaintiff was upon defendant's premises with the latter's knowledge and consent.

"It may be conceded that, had this element of wrongdoing been absent from the case, and had there been naught but a mere technical trespass upon defendant's premises, all question as to plaintiff's immaturity of intelligence and foresight * * * would have been foreclosed by those averments in the complaint which allege, in substance, that plaintiff was attracted to the tin box * * * and that he was 'too young and inexperienced to foresee the danger' which might result from playing with the dynamite caps. Cahill v. E. B. & A. L. Stone, etc., Co., supra, p. 577 [of 153 Cal.], 96 P. 84 [19 L. R. A. (N. S.) 1094]. But since the injury was the direct result of plaintiff's peculation as well as of his trespass upon defendant's land, the complaint should have contained some averment which would have sufficed to show that this 11 year old boy was ignorant of the moral turpitude involved in his conduct." Bradley v. Thompson, 65 Cal. App. 231, 223 P. 572, 574.

In the case at bar, we have nothing more than a mere technical trespass upon land, no surreptitious taking, nor moral turpitude and a positive allegation that the plaintiff was upon the land of the defendants with their knowledge and consent.

In Nicolosi v. Clark, supra, defendant was a street contractor, and in the prosecution of his work, kept upon the street a large tool box. This box set about 3 feet from the sidewalk upon the street, and both the street and sidewalk were open to the public. Within this tool box was a small box of dynamite caps. Plaintiff, passing along the street, saw the tool box, and "being a child of tender years, to-wit, 10 years, and being attracted," etc., approached the tool box and took therefrom the dynamite caps, which exploded, causing him injury. To this complaint a general demurrer was sustained, the court saying:

"In the case at bar the plaintiff was clearly guilty of trespass, if not of peculation. If a boy of 10 years of age is not chargeable with knowledge that he has no right to make free with the contents of a box placed such as this, manifestly a box belonging to other people and containing their goods, it can only be because that particular boy is of deficient intellect and understanding. But this is not alleged. Not being alleged, we hold it plain, as a proposition of law, that he was guilty of an unwarranted trespass, barring his right of recovery."

In the case of Peters v. Bowman, 115 Cal. 349, 47 P. 113, 598, 599, 56 Am. St. Rep. 106, the court states the governing principle, but Chief Justice Beatty therein takes occasion to distinguish the pond and excavation cases from the so-called turntable cases, saying:

"The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character."

In the Nicolosi Case, the boy knowingly took the property of another from its recognized place of storage. There was no element of abandonment or even negligence on the part of defendant, except, perhaps, as to the accessibility of the boxes. Although the boy had a right to be in the street, he knew he had no right to place his hand within the box. As suggested by appellant, these cases differ from the instant case, in that there was in the cited cases no allegation of knowledge or consent of defendants, or custom or usage in frequenting the place where the caps were found, and no allegation of abandonment, but rather allegations showing some care, at least, in the storage of the caps.

In Cahill v. E. B. & A. L. Stone & Co., 153 Cal. 571, 96 P. 84, 85, 19 L. R. A. (N. S.) 1094, a boy was injured while playing with a pushcar left unguarded in a public street. Judgment on demurrer was given for defendant. The Supreme Court, in reversing the trial court, said: "The car being thus rightfully in the street, the plaintiff had no right to go upon it, or to interfere with it in any way, without the consent of the defendants. He would have been with respect to the car technically a trespasser, except for the allegation that children were accustomed to play upon it with the knowledge and consent of the defendants."

So, in the case of Bransom's Adm'r v. Labrot, 81 Ky. 638, 50 Am. Rep. 193, known as the lumberpile case, cited with approval in Peters v. Bowman, supra, it was held that children were excused from trespass by reason of their custom and habit of playing where the injury occurred without objection or warning.

[5] It is true, as respondents point out, that to establish negligence in a legal sense, one of the essential elements is a duty on the part of the party charged.

[6, 7] While it is true that a landowner owes no duty to a trespasser or a licensee, except to refrain from a willful injury, still the invitation to go upon the land may be an implied invitation as well as one expressed, and the allegations of the complaint here are sufficient to show such implied invitation, at least, as against a general demurrer, although probably the right of action more properly falls within the second theory of the exception to the trespass rule, which is, although children may be trespassers, still landowners are liable for the maintenance of a trap or concealed injury upon their premises, into which they may reasonably anticipate that others may fall. This is merely the restatement of the old common-law duty to refrain from willful injury even to a trespasser.

[8] "A person cannot escape liability for negligence merely because the person was a trespasser, where * * * the presence of the trespasser was known to him, or ought to have been known, and by the use of ordinary care the defendant might have avoided the injury." Fisher v. Burrell, 116 Or. 317, 241 P. 40, 43.

[9] Trespass is present in practically all "attractive nuisance" cases, but trespass alone is not sufficient to bar recovery in the case of children going upon unguarded premises. Sanchez v. Irrigation Co., 205 Cal. 515, 271 P. 1060, where a child swimming in an irrigation canal was drawn into a concealed syphon; Faylor v. Great Eastern Q. Min. Co., 45 Cal. App. 194, 187 P. 101, where a child, playing with a mine car, fell into an open pit; Clark v. Pacific Gas & Elec. Co., 118 Cal. App. 344, 5 P.(2d) 58, 6 P.(2d) 297, where a child climbed up a power pole and came in contact with a high-tension wire.

Plaintiff alleges abandonment. That is probably only an issue here in so far as it goes to show the degree of care exercised by defendants over a highly dangerous and insidious instrumentality.

We are concerned not with the refinements of title to personal property, or its technical ownership, but with the degree of negligence, if any, shown by defendants in leaving unguarded and lying upon the ground in a spot known to them to be frequented by children, dynamite caps.

It is not difficult to distinguish the case of Hernandez v. Santiago O. G. Ass'n, 110 Cal. App. 229, 293 P. 875, from the case at bar. There a boy was killed by being struck by a block of ice dropped from a loading platform, while fruit cars were being iced. The boy had been frequently warned to stay away from the car, both by his parents and the employees of defendant. Furthermore, he was not attracted by the desire to play, which gives rise to the rule, but was getting something, and as the rule is laid down in Peters v. Bowman, supra, the loading operation could not be rendered safe without destroying its usefulness, and the danger was obvious and unconcealed.

We are of the opinion that the complaint states a cause of action and the judgment is reversed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

219 Cal. 406

STOLTENBERG v. HARVESTON et ux.

S. F. 14799.

Supreme Court of California.
Nov. 17, 1933.

1. Appeal and error ⚷516.

Matters not part of judgment roll cannot be considered on appeal, unless embodied in some other record.

2. Appeal and error ⚷544(3).

Court, on appeal on judgment roll alone, is limited to matters appearing on face of roll.

3. Appeal and error ⚷659(3).

On appeal on judgment roll alone, motion for diminution of record to bring up certified and authenticated excerpts of testimony and exhibits must be denied; statute relating to certification of copies being inapplicable (Code Civ. Proc. § 953).

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by H. P. Stoltenberg against Joe Harveston and wife. Judgment for plaintiff, and defendants appeal. On respondent's motion for diminution of record.

Motion denied.

Geo. D. Collins, Jr., and M. M. Getz, both of San Francisco, for appellants.

Dunn, White & Aiken and Hamilton Wright, all of Oakland, for respondent.

WASTE, Chief Justice.

In this action in unlawful detainer based upon the terms of a written lease, judgment was entered for the plaintiff for the amount of the rent found unpaid, canceling the lease, and restoring plaintiff to possession. The defendants appealed on the judgment roll alone.

Respondent now moves for a diminution of the record for the purpose of bringing to this court "certified and authenticated excerpts of the testimony and proceedings had upon the trial of the cause and copies of certain writings offered and received in evidence." Generally speaking, the portion of the testimony and proceedings sought to be brought here are alleged to show objections made by plaintiff to certain testimony offered or questions asked touching oral promises or agreements alleged by appellants to have been made by the lessor prior to the time of the execution of the written lease under which the appellants entered into possession of the premises, and certain testimony and exhibits which the respondent contends prove the falsity of the testimony offered in support of the appealing defendants.

[1-3] In view of the fact that the appeal here is on the judgment roll alone, respondent cannot secure the relief sought on this motion. No rule is better established in this state than that matters which are not part of the judgment roll cannot be considered on appeal, unless they are embodied in some other record, such as a bill of exceptions, statement of the case, or reporter's transcript. When an appeal from a judgment is heard upon the judgment roll alone, nothing can be assumed or considered that does not appear upon the face of that roll. See citations in 2 Cal. Jur., pp. 520, 521. Section 953 of the Code of Civil Procedure has no application to such a situation as that presented by the motion here. It relates to the record on appeal as provided in the three sections of the Code immediately preceding, and not to evidentiary matter properly brought up by a bill of exceptions, statement of the case, or transcript of testimony.

The motion for diminution of record is denied.

We concur: IRA F. THOMPSON, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.

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219 Cal. 415

STAFFORD v. STATE BAR OF CALIFORNIA.

S. F. 13748.

Supreme Court of California.
Nov. 22, 1933.

Rehearing Denied Dec. 22, 1933.

Attorney and client ⚷53(2).

Evidence *held* to establish that attorney was guilty of professional misconduct in handling money and affairs of clients, and in executing legal instruments by which money was obtained without knowledge of clients, warranting disbarment, in view of further evidence negativing rehabilitation.

In Bank.

Original application by William M. Stafford to review an order of the Board of Governors of the State Bar of California recommending that petitioner be disbarred from practicing as an attorney at law.

Petitioner disbarred.

Carey Van Fleet and J. J. Dunne, both of San Francisco, for petitioner.

Frederic E. Supple, of San Francisco, and Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a review of the proceedings before the State Bar involving charges against the petitioner as an attorney at law, and of the recommendation of the board of governors that the petitioner be disbarred.

The petitioner, at the present time about forty-one years of age, was admitted to practice law in this state in May, 1914, and since that time has practiced his profession in San Francisco. In July, 1928, by notice to show cause, he was charged with the commission of specific acts involving moral turpitude, dishonesty, and corruption. The local administrative committee of San Francisco, before which the charges were heard, found that in January, 1924, the petitioner without authority had effected on behalf of his client, Clara K. Smith, a settlement of a claim of damages for personal injuries for the sum of $350, which sum he received. The committee found that the petitioner without authority had signed the names of his clients, husband and wife, to a release and satisfaction, to which he procured a notarial certificate of acknowledgment; that he delivered the release pursuant to the terms of the settlement; but that the facts of the settlement and the receipt of the moneys were not communicated nor revealed to his clients for a period of eight months; that discovery thereof was made independently; and that upon the clients' demand through another attorney the petitioner paid the sum of $350, together with an additional sum of $150 for retaining the money and as attorney fees. The recommendation of the committee on that proceeding was that the attorney be disbarred.

In March, 1929, the petitioner was cited to answer similar charges in another matter. The hearings on these charges were held before the San Francisco local administrative committee No. 4. That committee found substantially the following facts:

In March, 1923, the petitioner represented Minnie Lubbe in a divorce action in which she was the plaintiff. In the absence of Minnie Lubbe from the state, without her knowledge or authority, the petitioner signed her name to a property settlement agreement between the spouses, secured a notarial affidavit of acknowledgment thereto, and delivered the agreement. Pursuant to this agreement the petitioner received the sum of $3,000, the full amount of the settlement. He never at any time communicated the fact of the settlement nor the terms thereof nor the fact of the receipt of the money to his client. Early in November, 1923, Minnie Lubbe returned to San Francisco. On November 16, 1923, she died. The petitioner represented the executors in the probate of her will. Until September, 1924, no disclosure of the foregoing facts was made to the executors by the petitioner.

In February, 1924, the petitioner affixed the signatures of the executors to a petition for leave to execute a contract for the sale of land belonging to the estate, and affixed the signature of one of the executors to the affidavit of verification. One of the executors was absent from the state, but the other testified at the hearing on that petition. The petition was granted. The attorney signed the names of the executors to a deed, had a certificate of acknowledgment attached, and delivered it to the grantees. About March 1, 1924, he received the sum of $5,000 as a portion of the purchase price. Knowledge of the receipt of this sum was withheld from the executors until September, 1924. In that month the executors discovered the facts in all the foregoing transactions, and procured a substitution of attorneys. Full restitution of the moneys in both transactions was made by the petitioner, who also delivered to the executors a document executed by Wm. F. Stafford, his father, guaranteeing restitution to the extent of $14,058.50, named as the amount involved in the Lubbe matters, including costs, expenses and attorney fees.

The local administrative committee No. 4, in its recommendation, stated that had it been called upon in 1925 to act it would unhesitatingly have recommended disbarment, but in view of the fact that six years had elapsed since the events disclosed by the inquiry and five years since full restitution had been made, it preferred under the particular facts, and in the light of some showing of rehabilitation since, to recommend that the proceeding be treated by the board of governors as though it were one for reinstatement and that further proof of rehabilitation be received.

The proceedings in the Smith and the Lubbe inquiries were consolidated before the board of governors. That board, however, rejected the recommendation of the local administrative committee No. 4 in the Lubbe matter, refused to receive further evidence of rehabilitation offered by the petitioner, and on September 20, 1929, by a vote of ten to three passed a resolution recommending disbarment.

Upon a review of the foregoing proceedings, this court felt impressed by the showing on behalf of the petitioner in support of his request that the recommendation of the local administrative committee No. 4 be adopted. Therefore, by an order made on October 27, 1931, it referred the proceedings back to the board of governors with instructions to conduct an investigation into the professional conduct of the petitioner during the period intervening between the time of the alleged offenses and the date of such further inquiry, and return its findings to this court. The board appointed the personnel of the local administrative committee No. 4 hereinabove referred to as a special local administrative committee to conduct the special inquiry and report to the board. Hearings were conducted by that committee at numerous meetings from January 31, 1932, to June 10, 1932. The record of those meetings discloses the following:

The petitioner voluntarily presented evidence of numerous collections handled on behalf of clients in various types of claims, wherein settlement by the petitioner with his client in each instance was shown and not questioned. In one or two cases in which the petitioner reported that complaint or dissatisfaction on the part of the client was indicated, any question so arising was apparently satisfactorily explained to the committee. At the close of this testimony the committee asked the petitioner whether there were any other cases in which clients had made complaint, or wherein it was claimed that the petitioner owed the client money at that time. To these questions the petitioner gave answers in the negative. The committee then, on its own initiative, conducted an inquiry into the history of the transactions of the petitioner as attorney for a corporation known as Sisters of the Presentation. The petitioner became the attorney for that corporation during the latter part of the year 1928. The immediate purpose of his employment was to assist his clients to raise funds for the erection of a new school building at Turk street and Masonic avenue in San Francisco. From time to time during a period commencing at that date the president of the corporation delivered to the petitioner various sums of money, aggregating between $38,000 and $40,000 to be invested in the stock market. These funds were commingled with the petitioner's personal funds and no separate account thereof kept.

About December, 1929, negotiations with Bank of America for a loan of $150,000 secured by the property at Turk and Masonic were consummated by the petitioner. The funds from this loan passed into a trust account opened by the petitioner in his name. Construction of the building was commenced, but the procurement of further funds became necessary. During this time many documents, applications, reports, deeds, checks, some of the latter in blank, and notes were signed and executed by the sisters at the petitioner's request. Further loans could not be obtained on the property at Turk and Masonic. Among the papers which the sisters signed were a note for $50,000, a deed of trust on some Berkeley property owned by the sisters securing the same, and an unsecured note for $20,000. There is evidence that the sisters executed these documents, among others, without reading them, without being advised of their contents or purport by the petitioner, and without any knowledge that such loans had been obtained and such security given until the loans were called in June, 1931. The proceeds from these loans also passed into the petitioner's trust account. Before the close of the year 1930 the petitioner, with the authority and consent of his clients, effected a $250,000 bond issue which realized the sum of $233,375. These funds were disbursed by a title company, $150,000 thereof to pay off the first loan, further obligations in the building operations, and on November 19, 1930, a check for the balance of $6,899.23 from that fund was deposited by the petitioner in his personal account.

About June, 1931, and thereafter the petitioner's clients demanded an accounting, making several such demands. They engaged another attorney. In September, 1931, the petitioner rendered a statement of all moneys received and disbursed, with the exception of the moneys received for stock investment purposes. That statement showed a balance unaccounted for of $58,042.24. On September 25, 1931, the petitioner delivered to his former clients a promissory note and a written guaranty signed by himself, each in the sum of $98,542.24, representing the above balance, the moneys received for investment on the stock market, and a further sum more recently received by him. A subsequent statement dated in March, 1932, delivered to his former clients showed the amounts received and disbursed for speculation on the stock market. The petitioner testified and now claims that all of the foregoing sums were used in stock market speculation with the consent and authority of the sisters; and that all thereof were lost. Nevertheless there is in evidence a statement dated March 21, 1932, addressed to his former clients, which places the loss sustained in stock speculation at the sum of $22,903.59, and shows a supposed balance remaining from all sums received of $61,857.65. The committee found that the petitioner was unable to or refused to account for more than about $20,000 handled in stock broker's accounts. No further accounting was made to the committee. The bank statements in evidence showed no balance in the petitioner's bank accounts. Up to the time of the hearing the petitioner had paid back to the sisters no more than the sum of $500. The petitioner never rendered a bill for legal services in relation to any of the foregoing transactions.

The committee reported its conclusion that the proof was insufficient to warrant a finding that rehabilitation was established, or a recommendation of anything less than disbarment.

The petitioner urged before the committee and now urges as an excuse for his failure to account further, the sisters' right to invoke the privilege relating to confidential communications between attorney and client. That privilege obviously does not exist when the question is, "What has become of trust funds?" propounded by a duly constituted body or tribunal otherwise under the law entitled to an answer. Furthermore, any privilege which could be said to have existed was waived by the sisters themselves, who testified fully before the committee. The petitioner urged as a further excuse that there is a controversy and litigation pending between the Bank of America and the Sisters of the Presentation involving the validity of the claims of the former to judgments on the $50,000 and $20,000 notes, etc., and that the present investigation might affect the issues in that controversy. The present investigation is not a proceeding to try and decide those issues, and any incidental finding thereon could have no evidentiary or other bearing or value on a trial thereof in the appropriate tribunal. Furthermore, we are at a loss to comprehend how a full and *proper* accounting of trust funds by the petitioner could affect adversely any interest which he or his former clients might have in any possible controversy, pending or imminent. We may give all the consideration asked by the petitioner to the possible interest of his former clients in the outcome of such controversies as bearing upon the weight to be accorded their testimony in this inquiry. We may leave out of consideration every element in this case except the undisputed fact that the petitioner has been entrusted by his former clients with the possession and handling of large sums of money. Still we are compelled to give due weight to the reasonable inference drawn by the committee that if the petitioner could have made a full and proper accounting of the whereabouts of such funds, or his disposition or disbursement of them, he would not have refused to do so. Thus we must come to the conclusion that the petitioner himself has blocked any possible different action or order herein than an adoption of the finding of the committee that rehabilitation is not established and that the petitioner has not shown that he is entitled to pursue the practice of the law.

It is therefore ordered that the petitioner, Wm. M. Stafford, be and he is hereby disbarred from the further practice of law in this state, and that his name be and it is hereby stricken from the roll of attorneys and counsellors at law of the state of California.

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135 Cal.App. 238

SALVETER v. SALVETER.

Civ. 4892.

District Court of Appeal, Third District, California.

Nov. 8, 1933.

1. Divorce 🔑321½.

Where no final order was made as to community property, wife procured ex parte execution when husband was not indebted under preliminary order for wife's maintenance, which was continued in divorce decrees, and purchased on execution sale for $1,000 husband's community interest in property having value of $30,000, former husband was entitled to accounting.

2. Husband and wife 🔑265.

Wife's possession of community property is husband's possession.

3. Judgment 🔑950(1).

Res judicata must be appropriately pleaded and shown by some evidence before plaintiff can be barred (Code Civ. Proc. § 581).

4. Limitation of actions 🔑180(5).

Demurrer to complaint on general allegation that cause of action was barred by limitations *held* not proper way to raise question indicated (Code Civ. Proc. § 458).

5. Limitation of actions 🔑180(6, 7), 182(5).

Failure to raise issue of limitations at proper time, either by demurrer or answer, waived question, which could not be raised on oral motion against introduction of testimony in support of complaint (Code Civ. Proc. § 458).

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Harry D. Salveter against Maud E. Salveter. From a judgment dismissing plaintiff's action, plaintiff appeals.

Reversed.

See, also, 127 Cal. App. 401, 15 P.(2d) 862.

Goodspeed, Pendell & McGuire, of Los Angeles, for appellant.

Hugh A. McNary, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The question here involved is whether the complaint in issue states a cause of action.

The trial court sustained an objection by the defendant that the complaint did not state a cause of action, and that the cause of action attempted to be set forth was barred by the statute of limitations, and the judgment of dismissal followed.

[1, 2] It was alleged in the complaint, which is one for an accounting, that plaintiff and defendant were once husband and wife; that said Maud E. Salveter filed an action for divorce against plaintiff herein, and a trial was had, resulting in an interlocutory decree dated June 14, 1927, followed in due time by a final decree. Pending the trial, plaintiff therein obtained an order under date of May 11, 1925, allowing her certain moneys for maintenance and support, and in the decrees these payments were continued, and the rentals thereafter to be received from certain community property were impounded to insure payment thereof. No final order was made as to the title to the community property, that matter having been reserved.

The defendant in the divorce action, having failed to make certain payments, plaintiff therein, Maud E. Salveter, sought by an ex parte application a writ of execution to obtain payment of the amount stipulated in the preliminary order. By virtue of this writ of execution, the sheriff sold plaintiff's community interest in a certain leasehold. At the sale defendant herein became the purchaser of the interest, paying therefor $1,000. Plaintiff alleges that the property had a value of $30,000 and a monthly rental of $549.

The preliminary order and the interlocutory and final decrees required of plaintiff that he pay to Maud E. Salveter the sum of $50 per month, and at the time of the writ of execution, defendant claims plaintiff was indebted to her over $2,000, whereas plaintiff contends he was not indebted to defendant in any amount. Plaintiff alleges in his complaint that demand has been made of defendant for an accounting of the rentals from May 11, 1925, being the date of the preliminary order of court requiring him to make such payments for temporary maintenance to June 14, 1927, the date of the interlocutory decree, it being alleged that during all of that period defendant had full charge of the premises and the rentals received therefrom, which accounting has been refused; plaintiff alleges he suffered irreparable loss, and is without money to pay the amounts claimed by the defendant to be due under the divorce decree, and has no adequate remedy at law. The prayer of the complaint is for an accounting and other equitable relief.

When this action was brought to trial, oral objection was interposed by defendant to the maintenance of the action and to the introduction of any evidence upon the ground that the complaint did not state a cause of action and that the alleged cause of action was barred by the statute of limitations, under subdivision 1 of section 339, Code of Civil Procedure.

The objections were by the trial court sustained, and also that the matter was res adjudicata, and ordered the action dismissed.

Plaintiff here contends that he, as husband, has the right to the control and disposition of the rentals from the community property, and when the defendant, as wife, collected the rentals, she acted in his behalf and collected them for his account and held them subject to his legal right to the benefits thereof.

Her possession was his possession. 5 Cal. Jur. 335. Therefore, having the right to possession, he had the right to sue and recover judgment against her for moneys had and received. Fennell v. Drinkhouse, 131 Cal. 447, 63 P. 734, 82 Am. St. Rep. 361. She was his agent, and all moneys collected by her were by her held in trust, subject to his order and disposition. He had the right, therefore, to have such moneys applied upon his obligation under the order directing him to pay a family allowance and to receive credit therefor. Neither the fund nor the surplus, if any, has ever been determined by the court, by interlocutory decree or otherwise, and we believe plaintiff is entitled to a statement and an accounting of all receipts and disbursements thereof. Prince v. Lamb, 128 Cal. 120, 60 P. 689; Green v. Brooks, 81 Cal. 328, 22 P. 849.

We cannot agree with defendant that the court passed upon these matters at the time the divorce proceedings were under consideration. The question here raised was neither relevant nor pertinent to the issues there considered, nor was it reserved for further consideration in the interlocutory or final decrees.

[3] As to the question of res adjudicata suggested by the trial court as being a bar to the trial of the action, we do not here find present the elements essential to such a bar. Res adjudicata cannot, of itself, and without either appropriate allegations in the answer, nor without the introduction of some evidence, successfully bar a plaintiff from setting up a cause of action. Section 581, Code of Civil Procedure, enumerates when the action may be dismissed. The conditions referred to in the several subdivisions have no application to the facts here presented.

[4, 5] Defendant, prior to the order of dismissal, interposed two demurrers to the complaint, and therein attempted to raise the defense of the statute of limitations by merely alleging that the cause of action was barred thereby. This is not the language prescribed for such a plea (section 458, Code Civ. Proc.), and this being a defense purely statutory, and having failed to raise the issue in the statutory manner at the proper time, either by demurrer or answer, she must be deemed to have waived it. It came too late

as an oral motion to the introduction of testimony in support of the complaint.

It appears the trial court erred in dismissing the action, and the judgment is hereby reversed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

PEOPLE v. D'A PHILIPPO et al.*

Cr. 1251.

District Court of Appeal, Third District, California.

Nov. 10, 1933.

Hearing Granted by Supreme Court Dec. 7, 1933.

1. Constitutional law 🔑203.
Criminal law 🔑1201.

Statutory provision increasing penalty when accused is found guilty of prior felony convictions *held* not ex post facto or unconstitutional (Pen. Code, § 644).

2. Constitutional law 🔑203.

That crimes primarily charged were committed prior to amendment of habitual criminal statute to include forgery among felonies considered, *held* not to preclude increase in penalty on account of prior convictions for forgery (Pen. Code, § 644).

3. Criminal law 🔑321.

Jurisdiction of foreign court from which duly authenticated judgment regular on its face is presented is presumed (Code Civ. Proc. § 1963, subd. 16).

4. Criminal law 🔑320.

In prosecution for grand theft, in which prior conviction in United States Court for China was charged, court must assume that foreign court had jurisdiction, and that law respecting forgery prosecutions in that court is same as in California (Pen. Code, § 644).

5. Criminal law 🔑438.

Where prior convictions were charged, admission of photographs of finger prints used in trial resulting in conviction, of which defendant pleaded guilty, *held* not error, where photographs were used to identify defendant with another conviction which defendant denied (Pen. Code, §§ 644, 1025).

6. Criminal law 🔑1202(3).

Evidence incidentally connected with admitted prior conviction may be introduced if it is competent proof of fact necessary to establish guilt of principal offense or of another prior conviction which defendant denies (Pen. Code, §§ 644, 1025)

7. Criminal law 🔑1137(5).

Defendant who, on witness stand, voluntarily referred to prior conviction waived objection to incidental reference thereto in evidence introduced by prosecution (Pen. Code, §§ 644, 1025).

8. Criminal law 🔑636(4).

Agreement of defendant's attorney, made after defendant left courtroom, to stipulate to authenticity of certain record, *held* not prejudicial, where stipulation was thereafter renewed in open court in defendant's presence.

9. Criminal law 🔑865(1).

Court's question to jury, when they first returned, whether they thought further consultation might aid them in agreeing on remaining counts of indictment, following which jury again retired, *held* not improper.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Pierre D'A Philippo was convicted of grand theft and of prior conviction of forgery, and he appeals.

Affirmed.

Pierre D'A Philippo, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant Pierre D'A Philippo was charged by an indictment filed in San Joaquin county July 28, 1932, with the crime of grand theft, together with two prior convictions of separate forgeries. The indictment was drawn in seventeen counts, separately charging the defendant with the appropriation of numerous shares of stock belonging to different named individuals, upon specified dates from April 7, 1930, to April 9, 1931, aggregating the value of $11,035. Prior to the trial six of these counts were dismissed. Upon arraignment the defendant pleaded not guilty to each of the separate charges of theft, and also pleaded not guilty to one of the charges of prior conviction of forgery. He admitted a prior conviction of forgery which occurred in the superior court of Santa Clara county. At the trial he was convicted of each of the remaining counts, except the first and second ones. A verdict of guilty was rendered against him on counts Nos. 3, 4, 7, 8, 9, 10, 11, 16, and 17, which charged him with the theft of stock aggregating the value of $8,330. He was also found guilty of both charges of prior convictions of felonies, to wit, forgeries. He was thereupon sentenced to imprisonment in the state prison at Folsom, for the term of

*For subsequent opinion see 32 P.2d 962.

his life, under the provisions of section 644 of the Penal Code.

The appellant contends the court erred in receiving evidence during the trial, in his absence, and also in permitting testimony to be adduced contrary to the inhibition of section 1025 of the Penal Code, relative to the prior conviction of forgery in Santa Clara county, to which he had previously admitted his guilt. It is claimed the pronouncing of life sentence upon the defendant as an habitual criminal was unauthorized and void, since at the time of the commission of the crime of grand theft by the defendant, section 644 of the Penal Code did not include forgery among the felonies, the prior conviction of which might then be considered in determining whether the accused was an habitual criminal. It is further asserted section 644 of the Penal Code is ex post facto and unconstitutional for the reason that it provides for a double penalty for former crimes. Finally, it is asserted the verdict is the result of coercion and misconduct on the part of the judge, and that the district attorney was also guilty of prejudicial misconduct which precluded the defendant from receiving a fair trial.

[1] Section 644 of the Penal Code is not ex post facto or unconstitutional on account of its provision increasing the penalty upon conviction of a felony when the accused at the same time is also found guilty of prior convictions of two other felonies which are therein mentioned. Ex parte Gutierrez, 45 Cal. 429; People v. Vaile, 112 Cal. App. 258, 296 P. 901; People v. Rosencrantz, 95 Cal. App. 92, 272 P. 786; People v. James, 71 Cal. App. 374, 235 P. 81; 8 Cal. Jur. 641, § 614; Cooley's Const. Lim., (7th Ed.) p. 382.

[2] The appellant contends the sentence which was imposed in this case is void and that section 644 of the Penal Code is inapplicable to the circumstances of this case since the crime of forgery was not included, at the time of his commission of the crime of grand theft, in that section among the felonies, the prior conviction of which may be considered in determining whether the accused is an habitual criminal. We think the appellant is in error regarding this assertion. It is true both felonies, with the prior conviction of which the defendant was charged, were forgeries. It is also true that the several crimes of grand theft with which he was primarily charged were all committed prior to August, 1931, at which time the amendment of that section went into effect (St. 1931, p. 1052), when, for the first time, forgery was included among the felonies to be considered in determining whether the accused is an habitual criminal. The act was amended in May, 1931, to take effect ninety days thereafter. This amendment was in effect before the indictment in this case was filed, and before the defendant was tried or convicted of grand theft. That section does not declare that prior convictions must occur before the commission of the subsequent offense upon which the accused is tried. It merely provides that "Every person convicted in this state of any felony who shall have been previously twice convicted," of other designated felonies, "shall be adjudged an habitual criminal." Clearly this section authorizes the consideration of any felony of which the accused was convicted previous to his conviction of the subsequent offense, in determining whether he is an habitual criminal. The increase of penalty which is provided by this section, by virtue of the determination that one who has been previously convicted of two other felonies is deemed to be an habitual criminal, is not an increase of punishment for the former crimes. It is merely a penalty for the recidivism of the individual. 8 Cal. Jur. 642, § 614; People v. Coleman, 145 Cal. 609, 79 P. 283. The increased penalty is administered to an habitual criminal to discourage him from continuing a life of crime, and also to protect society against the menace of his defiance of law. To construe the law so as to require the former convictions to have been secured before the commission of the subsequent crime which furnishes the basis of an adjudication that a felon is an habitual criminal, would frequently defeat the very purpose of the law. The apprehending and conviction of a murderer might be delayed for the lack of evidence to identify the assassin, or to secure necessary evidence to assure a conviction. The trial of such a case might be necessarily delayed to secure evidence or because of the illness of counsel. In the meantime other crimes might be subsequently committed by the same criminal for the commission of which he might be speedily tried and convicted. There is no good reason why these subsequent convictions should not furnish competent evidence of the fixed criminal nature of the man so long as they occur prior to the trial and conviction of the accused upon the principal charge upon which he is being tried, provided he is formally charged with the prior convictions and is afforded a fair opportunity to defend against them. The letter and spirit of the Habitual Criminal Act impels us to say it is necessary only that the prior convictions shall antedate the trial and conviction of the accused in the chief action upon which the determination of his status as an habitual criminal depends. The process of ascertaining that a felon is an habitual criminal is a matter of procedure and in no way alters the facts upon which it depends. It is therefore immaterial, in the present case, that section 644 of the Penal Code did not authorize the consideration of the former convictions of forgeries until after the actual commission

of the grand thefts with which the defendant was charged.

[3] The defendant asserts that the prior conviction of a felony in the United States Court for China, at Shanghai, is void for the reason that that court was without jurisdiction. A certified copy of that judgment was received in evidence over the objection of the defendant, showing that in 1914 he was convicted of forgery in that court under the name of Peter A. Grimes. The only objection which was offered to this record was that Peter A. Grimes was not shown to be the same person as the defendant, and upon the further ground that there "has been no foundation laid." The identity of the defendant as the same Peter A. Grimes, who was convicted of forgery in that court at Shanghai, was satisfactorily established. The defendant failed to specify any other particular reason why the foundation for the introduction of the certified judgment was not sufficiently laid. The court therefore properly admitted the document in evidence as proof of the former conviction of the defendant. The defendant failed to object to the introduction of the record on the ground of a lack of jurisdiction. We are directed to no evidence tending to show a lack of jurisdiction on the part of the United States Court for China, either of the person of the defendant or of the crime of forgery with which he was charged. In the absence of proof to the contrary, the jurisdiction of a court in a sister state or in a foreign country, from which a duly authenticated judgment which is regular upon its face is presented in evidence, will be presumed. Collins v. Maude, 144 Cal. 289, 77 P. 945; McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036, 101 Am. St. Rep. 125. It is said in 34 C. J., page 1140, § 1615 (b): "In an action on a judgment recovered in another state, the record of which is duly authenticated and produced in evidence, it will be presumed that the court had jurisdiction of the subject-matter and the parties, in the absence of proof to the contrary."

Section 1963, subdivision 16, of the Code of Civil Procedure, provides that in the absence of evidence to the contrary, the presumption is satisfactory proof: "That a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction."

[4] Since there is no evidence to the contrary we must assume that the United States Court for China had jurisdiction to try criminal cases wherein an accused is properly charged with forgery. In the absence of proof to the contrary, we must assume that the law with respect to the prosecution of forgery in the United States Court for China is the same as it is in California. In the case of Wickersham v. Johnston, 104 Cal. 407, 38 P. 89, 43 Am. St. Rep. 118, it is said in that regard: "There was no evidence at all tending to show what the law was in the foreign country touching any of the questions which are raised here, and it must therefore be assumed that the law with respect to those matters was the same there as in California."

A United States Court for China was created by an act of Congress June 30, 1906. (22 USCA p. 93, § 191, c. 3934, 34 Stat. 814.) That court was given jurisdiction over civil and criminal proceedings involving citizens of the United States in China. In the absence of statutory provisions with relation thereto, the procedure of the common law is made applicable to criminal trials in China. Biddle v. United States (C. C. A.) 156 F. 759. Forgery was a crime, punishable by law, under the common law. 2 Bishop's New Crim. Law, p. 300, § 523. There can be no doubt the United States Court for China, which was located at Shanghai, had jurisdiction over the person and of the criminal charge of forgery, for which the defendant was there tried and convicted.

[5] It is claimed prejudicial error occurred by permitting evidence to be adduced at the trial, contrary to the inhibition of section 1025 of the Penal Code, regarding the defendant's prior conviction of forgery in Santa Clara county in spite of the fact that he had pleaded guilty to that particular charge. There is no merit in this contention. While the defendant admitted his guilt of the former conviction of forgery in Santa Clara county under the name of James H. Rogers, he pleaded not guilty to the charge of former conviction at Shanghai, China, under the name of Peter A. Grimes. He also denied that he had ever gone by the name of Grimes. It therefore became necessary in proof of the Shanghai conviction to show that the Peter A. Grimes who was convicted in China in 1914 was this defendant. He was fully identified by an expert witness as the same individual, by comparison of a photograph and reproductions of his fingerprints which were used in connection with his conviction at Shanghai, with his physical appearance at the trial of this case, and photographs of his fingerprints which were used in connection with the Santa Clara trial.

[6, 7] It is not error to admit evidence incidentally connected with a prior conviction of the defendant, to which he has pleaded guilty, provided such evidence is competent proof of any material fact necessary to establish his guilt of the principal offense or any other alleged prior conviction included in the charge for which he is being tried, of which he has not admitted his guilt. People v. McFarlan, 126 Cal. App. 777, 14 P.(2d) 1066; People v. Booth, 72 Cal. App. 160, 236 P. 987; People v. Forrester, 116 Cal. App.

240, 2 P.(2d) 558. Moreover, the defendant waived any objection to a reference to the prior conviction to which he had pleaded guilty, by subsequently becoming a witness in his own behalf and voluntarily referring to that case in an effort to explain the facts and excuse the crime. People v. Fontes, 110 Cal. App. 141, 293 P. 835. Reference to the defendant's former conviction in Santa Clara county became necessary on account of his denial of his identity as Peter A. Grimes, as a matter of impeachment, which was competent. To protect the defendant against an improper consideration of the evidence of the former conviction, the court charged the jury as follows: "The defendant, Pierre D'A Philippo, has admitted that he has been previously convicted of felony. You must not consider this fact for the purpose of raising a presumption or inference of his guilt of the offenses of which he now stands charged. Evidence of former conviction of felony can be considered by you only for the purpose of impeachment of the defendant as a witness."

[8] The record does not indicate that any evidence was adduced at the trial in the absence of the defendant. It is true that the court adjourned the trial on Monday afternoon, December 12, 1932, on account of the illness of the defendant. After the defendant left the courtroom a discussion arose between respective counsel regarding the urgency of establishing proof of the former conviction which occurred in China, by a foreign witness who was then present, but who was required to leave the city that day. To accommodate the witness, the defendant's attorney agreed to stipulate to the authenticity of the record when court again convened. Thereupon the jury was dismissed until the following day. When court again convened no objection was made to the authenticity of the record. A statement in open court, in the presence of the defendant, was then made regarding the substance of the former stipulation, which was conceded by the attorney for the defendant. The district attorney then proceeded to read the record in evidence, subject to the objection only that, "It don't tend to prove or disprove any issue in this case, and that the statement is incompetent, irrelevant and immaterial." The former agreement, which was made in the absence of the defendant, was harmless. The same stipulation was subsequently made in open court in the presence of the defendant, by affirming the district attorney's statement that it had been previously agreed upon. Error may therefore not be predicated on that circumstance.

There is nothing in the record to indicate that the judge of the court or the district attorney was guilty of any prejudicial misconduct in the trial of the case. The defendant appears to have had a fair and impartial trial. The verdict and judgment are adequately supported by the evidence.

[9] Nor was there any irregularity or coercion in procuring or returning the verdict. The only thing to which the defendant objects is that the jury first returned into open court and presented a proposed verdict in which it appeared they had found the defendant guilty of many counts contained in the indictment, but in which they had failed to agree upon several other counts. Before the verdict was recorded by the clerk, the judge observed this omission, and called the attention of the jury to that fact, asking them generally if they thought further consultation might aid them in agreeing to the remaining counts. Several jurors said they believed they might so agree. Nothing was said by the court intimating whether the jury should convict or acquit the defendant on those counts. The jury did retire and again deliberated on their verdict. They subsequently returned into court and formally rendered their verdict, in which they had agreed to the defendant's guilt with respect to all of the counts except two, which still remained without agreement thereto. The verdict was then accepted, read to the jury and confirmed by the members thereof, and formally recorded by the clerk. There was no error in this procedure.

The court properly sentenced the defendant as an habitual criminal, under the provisions of section 644 of the Penal Code.

The judgment and the order are affirmed.

We concur: **PULLEN**, P. J.; **PLUMMER**, J.

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135 Cal.App. 337

PLOCHER et al. v. SUPERIOR COURT IN AND FOR YOLO COUNTY et al.

Civ. 4976.

District Court of Appeal, Third District, California.

Nov. 16, 1933.

Rehearing Denied Dec. 16, 1933.

1. Prohibition 🔑3(2).

"Prohibition" is preventive, not remedial or corrective, writ, and it cannot take place of appeal, though objections thereto are based on jurisdictional grounds.

[Ed. Note.—For other definitions of "Prohibition (Writ of)," see Words & Phrases.]

2. Prohibition 🔑3(1).

Where there is plain, speedy, and adequate remedy at law, prohibition will not lie.

3. Prohibition ⚷13.

Where acts of which complaint was made had already been performed, writ of prohibition would not issue.

4. Prohibition ⚷3(3).

Where court had jurisdiction of parties and subject-matter, any error in granting new trial and in setting aside order sustaining demurrer could be corrected on appeal from final judgment, such appeal acting as supersedeas, and writ of prohibition would not lie (Code Civ. Proc. § 946).

Application for writ of prohibition by Karl Plocher and another against the Superior Court in and for Yolo County, Hon. J. O. Moncur, as Judge thereof.

Writ denied.

Butler, Van Dyke & Harris, of Sacramento, for petitioners.

C. C. McDonald, of Woodland, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an application for a writ of prohibition. The original action was brought in the superior court by Petitioner Karl Plocher as plaintiff against Dalel Singh for damages to his automobile and loss of use thereof, arising from a collision between an automobile owned and operated by Dalel Singh and a car owned by Karl Plocher. To this complaint Dalel Singh filed an answer and cross-complaint. Karl Plocher, answering the cross-complaint, denied negligence, and upon the issues thus presented the cause proceeded to trial. During the process of the trial, it developed that at the time of the accident the car, although the property of Karl Plocher, was then being operated by John Plocher in the absence of Karl Plocher, upon his own business, but with the consent of Karl Plocher. Thereupon Dalel Singh, the cross-complainant, asked leave to make John Plocher a party cross-defendant. Permission was granted, and to this amended cross-complaint defendants demurred, John Plocher demurring especially, setting up the statute of limitations. In the complaint it was not alleged that plaintiff was operating the automobile at the time of the collision, although in the answer to the original cross-complaint there was an allegation that the automobile was then and there being operated by plaintiff. More than a year had elapsed after the accident before it appeared during the trial that John Plocher was driving the car at the time of the accident.

At the conclusion of the trial it was ordered that Karl Plocher take nothing upon the issues raised by the complaint and answer thereto, and that Singh recover costs. It was further ordered that the demurrer to the supplemental cross-complaint be sustained and the demurrer of John Plocher to the supplemental cross-complaint be sustained without leave to amend, he to recover costs, and judgment was entered accordingly. Within the time prescribed by law, Singh moved for a new trial and also to vacate the judgment and to enter another and different judgment. After consideration, respondent entered an order granting a new trial; denied the motion to vacate, but set aside the order sustaining the demurrer of John Plocher to the amended and supplemental cross-complaint, and entered an order overruling the same. From this judgment petitioners, plaintiffs herein, attempted to perfect an appeal, but, inasmuch as section 963, Code of Civil Procedure, authorizes an appeal only from an order granting a new trial in an action or proceeding tried by a jury wherein such trial by jury is a matter of right, the proposed appeal would not lie. Petitioners therefore sought by this writ of prohibition to prevent respondent from further proceeding in the matter.

Petitioners contend the court was without authority to grant a new trial in favor of Dalel Singh as to the issues raised by the complaint and answer, for, the judgment therein being in favor of Dalel Singh, he was not aggrieved, and therefore could not move for a new trial; and, secondly, as to the judgment sustaining the demurrer of John Plocher to the amended and supplemental cross-complaint there being no trial upon an issue of fact, a new trial would not lie.

We are here concerned, however, with the various orders and judgments so far only as they may affect defendant's application for a writ of prohibition, and we need not concern ourselves with the obstacles set up by petitioners to a consideration of the order granting a new trial, however logical they may appear.

[1] Essentially prohibition is a preventive, not a remedial nor corrective, writ, and cannot be used to take the place of an appeal or other mode of review, even though objections thereto are based upon jurisdictional grounds. 21 Cal. Jur. 580; Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, 220 P. 306.

[2-4] Where there is a plain, speedy, and adequate remedy at law, prohibition will not lie. Carr v. Superior Court, 147 Cal. 227, 81 P. 515. Here the acts of which complaint is made have already been performed, and the writ will not issue "to prevent judicial acts already done." Hull v. Superior Court, 63 Cal. 179; More v. Superior Court,

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

64 Cal. 345, 28 P. 117; Traffic Truck Sales Co. v. Justice's Court, supra. The very purpose of prohibition is to stay proceedings until the matter in dispute may be passed upon by a court of review. In Clark v. Superior Court, 55 Cal. 199, it is said: "If, after acquiring jurisdiction of the parties and subject-matter of an action, a superior court should order judgment in favor of one of the parties without a trial, that judgment would neither be 'without nor in excess of the jurisdiction of such tribunal,' although it may be erroneous." So here the court has jurisdiction of the parties and the subject-matter, and errors, if any, may be corrected by an appeal from the final judgment, such appeal acting as a supersedeas, and all proceedings will be stayed until the questions here raised are determined. Section 946, Code Civ. Proc.

Petitioners having a plain, speedy, and adequate remedy by appeal, the writ is denied.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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135 Cal.App. 96

MARTIN v. BOARD OF SUP'RS OF LAKE COUNTY.

Civ. 5014.

District Court of Appeal, Third District, California.

Nov. 6, 1933.

1. Licenses 🔑22.

Denial by county board of supervisors of regular petition for license to sell nonintoxicating beverages, without hearing any judicial evidence or giving petitioner opportunity to be heard, *held* arbitrary (Pol. Code, § 4041.14, as added by St. 1929, p. 1457, § 15).

2. Licenses 🔑7(1).

Ordinance of county board of supervisors regulating licensing and sale of beverages in connection with sale of food *held* lawful exercise of police powers (Pol. Code, § 4041.14, as added by St. 1929, p. 1457, § 15).

3. Mandamus 🔑87.

Mandamus lies to require county board of supervisors to exercise clear duty imposed by law, or to correct clear abuse of discretion, but not to control quasi judicial discretion in granting, or refusing to grant, on proper hearing, a license.

4. Licenses 🔑22.

County board of supervisors charged with issuance of licenses on specified conditions is quasi judicial body for determining facts and exercising reasonable discretion, and must give applicant for license opportunity to present evidence, though all formalities of court proceeding need not be observed (Pol. Code, § 4041.14, as added by St. 1929, p. 1457, § 15).

5. Constitutional law 🔑101.

No person has vested right to engage in sale of intoxicants.

6. Intoxicating liquors 🔑110.

County ordinance regulating sale of beverages containing not less than half of 1 per cent. nor more than 3.2 per cent. of alcohol by weight should be governed by same rules applicable to regulation of intoxicating drinks (Pol. Code, § 4041.14, as added by St. 1929, p. 1457, § 15).

7. Evidence 🔑7.

Court cannot judicially know just what percentage of alcohol mingled with beverages will necessarily intoxicate given person, nor just what quantity of such beverages will have that effect.

8. Intoxicating liquors 🔑13.

County board of supervisors may regulate sale of beer, wine, or porter, whether intoxicating or not, regardless of federal statute, authorizing sale of beer containing not more than specified percentage of alcohol, and prohibition amendment (Pol. Code, § 4041.14, as added by St. 1929, p. 1457, § 15; 27 USCA § 64a et seq.; Const. U. S. Amend. 18).

9. Mandamus 🔑87.

Relator cannot have mandamus to compel granting of license under the law for a reason which, if valid, shows law to be invalid.

10. Mandamus 🔑87.

Where county board of supervisors arbitrarily refused license to sell beverages without giving applicant hearing, mandamus will issue directing that applicant be given hearing (Pol. Code, § 4041.14, as added by St. 1929, p. 1457, § 15).

Application by Bessie M. Martin for a writ of mandate to be directed to the Board of Supervisors of Lake County to compel respondent to issue petitioner license for sale of nonintoxicating beverages.

Writ granted directing Board of Supervisors to grant petitioner a hearing.

Charles Kasch, of Ukiah, for petitioner.

Burt W. Busch, of Lakeport, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The petitioner seeks a writ of mandamus to compel the board of supervisors of Lake county to issue to her a license to sell nonintoxicating beverages at a restaurant in Nice. It is contended the application therefor was arbitrarily denied without affording the petitioner an opportunity for a legal hearing thereof.

[1] On May 22, 1933, pursuant to the provisions of section 4041.14 of the Political Code (as added by St. 1929, p. 1457, § 15), in the exercise of its police power, the board of supervisors of Lake county enacted Ordinance No. 202 under the provisions of an act of the Legislature enacted in April, 1933, entitled: "An act to levy an excise tax and to regulate the manufacture, distribution and sale of certain beverages; to provide for the licensing of the manufacture, distribution and sale; prescribe penalties for the violation of this act and to provide that this act shall take effect immediately."

The ordinance provides in part:

"Section 2. As used in this ordinance:

"(a) 'Beverage' means and includes any beer, lager beer, ale, porter, wine, similar fermented malt or vinous liquid, and fruit juice, or other fermented beverage containing not less than one-half of one per cent. and not more than three and two-tenths per cent. of alcohol by weight. * * *

"(c) 'On sale license' means and includes a license to sell beverages at retail for consumption only on the premises in respect to which the license is issued. * * *

"Section 3. The Board of Supervisors is hereby designated as a licensing board for the issuance of 'on sale' and 'off sale' licenses under this ordinance.

"Section 4. Any person desiring a license to engage in or carry on 'on sale' or 'off sale' retail sales of beverages as herein defined shall make application in writing to the Board of Supervisors upon such forms as may be prescribed, and containing such information as may be prescribed by said Board of Supervisors. Said application shall be left with the Clerk of the Board of Supervisors.

"Section 5. Upon receipt of any application for a license the Board of Supervisors shall investigate and deny said application if:

"(a) The applicant is not of good moral character; or

"(b) The premises with which the license is to be issued do not comply with the provisions of this ordinance; or

"(c) The premises and equipment or the plans and specifications thereof in respect to which the license is to be issued are injurious to the public health and safety; or * * *

"Section 8. Each person to whom a license is issued or for whom a license is renewed hereunder, shall pay to the County of Lake for each period of one year as herein defined, a licensing fee as follows:

"(a) For each 'on sale' license, or renewal thereof, the sum of $25.00. * * *

"Section 10. 'On sale' licenses shall be granted only to bona fide restaurants, public eating houses, clubs, boarding houses and/or hotels."

The selling of beverages contrary to the provisions of this ordinance is made a misdemeanor and punishable by a fine not to exceed $500, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Upon a form supplied to the petitioner by the clerk as prescribed by the board of supervisors, she filed a verified application for license which conforms in every respect to the requirements of the ordinance. Without any hearing by the board of supervisors, and without opportunity on the part of the petitioner to offer proof in support of her application for license, the board arbitrarily denied her petition on June 30, 1933. The only minute order with respect to petitioner's application for a license was entered on the last-mentioned date, as follows: "On motion and vote of the Board, the application of Bessie M. Martin for 'on sale' beverage license for the year beginning July 1, 1933, is hereby rejected."

While it is true that certain ex parte statements were made to the board by the district attorney and the sheriff of Lake county tending to indicate the unfitness of the petitioner and the unsuitable surroundings of her restaurant, justifying a denial of her license, still it is uncontradicted that no formal hearing of the petition was had and no judicial evidence, as that term is defined by section 1823 of the Code of Civil Procedure, was adduced. The proceedings of the board were entirely unofficial, and their action in denying the petition was arbitrary and irregular.

[2] The foregoing ordinance regulating the licensing and sale of beverages in connection with the places of business therein specified is a reasonable and lawful exercise of the police powers of the board of supervisors of Lake county. Section 4041.14 of the Political Code (as added by St. 1929, p. 1457, § 15) provides that: "Under such limitations and restrictions as are prescribed by law, and in addition to jurisdiction and powers otherwise conferred, the boards of supervisors, in their respective counties, shall have the jurisdiction and powers to license, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, all and every kind of business not prohibited by law. * * *"

[3] Mandamus is the proper remedy to require a board of supervisors to exercise a

clear duty imposed upon it by law. It is also the proper remedy where it clearly appears that the board has acted arbitrarily and in abuse of its discretion. Bleuel v. City of Oakland, 87 Cal. App. 594, 262 P. 477; 16 Cal. Jur. 816, § 32; 18 R. C. L. 292, § 225; 38 C. J. 696, § 269. It is a well-recognized rule that mandamus will not lie to control the quasi judicial discretion of a board to grant or deny a license upon a proper hearing therefor. 16 Cal. Jur. 809, § 28; 33 C. J. 554, § 149.

[4] When a board of supervisors is charged by law with the duty of issuing licenses upon specified terms and conditions, that tribunal becomes a quasi judicial body for determining the facts and exercising sound and reasonable discretion in the performance of its duty. Since a board of supervisors is only a quasi judicial body in its investigation and determination of the merits of petitions for licenses in conformity with the provisions of an ordinance, its hearings may be somewhat informal and need not conform in all respects to the solemnity of a court proceeding. Nevertheless, the law does contemplate a fair and impartial hearing of an application for license with an opportunity for the petitioner to present competent evidence for the consideration of the board. Reed v. Collins, 5 Cal. App. 494, 90 P. 973; 33 C. J. 548, §§ 138–141. By the great weight of authority, as appears from the text in 33 C. J. at page 548: "One who has made an application for license is entitled to a hearing by the licensing authority." On page 549 of the same volume it is further said: "Where the hearing on an application for a license is held before a court, or before a board which acts in a judicial capacity, the proceedings are in the nature of a civil action and are governed by the ordinary rules of judicial procedure applicable thereto."

[5-7] It is not necessary that the hearing upon an application for a license to conduct a particular business or to sell a certain commodity pursuant to statute shall be held with all the formality of a court of justice. The very nature of such quasi judicial tribunals has led the courts to recognize the excuse for some informality in their procedure. This informality, however, does not justify the denial of a hearing, or the refusal to permit a fair presentation of the petitioner's claim, or the arbitrary denial of a license in conflict with undisputed facts. Forest Lawn Memorial Park Ass'n, Inc., v. State Board of Embalmers, etc. (Cal. App.) 24 P.(2d) 887; Stockwell v. Equitable Fire & Marine Ins. Co. (Cal. App.) 25 P.(2d) 873. It is true that an individual has no vested right to engage in the business of selling intoxicating liquor. Ritz v. Lightston, 10 Cal. App. 685, 689, 103 P. 363. The regulation of that business is governed by legal principles different from those which apply to what may be termed inherently lawful avocations. While it is contended the ordinance which is involved in this proceeding purports to license only nonintoxicating beverages, we are satisfied the interpretation of this act should be governed by the same rules which apply to the regulation of intoxicating drinks. A court may not take judicial notice of just what percentage of alcohol mingled with beer, ale, or wine will necessarily intoxicate a particular individual, or just what quantity of the beverage will have that effect. 33 C. J. 498, § 17. It is true that the sale of the beverages which are affected by the ordinance which is involved in this case are the ones which are uniformly recognized as a detriment to the peace and morals of a community. That is the very reason the board of supervisors, in the exercise of its police powers, is authorized to regulate the business by means of an ordinance. In spite of the fact that a vested right to engage in the dispensing of these beverages may not exist, still the law contemplates a fair and impartial hearing of any application for a license which has been filed in strict conformity with the law. What is said in 5 C. J. 84, § 175, regarding the hearing and procedure of a board of arbitration, seems to be also applicable to the proceedings before a board of supervisors in an application for a license in the present case. It is there said:

> "It may be stated, as a general proposition, that parties are always entitled to a hearing before the arbitrators, and, although arbitrators are not bound by strict rules of evidence, they cannot transgress that fundamental principle of justice which declares that no man shall be condemned without the opportunity of being heard. The parties are entitled to a hearing upon all the matters submitted. 'The injustice is the same, and the injury as great, to deprive one of a right without a hearing before arbitrators as before a court.' And the right is one which no statute can be so construed as to abrogate. So the fact that the arbitrators in denying the parties a hearing acted in perfect good faith, merely mistaking their duty in this respect, in no way affects the operation of the rule. The parties may, of course, waive their right to a hearing by an express agreement. But nothing short of plain and clear words will be sufficient for that purpose."

It would be preposterous to concede that any judicial tribunal could be clothed with the arbitrary power of issuing licenses and regulating business subject only to its own caprice; that, with or without a hearing on the merits of the application, with or without reason, or upon ex parte statements or rumors, with no opportunity of refuting them, the board could grant or deny a petition for license. This is not the purpose or spirit with which regulatory statutes are enacted. Law contemplates justice whether it is granted as a privilege or recognized as a vested right. We therefore conclude that the right to engage in the sale of beverages under the ordinance of Lake county may not be arbitrarily denied by the board of supervisors without a hearing or an opportunity on the part of the petitioner to present the merits of her application to the licensing tribunal.

In support of its claim that neither a formal hearing nor the reception of sworn testimony was necessary upon which to predicate an order denying petitioner's application for a license to sell beverages in her restaurant, the following cases are relied upon by the respondent, to wit: People ex rel. Hall v. Supervisors of City and County of San Francisco, 20 Cal. 591; Guzzi v. McAlister, 21 Cal. App. 276, 131 P. 336; Ritz v. Lightston, 10 Cal. App. 685, 103 P. 363; and Goytino v. McAleer, 10 Cal. App. 683, 103 P. 174. Nothing is contained in any of these cases which is in conflict with what has been heretofore said. In none of these cases was the lack of a hearing or the absence of judicial evidence involved.

[8, 9] The petitioner contends that, since Congress has lately passed an act (27 USCA § 64a et seq.) authorizing the sale of beer containing not to exceed 3.2 per cent. of alcohol, this is a determination that such beer is not intoxicating, since the Eighteenth Amendment to the Constitution of the United States prohibits the sale of all intoxicating beverages. It is asserted the petitioner, therefore, has a vested right to sell beer containing not more than that percentage of alcohol, without the necessity of first procuring a license to do so, since the sale of that beverage under such circumstances is rendered lawful by the act of Congress. But neither of these acts precludes the board of supervisors of Lake county from adopting reasonable ordinances, under its police power, regulating the sale of beer, wine, ale, or porter, regardless of whether these beverages are intoxicating or not. Moreover, it was held in People ex rel. Hall v. Supervisors of City and County of San Francisco, supra, that: "The relator cannot have a mandamus to compel the granting of a license under the law for a reason which, if valid, shows the law to be void."

[10] For the reason that it appears without conflict that the petitioner's application for a license to sell beverages under the Lake county ordinance was arbitrarily denied without affording her the formality of a hearing, we are of the opinion the writ of mandamus should issue. This court does not presume to interfere with the reasonable discretion of the board to determine the fitness of the petitioner or the suitableness of her place of business in rejecting or granting the license upon judicial evidence which may be adduced at a proper hearing.

The writ of mandamus is granted directing the board of supervisors of Lake county to grant petitioner a hearing and to afford her the opportunity of presenting competent evidence thereat in support of her application for a license.

We concur: PULLEN, P. J.; PLUMMER, J.

135 Cal.App. 348

BOOTH v. TAYLOR.

Civ. 8946.

District Court of Appeal, First District, Division 1, California.

Nov. 17, 1933.

1. Quieting title 🔑10(2).

Equitable owner of real property cannot quiet his title against legal owner.

2. Quieting title 🔑49.

Superior court could enter final decree quieting title to real estate in favor of grantee who held deed thereto as security for his indorsement of note of grantor who, within reasonable specified time set by interlocutory decree, failed to repay grantee who was required to pay note.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by J. C. Booth against Wilford M. Taylor, wherein defendant filed a cross-complaint. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Leslie S. Bowden and Oliver J. Marston, both of Los Angeles, for appellant.

Chambers & Lyman, of Los Angeles, for respondent.

JAMISON, Justice pro tem.

Plaintiff brought this action to quiet title to certain real property. The defendant Wilford M. Taylor answered the complaint, denying the ownership of plaintiff, and set up a cross-complaint alleging ownership in himself, asking that the title to said property be quieted in him. Judgment went for plaintiff and cross-defendant. From this judgment defendant Taylor appealed. The facts of this case are not disputed, and are as follows:

Appellant, desiring to borrow $2,000 from the Hollywood National Bank requested respondent to indorse his note to said bank for that sum. Respondent indorsed the said note, and to secure him for same appellant executed and delivered to him a deed to the property in controversy upon respondent's agreement to reconvey said property to appellant upon payment of the said note, and in the event that respondent was compelled to pay said note, then appellant was given one year after such payment by respondent to redeem the said property. Respondent was compelled to pay the said note and after the expiration of the one year from the date of said payment he took possession of said real property. Thereafter, on October 2, 1929, he commenced this action.

On July 17, 1930, the trial court made findings substantially covering the foregoing statement of facts and entered an interlocutory decree in which it was provided that there should be an accounting to determine the amount due and owing to plaintiff upon the said agreement, and giving defendant until June 10, 1931, to pay same. Thereafter, on February 10, 1931, the said appellant and respondent agreed, in open court, that the amount due and owing to respondent from appellant was the sum of $2,500 and thereafter, the appellant having failed to pay the same as provided in the said interlocutory decree, the court on June 23, 1931, made its final decree quieting respondent's title to said property.

[1, 2] Appellant contends that the trial court was without jurisdiction to enter the decree quieting the title in favor of respondent, and therefore the said decree is void on its face. In support of this contention he cites authorities to the effect that the equitable owner of real property cannot quiet his title against the legal owner. While there can be no question that this is the settled law in this state (22 Cal. Jur. § 6, p. 111, and authorities cited), yet by the entry of the interlocutory decree, and giving to appellant a reasonable and specified time to repay to respondent the ascertained sum owing to respondent, the court was authorized, upon the failure of appellant to pay same within the time so fixed, to enter the decree quieting title in respondent's favor.

In Bloom v. Bloom, 207 Cal. 70, 276 P. 568, 569, which was a case similar to the one at bar, the court said: "Under the circumstances here shown, the trial court should have entered an appropriate interlocutory judgment requiring the defendant to pay the amount found to be due the plaintiff within a specified reasonable time; that upon such payment within the time specified the defendant would be entitled to a reconveyance and that in default of payment within such time the plaintiff would be entitled to a decree quieting his title. Such a procedure was outlined and an interlocutory judgment was by the trial judge actually ordered to be prepared in accordance with a memorandum opinion filed in the case. This procedure, however, was not followed, but a final judgment was signed and entered with the infirmity above indicated."

In the instant case no such infirmity existed. The trial court by its interlocutory decree, made on December 10, 1930, after providing in what manner the amount owing to respondent by appellant should be determined, then specified June 10, 1931, as the date when the payment should be made. In the meantime, on February 10, 1931, it was agreed between the parties in open court that the amount due from appellant to respondent was the sum of $2,500. Thereafter, on June 23, 1931, on motion of respondent, the appellant having failed to make the payment aforesaid, the trial court rendered its final judgment quieting the title in favor of respondent. In the recent case of Warden v. Nahas, 212 Cal. 740, 300 P. 815, which was a similar case in all respects to the case at bar, the Supreme Court reversed the lower court for the reason that no definite time was specified for the payment to plaintiff of the amount owing to him by defendant, and ordered that a definite time be fixed for such payment; that upon failure of defendant to make same a decree be entered quieting plaintiff's title. In the instant case appellant had over six years in which he could have redeemed said property, but apparently he made no effort to do so.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

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135 Cal.App. 104

PEOPLE v. O'SHAUGHNESSY.

Cr. 256.

District Court of Appeal, Fourth District, California.

Nov. 6, 1933.

1. Criminal law 🔑586.

Granting of continuance is within trial court's sound discretion.

2. Criminal law 🔑1151.

Continuance granted state cannot be *held* prejudicial error without clear showing of abuse of trial court's discretion.

3. Criminal law 🔑613.

Granting of week's continuance for state to obtain absent witness or make proper showing of diligence *held* not prejudicial error.

4. Criminal law ⚷539(1).

Statutory provision that report of testimony at preliminary hearing must state witness' business or profession is directory merely, not mandatory (Pen. Code, § 869).

5. Criminal law ⚷539(1).

Testimony at preliminary hearing by state's witness, not stating her business, *held* admissible at trial as against objection that she was prostitute, whose testimony jury would not believe; such objection going only to weight of evidence (Pen. Code, § 869).

6. Criminal law ⚷543(2).

Question of due diligence to find witness, whose testimony at preliminary hearing state offers in evidence, is addressed to discretion of trial court, whose determination will not be disturbed, unless abuse of discretion clearly appears (Pen. Code, § 686).

7. Criminal law ⚷543(2).

Due diligence to find witness does not require search of entire state or sending of subpœnas to every county therein before admission in evidence of such witness' deposition at preliminary examination (Pen. Code, § 686).

8. Criminal law ⚷1144(12).

Presumption is that trial court properly exercised discretion in determining whether due diligence was used to find witness, whose testimony at preliminary hearing is offered in evidence (Pen. Code, § 686).

9. Criminal law ⚷543(2).

Evidence *held* sufficient to support trial court's conclusion that state exercised due diligence to find absent witness, whose testimony at preliminary hearing was admitted in evidence, though she was not arrested and detained (Pen. Code, § 686).

10. Criminal law ⚷543(2).

Due diligence, required by statute, to find absent witness before admitting in evidence latter's testimony at preliminary hearing, is merely reasonable effort to locate witness (Pen. Code, § 686).

11. Criminal law ⚷517(4).

Evidence in trial for receiving stolen property *held* sufficient to establish corpus delicti, so as to render defendant's statements and admissions to officers admissible in evidence.

12. Criminal law ⚷518(1).

Mere failure of officer, to whom defendant made incriminatory statements, to instruct him as to right to remain silent and warn him that statements might be used against him, *held* insufficient to show that they were involuntary.

13. Criminal law ⚷823(9).

Refusal of instruction on presumption of innocence *held* not error, in view of instruction sufficiently covering subject in exact language of statute (Pen. Code, §§ 1096, 1096a).

14. Receiving stolen goods ⚷8(3), 9(1).

Evidence *held* sufficient to take to jury question of defendant's guilt and justify conviction of receiving stolen property.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Michael O'Shaughnessy was convicted of receiving stolen property, and he appeals.

Affirmed.

Francis C. Whelan, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant, having been convicted of the crime of receiving stolen property, has appealed from the judgment and from an order denying a new trial.

It appears from the evidence that a store in San Diego was broken into on the night of May 29, 1933, or the early morning of May 30, and that a number of radios were stolen therefrom. On June 1, 1933, police officers found two of these radios in a house occupied by a Miss Johnson and a Miss Van Norton. On June 2, the appellant was arrested and at police headquarters was asked "what explanation he had to make regarding the two radios which he sold at Pearl Van Norton's home." The appellant replied that on Tuesday night (which was the night after the radios were stolen) a man asked him to sell the radios; that he did not know the man's name but he wore a gray suit and was of about his own age and size; that he told this man he thought he could sell the radios, whereupon the man brought the two radios to his room; that he immediately took them to Miss Van Norton's house and sold them for a total of $18; and that he returned to his room and paid the man in the gray suit $15, retaining $3 for himself. The appellant further stated that he had not participated in burglarizing the store referred to, but that when the man brought the two radios to his room, he was quite satisfied that they came from this particular store, as he had been through the same on previous occasions; that he first went to this store three or four days before and again on Monday when he was accompanied by the man in the gray suit; that they then looked over a number of radios in the store; that when this man brought the radios to his room he recognized them as some he had seen in the store; that he was satisfied that they were "hot"; that he knew that they were from this store and supposed they were stolen property; that he thought he could make some money by disposing of them for the other party; and that the man in the gray suit told him he was taking the other radios and leaving San Diego. He also identified the radios which had been recovered by the police officers as those "that he had sold at Pearl's house." Two radios were introduced in evidence which were positively identified as having been stolen from this store on the night of May 29, as having been sold at the home of Miss Van Norton, and as having been recovered there by the officers. There was introduced in evidence the testimony of Miss Johnson given at the preliminary hearing of the appellant, in which she stated that she lived in the home of Miss Van Norton; that she purchased one of these radios (identifying it) from the appellant; and that on the same occasion and while she was present the other radio, which she identified, was sold by the appellant to Miss Van Norton.

[1-3] It is first urged that the court erred in granting a continuance of one week after the trial of the action had been begun. The trial was commenced on July 24, 1933, and two or three witnesses had been examined when the district attorney stated that a subpœna had been issued for Miss Johnson, but that she was not present. An adjournment was taken until 2 o'clock that afternoon, at which time it developed that the sheriff's office had been unable to find Miss Johnson in order to serve the subpœna. The district attorney asked for a continuance, stating that he was willing to take the case up at the earliest possible date although he knew that the court had other criminal cases set for the rest of that week. The court stated that a continuance would be granted for a sufficient time to enable them to see if they could obtain the witness or make a proper showing of diligence, and the trial was continued for one week. The appellant relies especially upon the case of Ford v. Superior Court, 17 Cal. App. 1, 118 P. 96, 100. That case involved repeated continuances over a long period of time and the court stated that "a stronger showing of diligence and certainty is required in support of each successive application." The matter of granting a continuance is one within the sound discretion of the trial court and such a continuance cannot be held prejudicial error in the absence of a clear showing of abuse of discretion. People v. Treadwell, 69 Cal. 226, 10 P. 502; People v. Elgar, 39 Cal. App. 78, 178 P. 168; People v. Lyons, 80 Cal. App. 257, 251 P. 648. The one continuance here complained of was for a short time, was based upon adequate grounds, and no sufficient showing of prejudice is made.

[4, 5] The action of the court in receiving into evidence the record of the testimony given by Miss Johnson at the preliminary hearing is assigned as error. It is first urged that this evidence was inadmissible because Miss Johnson was not asked and did not state what was her business or profession. Pen. Code, § 869. It appears that this witness was a female person, that she was living in the home of another woman, and the record does not show her age. If it may not be presumed that she had no business (see People v. Grundell, 75 Cal. 301, 17 P. 214), at least it must be held that this provision is directory merely and not mandatory (People v. Grundell, supra; People v. Buckley, 143 Cal. 375, 77 P. 169). The appellant argues that had this witness stated her business, it would appear that she was a woman of the streets and that for this reason the jury would not have believed her testimony. Not only does this go to the weight of the evidence and not to its admissibility, but the record contains no evidence of the fact claimed, and it may not be assumed that the jury would have disbelieved her testimony when it coincided in every detail with statements made by the appellant.

[6] Another reason advanced for the inadmissibility of this evidence is that no sufficient showing of diligence appears. The only argument made as to lack of diligence is that the prosecution should have seen to it that this witness was arrested and kept in jail until wanted. The record contains no evidence, and none was offered, of any facts that would have justified such an arrest and detention. It appears that this witness was present and testified at the preliminary hearing; that the district attorney was informed and believed that she was present in the city and intended to be and would be present as a witness at the trial; that on July 21, a subpœna was delivered to the sheriff; that on several occasions and at different hours of the day a deputy sheriff went to the address named on the subpœna, being the one given by this witness at the preliminary hearing, and the one where the radios were found, and was unable to find any one at home; that he inquired of a man downstairs in the same building, who told him that Miss Johnson had stated to him that she was going to travel and that her first stop would be San Francisco; and that inquiry was made at the post office and no notice of change of address or forwarding address had been left there. Subpœnas were issued and sent to the sheriffs of all counties along the coast between San Diego and San Francisco, inclusive. The sheriffs of six of these counties, including San Francisco, made return to the effect that after search they were unable to find the witness. Based upon this showing, the evidence was admitted. As recently said by this court in People v. Noone, 22 P.(2d) 284, 287:

"The question of 'due diligence' contains three fundamental elements, to wit: (1) It is addressed to the discretion of the trial court; (2) the trial court's determination will not be disturbed on appeal unless it is clearly shown that there was an abuse of discretion; and (3) each case must be determined upon its own facts." In People v. Hewitt, 78 Cal. App. 426, 248 P. 1021, 1024, it is said:

[7, 8] "The 'due diligence' required by section 686 of the Penal Code does not mean or require that the entire state shall be searched for an absent witness, or a subpœna sent to every county in the state with instructions to the officers thereof to make a search for the witness, and, therefore, no such showing is required to be made as a prerequisite to or foundation for the allowance of the deposition of the absent witness taken at the preliminary examination at the trial. The rule is well stated in Heintz v. Cooper, 104 Cal. 668, 670, 38 P. 511, 512, as follows:

" 'Diligence is a relative term incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phases and bearings, as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed.' "

[9, 10] We are unable to hold that there is here no evidence of a substantial character to support the trial court's conclusion. Even the appellant sees no lack of diligence except a failure to arrest and detain the witness. Assuming that some circumstances might call for such drastic action, it can hardly be held to have been absolutely essential here. All that the due diligence referred to in the statute means is that a reasonable effort to locate the witness shall be made. What constitutes a reasonable effort naturally varies with the facts of each case. Where a witness has a home and a fixed address, which has apparently not been given up or changed and where he is traveling or away for an indefinite time, no good could be accomplished by requiring that an officer make a pretense of looking for the witness in a number of places where he could not reasonably be expected to be found or by requiring that an extensive or expensive search be made in every county of the state. There is nothing to indicate that any greater degree of diligence in this case would have secured the presence of this witness or that the diligence used was not reasonable under the circumstances. There is a presumption that the discretion of the court in this matter has been properly exercised and we think this presumption has not been overcome by a clear showing.

[11, 12] The next contention made is that the statements and admissions made by the appellant to the officers were not admissible since the corpus delicti had not been proven. Aside from these admissions there was evidence that these two radios had been stolen from this store on the night of May 29; that they were found in the home of Miss Johnson and Miss Van Norton on June 1; that at some time between those dates they were sold to these two parties by the defendant, one of them for less than one-third of its value and the other for a little more than one-third of its value; and the radios were positively identified. This was sufficient to establish the corpus delicti. Some point is also made of the fact that the officer, to whom the statements were made, admitted that he had not warned or instructed the appellant as to his right to remain silent or told him that any statements made by him might be used against him. This fact alone did not make the statements involuntary or inadmissible. People v. Clark, 28 Cal. App. 735, 153 P. 980. The record contains ample evidence that the statements in question were freely and voluntarily made.

[13] The appellant complains of the refusal of the trial court to give a requested instruction on the presumption of innocence. With respect to this, the court read to the jury an instruction containing the exact language of section 1096 of the Penal Code, which sufficiently covered the subject. Pen. Code, § 1096a. Another instruction given is attacked as containing an improper inference and as, to some extent, weighing the evidence. The appellant reads into the instruction something not contained therein and the objection is without merit.

[14] The only other points raised are that the court erred in failing to advise the jury to return a verdict of acquittal and that the evidence is not sufficient to justify the verdict. These points are covered by what has already been said. The statements made by the appellant after his arrest were practically a confession and, with the other evidence, furnish a sufficient answer to these contentions.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

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COUGHMAN v. HARMAN.

Civ. 4847.

District Court of Appeal, Third District, California.

Nov. 6, 1933.

1. Appeal and error 🔑110.

No appeal lies from order denying motion for new trial.

2. Automobiles 🔑242(8).

Where driver of automobile gave no warning, and it was not shown that deceased pedestrian had any warning or knowledge of approach of automobile, presumption arises that decedent was exercising ordinary care (Code Civ. Proc. §§ 1961, 1963, 2061).

3. Automobiles 🔑160(4).

Statute giving automobile driver right of way over pedestrian crossing highway at point other than crosswalk, if applicable in open country, *held* not to relieve automobile driver from obligations otherwise imposed (St. 1923, p. 517, § 131½(c), as added by St. 1931, p. 2127, § 47; p. 553, § 113, as amended by St. 1931, p. 2120, § 34).

4. Automobiles 🔑245(44).

Whether speed of 40 miles per hour at time automobile struck pedestrian walking on graveled part of highway off paved portion at curve constituted negligence, *held* question for jury (St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120, § 34).

5. Automobiles 🔑245(6).

Negligence of driver of automobile based on failure to give warning of approach, and failure to swerve to left on paved highway instead of swerving to right to avoid pedestrian on graveled portion, *held* question for jury (St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120, § 34).

6. Negligence 🔑1.

"Negligence" is failure to observe that degree of care, protection, and vigilance which circumstances justly demand.

[Ed. Note.—For other definitions of "Negligence," see Words & Phrases.]

7. Appeal and error 🔑999(1).

Determination of jury upon facts is binding on appeal.

8. Automobiles 🔑245(49).

Whether driver of automobile which struck pedestrian on graveled part of highway off paved portion at curve was confronted by sudden peril, *held* question for jury.

9. Automobiles 🔑160(4).

Automobile driver's right of way is conditioned upon driver's exercising due care, and does not extend to entire width of highway (St. 1923, p. 517, § 131½(c), as added by St. 1931, p. 2127, § 47).

10. Automobiles 🔑160(4).

Right of way of motorist over pedestrian crossing highway *held* not to extend to graveled portion of highway off paved part (St. 1923, p. 517, § 131½(c), as added by St. 1931, p. 2127, § 47).

11. Automobiles 🔑245(72).

Contributory negligence of pedestrian struck by automobile after crossing highway and reaching graveled part off paved portion at curve *held* question for jury (St. 1923, p. 517, § 131½(c), as added by St. 1931, p. 2127, § 47).

12. Death 🔑77.

In death action mortality tables do not constitute absolute limit of life expectancy of person of sound mind and body.

13. Death 🔑99(4).

$5,000 to surviving widow for death of husband, over 83 years old, with life expectancy of 3.20 years, earning approximately $50 monthly, and in good health, *held* not excessive.

14. Death 🔑104(3).

Instruction authorizing jury to assume that life of deceased husband would continue during lifetime of plaintiff, who had much longer life expectancy, *held* erroneous.

15. Appeal and error 🔑1170(9).

In action for wrongful death, erroneous instruction on measure of damages *held* not to warrant reversal, where damages were not excessive and did not result from passion or prejudice (Const. art. 6, § 4½).

16. Appeal and error 🔑757(4).

Erroneous instruction does not warrant reversal where all other instructions bearing upon same question are not brought to appellate court's attention in appellant's brief (District Court of Appeals Rules, Rule 8).

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

Action by L. A. Coughman against W. Harman. From a judgment in favor of the plaintiff, and from an order denying his motion for a new trial, the defendant appeals.

Appeal from the order dismissed, and judgment affirmed.

Edward Bickmore, of Merced, for appellant.

C. Ray Robinson and James D. Garibaldi, both of Merced, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action, the widow of D. A. Coughman, deceased, had judgment against the defendant in the sum of $5,000 damages for the death of said D. A. Coughman, alleged to have been caused by the negligence of the defendant. From this judgment the defendant appeals.

[1] The appeal is also taken from the denial of the defendant's motion for a new trial. As no appeal lies from an order denying a motion for new trial, the appeal, in so far as it purports to be taken from such denial, is hereby dismissed.

The complaint alleges that on or about the 30th day of December, 1931, the defendant, while proceeding in a westerly direction on the Los Banos highway, a public highway in the county of Merced, near the intersection of the Los Banos and El Nido roads, drove and operated a certain Chevrolet automobile in a careless and negligent manner, and without the exercise of due care and skill, so that said automobile ran into and instantly killed D. A. Coughman, the husband of the plaintiff in this action. The incident which we have just mentioned occurred at about 5:30 o'clock p. m. on the day mentioned. The cause was tried before a jury, which returned a verdict in favor of the plaintiff for the sum of $5,000. The collision between the automobile and the deceased occurred on or near the line between Madera and Merced counties, at a place known as the Y, caused by the juncture of the paved highway leading directly south from the city of Merced and with the paved highway leading west over the Pacheco Pass into the Santa Clara valley. At the Y caused by the juncture of these two highways, an oil and gas station was owned and operated by C. A. Coughman, a son of the deceased. South of the service station and across the highway leading to the Pacheco Pass was the residence or cottage occupied by C. A. Coughman, and by the plaintiff and her husband. At the time of being struck by the automobile the deceased had crossed the highway from the south and had reached a point about 8 feet north thereof, being a portion of the graveled premises surrounding the service station to which we have just referred. There were no crossings or pedestrian lanes leading across the highway from the residence occupied by the deceased to the service station. In driving from the south, one taking the Los Banos or, as it is also called, the Pacheco Pass highway, must make a left-hand turn.

[2] The record shows that automobile drivers on the highway in question coming from the south, frequently drive at such a speed that the momentum with which they are driving, in making the turn carries their cars off the paved portion of the highway onto the graveled part of the premises surrounding the service station. Just prior to reaching the turn leading westward on the Los Banos or Pacheco Pass highway the defendant had turned on the lights of his machine. At or near a culvert to the south or southeast of the service station the defendant, in driving northward, passed a truck and trailer driving southward. The speed of the truck and trailer was estimated at from 35 to 40 miles an hour. The defendant, in driving northward and turning onto the Los Banos or Pacheco Pass highway to the westward, estimated his speed at 35 to 40 miles an hour. Just after the truck had passed to the southward it appears that the deceased started across the highway in a "little trot," and continued northerly until he reached a point heretofore stated at about 8 feet, by some of the witnesses estimated at from 6 to 8 feet, on the graveled premises north of the paved portion of the highway. The defendant, coming from the south, according to his own testimony, saw the deceased just after the truck had passed, and instead of turning to the south or keeping on the paved portion of the highway, turned to the right, apparently with the intention of passing between the deceased and the service station, over the graveled premises which we have described. The defendant's version of swerving to the right was that in so doing he thought to pass in front of, and to the right of, the deceased. In so doing the automobile did pass in front of the deceased, but at just this moment the automobile and the deceased came in contact somewhere near the place where the left front fender joins the running board. In the contact the deceased was thrown several feet, receiving injuries from which he died in a very few minutes. The tracks on the pavement or gravel indicated skid marks of some 45 feet from where they began to where the deceased was killed, and continued on some 75 feet beyond that point, showing that from the time the brakes on the automobile were forcibly applied the car skidded approximately 120 feet. There is nothing in the record showing that the defendant, as the driver of the automobile, gave any sound or warning of his approach, nor is there anything in the record indicating that the deceased had any information warning, or knowledge of the approach of the defendant's automobile. Under such circumstances, so far as the deceased is concerned, the presumption applies that he was taking ordinary care for his safety, and this presumption comes to the aid of the plaintiff in this case (sections 1961, 1963 and 2061, Code Civ. Proc.; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529), and was entitled to be considered by the jury in determining whether the deceased was or was not guilty of contributory negligence in inducing the event which caused his death.

[3] The first contention of the appellant is that under subdivision c of section 131½ of the California Vehicle Act, which became

effective August 14, 1931 (as added by St. 1931, p. 2127, § 47), the defendant had the right of way, and therefore that the deceased should not have been crossing the highway. This contention goes beyond the terms of the subdivision referred to, which reads as follows: "Every pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right of way to vehicles upon the roadway, provided that this provision shall not relieve the driver of a vehicle or the pedestrian from the duty to exercise due care."

Assuming that the appellant's contention is correct that this rule as to the right of way applies in the open country where there are no crosswalks or cross lanes, yet at the same time it does not relieve an automobile driver from the obligations imposed upon him by subdivision a of section 113 of the same act (as amended by St. 1931, p. 2120, § 34), which requires that the driver of a "vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

[4-6] The map and photographs introduced in evidence show a physical condition which the jury had a right to take into consideration in determining whether one driving an automobile at 40 miles an hour was driving the same at a careful and prudent speed, or whether the speed was such as to endanger life, limb, or property in the vicinity of the service station. The photographs show the juncture of roads which may be approached from several directions, the curves in roads, the residence of the owner and attendant of the service station, and the location of the service station which would have to be approached by crossing the highway, in order to reach the same.

There being nothing in the record to establish the contrary, the presumption to which we have referred, that the deceased was taking due care for his own safety, the fact that he had reached a point 6 or 8 feet north of the paved portion of the highway, would support the conclusion of the jury that the deceased had taken the precautions necessary and had reached the place where his safety would be reasonably assured had the automobile been operated prudently and with due regard to the safety of limb, life, or property of others. It was for the jury to determine whether, as a prudent and careful driver, the defendant should have given some warning of his approach, or should have remained upon the highway and if necessary to avoid a collision, swerve to the left instead of going across to the north of the highway onto graveled premises to a place where a pedestrian would ordinarily consider a place of safety. These were questions for the jury. Just as stated by the court in Cooley v. Brunswig Drug Co., 30 Cal. App. 58, 157 P. 13, 15, quoting from Judge Cooley's Work on Torts, to wit: "Negligence is the failure to observe, for the protection of the interest of another person, that degree of care, protection and vigilance which the circumstances justly demand, whereby such other person suffers injury." And then adds: "It is a relative term, depending upon inferences to be drawn from many facts and circumstances which it is the province of the jury to draw in each particular case." Quoting further as follows: "It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff." (Citing a number of cases.) And then adds: "And when they do so find upon facts as to which reasonable minds might differ in the conclusion reached, their decision is not subject to review on appeal."

Again, as said by this court in the case of Fahey v. Madden, 58 Cal. App. 537, 209 P. 41, 42: "Moreover, since he was walking away from the pavement, and might reasonably expect that the driver would attempt to keep his machine thereon, what more natural thing than for the pedestrian to try to get still further away when he found that the machine was bearing down upon him? Manifestly his position upon the highway must be regarded in determining what movement reasonable care would require of him when it appeared to him that he was in danger of being run over." In the Fahey Case, just as in the present instance, the driver turned the course of his automobile in the direction toward which the pedestrian was walking, went off the paved portion, and inflicted the injury.

[7] A somewhat similar case is that of Hamblin v. Schultis, 64 Cal. App. 104, 220 P. 320, where two pedestrians were crossing a street, and one of whom was injured just as she had reached the curbing, by an automobile which was swerved in the direction in which the pedestrians were walking, in an attempt to pass in front of them. Such instances present facts for the jury to determine, and whether found in favor of the plaintiff or the defendant, the rule applies that the determination of the jury upon the facts is binding upon appeal, and courts cannot declare as a matter of law either that the plaintiff was negligent or that the defendant was negligent.

The record in this case, as we have stated, does show that the brakes were applied to the automobile with considerable force at a distance of some 45 feet from where the deceased was struck, but it also shows that the automobile traveled some 75 feet beyond that point before it came to a stop. We find no testimony in the record as to how far an au tomobile, moving at a speed of 40 miles an hour, will travel after the brakes have been applied with such force as to skid the wheels, but we think the jury had a right to take into consideration the 120 feet that the automobile skidded along in determining whether the defendant was driving at only 40 miles an hour, or whether he was exceeding that limit by a great many miles.

[8] Again, it was within the province of the jury to determine, under all the circumstances, whether the defendant was confronted by such a sudden peril that he should be excused for not exercising that sudden degree of care or caution which in the light of after events might be shown to have been most advisable. In this particular the court specifically instructed the jury that this rule of law should be taken into consideration in determining whether, under all the circumstances, the defendant was excusable or liable for the injuries inflicted by his manner of driving.

[9] The cases cited by the appellant to the point that there can be no recovery if the defendant, after becoming aware of the plaintiff's peril, did what an ordinarily prudent person would have done under the same or similar circumstances to avoid injury, sufficiently support the rule of law just as contended for, but the facts bearing upon the question as to whether the defendant so acted are to be determined by the jury unless a situation is presented where reasonable minds cannot differ. Even under the subdivision of section 131½ of the California Vehicle Act, the appellant did not have the absolute right of way. That right of way is conditioned upon the driver of the vehicle exercising due care. Nor does that right of way extend to the entire width of the highway belonging to the state.

[10] In the instant case the record shows a macadamized strip 20 feet in width constructed and designed for vehicular traffic. The graveled premises leading from this macadamized strip to the service station constituted no part of the roadway over which the section accorded to the plaintiff a prior right. The moment the automobile left the macadamized strip and started over across the graveled premises where the deceased was struck, the prior right claimed by the appellant ceased. The deceased being on the graveled premises first and in a place of safety where, if the appellant had remained on the part of the roadway over which he had priority no injury would have resulted, the priority of right was in the deceased and not in the driver of the automobile.

[11] In the absence of evidence it cannot be assumed that the deceased had any knowledge that he was in danger of being injured after he had crossed the macadamized portion of the roadway and had reached the situation where automobiles are not supposed to travel and where automobile drivers had no right of way. The evidence shows that the appellant was aware of the presence of the deceased. Thus, as stated in California Jurisprudence 1928, Permanent Supplement, page 258: "Where the evidence shows that the plaintiff (deceased) attempted to cross the street or highway in advance of the defendant's oncoming vehicle, a recovery is sustainable unless it appears that to the plaintiff's (deceased's) knowledge the defendant was not aware of his presence, or for some reason could not or would not slacken speed, stop or swerve his car. The issue as to the plaintiff's (deceased's) appreciation of the danger of collision is to be determined primarily with the view to his knowledge as to the speed of the vehicle and its distance from him at the time when he attempted to cross the way."

Here, the evidence establishes conclusively that even if the deceased had knowledge of the approach of the automobile being driven by the appellant, he had time to, and actually did, cross that portion of the roadway set apart for the use of automobiles.

As to the points relied upon for reversal which we have been considering it must be held that the appellant cannot be relieved from liability as a question of law.

[12, 13] As an additional ground for reversal the appellant contends that the damages awarded were and are excessive. The record shows that the plaintiff at the time her husband met his death was 64 years of age; that the deceased was aged 83 years and 9 months. The life expectancy of the plaintiff, according to mortality tables, was 11.67 years; that of the deceased, 3.20 years. The deceased was earning approximately $50 a month; was in good health, physically and mentally sound. Upon these facts it is contended that for 3.20 years the deceased would have earned the sum of $1,920, one-half of which would have probably been used for his own support, leaving $960 for the support of the plaintiff; and that the remainder of the damages allowed, covering comfort, loss of society and protection for an estimated 3.20 years, was and is grossly excessive.

There is nothing in the record indicating that the jury was actuated by malice or a desire to award the plaintiff an undue sum of money as damages for the losses sustained by her. While the mortality tables allowed the deceased only 3.20 years in which to live, those tables are only an approximation of how long any one may be said to survive, and by no means constitute an absolute limit as to how many years a person of sound mind and body may remain alive. Common experience teaches us that many individuals live beyond the period of life which the tables would have allotted to the deceased in this case. We do not very well perceive how this court can say as a matter of law that the sum of $5,000 is an excessive sum to award a widow for the loss of the comfort, protection, and society of her husband, even though mortality tables limit his supposed span of life to a very few years.

There being nothing to indicate passion or prejudice on the part of the jury, we find no reason for disturbing the verdict on the grounds of excessive damages. A human life, if worth anything to another is certainly worth at least the sum of $5,000. The jury was specifically told that nothing could be allowed as compensation for grief or sorrow.

[14, 15] It is finally contended that the court erred in its instructions to the jury. In this particular our attention is called to the following: "You are instructed that it is proper for you to consider the value in money of the benefits which from all the circumstances of the case, the plaintiff, Mrs. D. A. Coughman, might be reasonably expected to derive from her husband, D. A. Coughman, during the remainder of her life expectancy, assuming that her husband's life was to be continued for that period." This instruction appears to have been based upon the language contained in the opinion of the court in deciding the case of Parsons v. Easton, 184 Cal. 764, 195 P. 419, where it is said that the life of the deceased might have been assumed to continue during the lifetime of the person claiming damages. The facts in the case of Parsons v. Easton, supra, justified the language there used, but the language used in an opinion is not always a correct basis upon which to build an instruction to be used in another case where the facts are dissimilar. In the case at bar the life expectancy of the plaintiff was much greater than the life expectancy of the deceased. Therefore, it was incorrect to advise the jury that in determining damages, it might be assumed that the life of the deceased would continue during the lifetime of the plaintiff, the one having the much longer life expectancy. However, there are two reasons why the verdict cannot be disturbed on account of the giving of an incorrect instruction. The first reason is, just as we have stated in this opinion, that the damages awarded do not appear to be excessive, or are not shown to have been the result of any passion or prejudice on the part of the jury. This being the case, section 4½ of article 6 of the Constitution applies, for the simple reason that neither as a question of fact nor as a question of law does it appear that there was any miscarriage of justice. The plaintiff being entitled to damages, it follows that she was entitled to a verdict which would fairly compensate her for the loss sustained.

[16] The second reason which precludes a reversal for the giving of the quoted instruction is that the appellant has made no attempt whatever to comply with rule VIII of this court, where in cases it is alleged that instructions given to the jury are erroneous, all the other instructions bearing upon the same question must be printed in the appellant's brief. For aught that appears in the appellant's brief, it may be that the court correctly instructed the jury as to the measure of damages and the manner of determining the same. Not having called our attention to all the instructions given, and nothing having been stated indicating that other instructions were not given on the subject of damages, we are not called upon to do so, yet we have examined the record and found that the court did correctly instruct the jury as to the elements that should be considered by them in estimating the damages. The limited amount of the verdict shows that such instructions were followed by the jury.

Irrespective of this omission, however, we think that as stated the error is cured by section 4½ of article 6 of the Constitution.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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135 Cal.App. 395

MORRIS PLAN CO. OF ORANGE COUNTY v. KAHEN.

Civ. 1443.

District Court of Appeal, Fourth District, California.

Nov. 21, 1933.

1. Courts 🔑99(1).
Questions decided on motion to dismiss appeal become law of case.

2. Appeal and error 🔑185(1).
Parties who failed to object to respective jurisdictions of justice and superior courts, waived objection, and could not raise jurisdictional question for first time in District Court of Appeal.

3. Appeal and error 🔑907(3).
Judgment supported by findings must be affirmed, where appeal is on judgment roll alone.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by the Morris Plan Company of Orange County against Frederick E. Kahen, commenced in justice court, in which defendant counterclaimed. Judgment was entered for defendant on appeal to the Superior Court, and plaintiff appeals.

Affirmed.

William J. M. Heinz, of Anaheim, for appellant.

Charles D. Swanner, of Santa Ana, for respondent.

WARMER, Justice pro tem.

Plaintiff brought this action in a justice's court with a jurisdiction of $300. Defendant Frederick E. Kahen answered and filed a counterclaim. The case was tried in the justice's court, and defendant Kahen appealed to the superior court, which said court tried the case de novo and entered its judgment on the counterclaim in the sum of $55.22 and costs. Plaintiff appealed to this court, and the defendant moved to dismiss the appeal.

[1, 2] The motion to dismiss was denied. Morris Plan Company of Orange County, a corporation, v. Frederick E. Kahen (Cal. App.) 22 P.(2d) 36. All questions therein decided became the law of the case. Deacon v. Bryans, 212 Cal. 87, 298 P. 30, and cases there cited. The record on appeal fails to disclose that any objection was made in the courts below as to their respective jurisdictions, and the parties having failed to make such objection, the same is waived, and cannot be made for the first time on appeal to this court. De Jarnatt v. Marquez, 127 Cal. 558, 60 P. 45, 78 Am. St. Rep. 90, and City of Madera, a municipal corporation, v. Black, 181 Cal. 306, 184 P. 397.

[3] The appeal is on the judgment roll alone, and the judgment is supported by the findings. Therefore, the judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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135 Cal.App. 260

CHAIN v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 4999.

District Court of Appeal, Third District, California.

Nov. 8, 1933.

1. Master and servant ⟹405(1).

Evidence *held* not to establish violation of Industrial Accident Commission's safety orders respecting construction of scaffolds, precluding injured employee from recovering as for employer's serious or willful misconduct (St. 1917, p. 863, § 39; p. 850, § 20(d).

2. Master and servant ⟹405(1).

Any ambiguity in affirmative answers by employer's construction superintendent to questions respecting knowledge of Industrial Accident Commission's safety orders *held* required to be resolved against employer, where employer had ample opportunity at hearings before commission to deny knowledge of orders (St. 1917, p. 863, § 39).

3. Master and servant ⟹416.

Industrial Accident Commission could not, after award had become final, strike therefrom order dismissing employer from liability and thereafter entertain supplemental employee's application based on employer's serious and willful misconduct, without showing of good cause (St. 1917, p. 850, § 20(d).

4. Master and servant ⟹398.

Where accident occurred March 5, 1930, supplemental claim filed March 31, 1932, for employer's alleged serious and willful misconduct *held* not barred by limitations, notwithstanding amendment to statute fixing 12-month limitation became effective in August, 1931 (St. 1917, p. 841, § 11(i), as added by St. 1931, p. 2372).

Proceeding under the Workmen's Compensation Act by Charles A. Daugherty and Mrs. Louise Daugherty opposed by O. H. Chain, employer. To review an order of the Industrial Accident Commission awarding additional compensation as against employer as for serious and willful misconduct, employer brings certiorari.

Order annulled.

Nutter & Rutherford and A. P. Hayne, all of Stockton, for petitioner.

A. I. Townsend and Everett A. Corten, both of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This petition to review an award of the Industrial Accident Commission (Workmen's Compensation Act, Stats. 1917, p. 831) discloses that Charles A. Daugherty, the applicant before the commission, was employed by petitioner, a general building contractor. During the course of his employment Daugherty was assigned the duty of passing lumber from the ground floor to a fellow employee on the roof. To do so he stood upon a scaffold in the center of the building against which the lumber to be passed was placed, one end resting against the scaffold. While so engaged, the scaffold collapsed, injuring applicant.

The scaffold upon which applicant was standing at the time of his injury was from eight to ten feet high, the platform of which was made of two planks, one end being supported by what is known among builders as a "horse," and the other end supported by a built-up structure of two uprights, a horizontal crosspiece on top, and three crossbraces.

The first application filed by the injured employee for compensation was on December 12, 1931, against his employer, the petitioner herein, and the insurance carrier. A hearing was had and an award made granting applicant compensation until termination of disability. The order discharged O. H. Chain, the employer, from liability. Thereafter the insurance carrier petitioned to have a permanent rating fixed, and the Industrial Accident Commission amended its former award by granting applicant a fixed total amount. This order also contained the language, "It is ordered that the employer herein be dismissed and discharged from liability herein." This award was immediately paid. In the meantime and on March 31, 1932, applicant filed a new petition before the commission making the charge for the first time that the employer was guilty of serious and willful misconduct. This application is entitled "Amended Application" and briefly states that the injury which he sustained on March 5, 1930, was proximately caused by the serious and willful misconduct of his employer O. H. Chain. The application closes with a prayer that the portion of the original award discharging O. H. Chain for liability be set aside and annulled and that the applicant be allowed 50 per cent. of all compensation heretofore awarded him. The employer answered the petition, denying the charge of serious and willful misconduct, alleged that the proceeding was barred by section 11 of the Workmen's Compensation Act (St. 1917, p. 841), and further pleaded that the award of February 7, 1932, had become final due to the fact that more than twenty days had elapsed between the date of the award and the petition charging serious and willful misconduct.

A hearing was had upon the issues thus raised and on April 28, 1933, the commission made its award finding the employer guilty of serious and willful misconduct and assessing against him and in favor of applicant, 50 per cent. of the permanent award. A petition for rehearing was denied and the matter is now before us for consideration.

[1] The first point urged upon review is that the evidence does not disclose serious or willful misconduct. The charge is based on the alleged violation of certain general safety orders, being orders Nos. 1121a, 1124c, 1125, and 1127a. These orders relate to the requirements for the construction of scaffolds.

Order No. 1121a refers to a pole scaffold. A pole scaffold, according to this order, is one built alongside of and attached to the wall. In such a structure the uprights must be four feet six inches from the wall and parallel thereto. It requires putlocks, one end of which shall be attached to the wall and the other end to the pole scaffold. We are not here considering pole scaffold.

Order No. 1124c reads: "Scaffold shall not be overloaded. Material shall not be delivered nor be allowed to accumulate to such an extent as to subject the scaffold to a load which it is not intended to support." This order applies to the use of the structure rather than to its construction.

The power of the commission to establish safety orders is found in section 39 of the act (St. 1917, p. 863), which reads: "The commission shall have power * * * to declare and prescribe what safety devices, safeguards or other means or methods of protection are well adapted to render the employees of every employment and place of employment safe as required by law or lawful order." This language is practically identical with a similar provision of the Wisconsin act. In Saxe Operating Corp. v. Industrial Accident Commission, 197 Wis. 552, 222 N. W. 781, 782, the commission had passed an order requiring in passenger elevators that "the landing doors * * * must be closed and locked before the car leaves the landing." It was sought in that case to have a penalty added to the award by reason of a violation of that order. The court, in vacating an award for misconduct, said:

"The order here in question does not deal with the erection, contruction, or equipment of the physical plant of the elevator, but with the element of negligence or want of ordinary care on the part of the elevator operator in failing to close the landing doors before starting the elevator.

"If the commission may subject the employer in this case to the 15 per cent. penalty by adopting the rule which prohibits this negligent starting of the elevator before the landing doors are closed, it may adopt orders which will cover the entire field of want of ordinary care on the part of employees, and thereby subject employers to this penalty in every case where any employee is injured through the negligence of a fellow employee. Such clearly was not the legislative intent. That intent was to subject the employer to the payment of compensation in all cases which came within the statute regardless of the question of whether the injury was caused by want of ordinary care on the part of a fellow employee, and to impose this added compensation in the nature of a penalty where the employer has permitted his physical plant to be operated in such condition that it fails to comply with any statute of this state or any lawful order of the Industrial Commission. In the case of a physical plant, the employer is chargeable with notice of the conditions that prevail in the plant which generally remain fixed and unchanging. But he cannot know in advance of the conditions which may be produced by the negligent or inadvertent acts of his employees."

Furthermore, there is no testimony in this record as to what weight this particular scaffolding was intended to or did support. It also appears from the transcript that the scaffold did not collapse from the weight it bore, but rather due to a lack of balance caused by applicant taking the load away from the two sides unevenly.

Order No. 1125 refers to the dimensions to be used in particular types of scaffolding. This order refers to a scaffold more than thirty-two feet in height and to a "special adjustable" scaffold. In neither of these groups does this structure fall. Furthermore, the testimony shows that it was not the cross-braces that gave way in the structure in the present case, but rather the uprights which were of the dimensions prescribed by the order.

Order No. 1127a has to do with the construction of horse scaffolds and the anchoring of the platforms. The evidence here shows the fault was not in the horse structure but rather, if any, in the built-up support, and therefore this order is not applicable.

We therefore find no violation of any of the safety orders as set out in the rules of the commission.

[2] Petitioner makes some contention that no proof was made of knowledge by petitioner of these orders, the record showing that the superintendent of construction for petitioner was asked, "Are you familiar with the general construction of the safety orders of the Industrial Accident Commission?" "Have you seen that book before?" "Have you read it?" The affirmative answer petitioner claims is only an admission of present knowledge of the orders, but it is apparent that the parties had in mind the period of time covered by the accident, and this ambiguity, if any, may well be resolved against the petitioner, as he had ample opportunity in the various hearings before the commission to deny knowledge of the orders if such were the case.

[3] The next major point urged by petitioner for an annulment of the award is that the order of February 6, 1932, had become final and the commission had no authority to strike from that order the dismissal of the employer from liability and thereafter to entertain the supplemental application for serious and willful misconduct.

Section 20 (d) of the Workmen's Compensation Act (St. 1917, p. 850), provides, "The commission shall have continuing jurisdiction over all its orders, decisions and awards * * * and may at any time, upon notice, * * * rescind, alter or amend any such order, decision or award made by it *upon good cause appearing therefor*, such power including the right to review, grant or regrant, diminish, increase or terminate * * * any compensation awarded, upon the ground that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury."

The first requirement to be noted in section 20 (d) is the requirement which we have italicized, "upon good cause appearing therefor." The order discharging petitioner herein from liability was unconditional in its terms and neither in the subsequent pleading nor in the proof is any showing made why the case should be reopened. In the case of Bartlett Hayward Co. v. Industrial Accident Commission, 203 Cal. 522, 265 P. 195, 199, the court held: "What constitutes 'good cause' depends largely upon the circumstances of each case. The term is relative. It may be assumed that the determination of the commission as to what constitutes 'good cause,' while entitled to great weight, would not be conclusive."

In a later case, Western Pipe & Steel Co. v. Industrial Accident Commission, 126 Cal. App. 225, 14 P.(2d) 530, the granting of an application for a supplementary award on account of serious and willful misconduct was upheld upon review on the ground that the petition and proof showed good cause therefor, to wit, a mistake of fact occasioned by the failure or inability of the employee to produce certain testimony at a prior hearing.

In Hogeberg v. Industrial Accident Commission, 201 Cal. 169, 256 P. 413, 415, it is said: "There can be no question that the commission has no power to increase the original award by amended findings after its original findings and award have become final without new facts or a change in the condition of the applicant to support it."

In the case at bar, there being no showing of any cause whatsoever for the reopening of the case, we must hold the commission acted beyond its authority, for not only must facts be alleged and proved, but they must be such facts as would constitute good cause, to be so found by the commission in the first instance and subject to review by the courts as a final resort.

[4] Petitioner also contends the claim for serious and willful misconduct is barred by the statute of limitations. The accident happened on March 5, 1930, and the supplemental application for the penalty on account of serious and willful misconduct was filed March 31, 1932, or approximately two years after the accident. On August 14, 1931 (St.

1931, p. 2372), there became effective an amendment to section 11 (i), fixing a definite period of limitation of twelve months. Prior thereto, if an original petition was filed in time, claimant was allowed 245 weeks within which to institute proceedings on the ground of further disability. Under the rule reaffirmed in Davis & McMillan v. Ind. Acc. Com., 190 Cal. 631, 246 P. 1046, 46 A. L. R. 1095, we believe petitioner has filed in time and his petition is not barred by the statute.

For the reason that it does not appear from the evidence that there was any violation of the safety orders of the commission, and upon the further ground that no cause, good or otherwise, has been shown why the commission should rescind, alter, or amend its original order made herein, the order finding petitioner guilty of serious and willful misconduct is hereby annulled. Other points are suggested by petitioner, but the conclusions we have reached make it unnecessary to give this consideration.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

KELLETT v. KELLETT. *

Civ. 4894.

District Court of Appeal, Third District, California.

Nov. 6, 1933.

Hearing Granted by Supreme Court Jan. 4, 1934.

1. Divorce 🔑184(1).

Decision affirming order denying plaintiff's motion to vacate interlocutory divorce decree *held* to have established validity of interlocutory decree and settled all issues therein contained, together with all issues which might have been properly presented on such appeal.

2. Divorce 🔑183.

Where plaintiff, appealing from divorce decree, also gave notice of appeals from judgments in other cases consolidated with divorce case for trial, but proceedings in the other cases were not in record, appeals as to other cases required dismissal (Code Civ. Proc. §§ 953a, 954).

3. Divorce 🔑184(1).

Former decision on appeal affirming interlocutory divorce decree as respects validity of property settlement *held* law of case binding on appeal from final decree to extent of determining status of parties and property rights.

4. Divorce 🔑165(1, 3), 167.

Final or interlocutory divorce decree may be vacated on proper motion in original action or independent equitable suit for intrinsic fraud, but equity will not interfere with decree secured by collusion of parties.

5. Divorce 🔑184(6).

There being substantial evidence to support order denying plaintiff's opposition to final divorce decree, *held* decree should be affirmed.

6. Divorce 🔑223, 286.

Allowance of counsel fees in divorce proceeding rests in trial court's sound discretion, exercise of which may not be interfered with except for abuse thereof.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Marion Clara Kellett against Thomas N. Kellett. From a final divorce decree entered in plaintiff's favor against her opposition, from a subsequent order denying plaintiff's application for certain counsel fees, and from three other judgments entered in separate actions between the same parties consolidated with the present cause for trial, plaintiff appeals.

Final divorce decree and order denying counsel fees affirmed, and purported appeals from the other judgments dismissed.

A. Edward Nichols and C. C. Caswell, both of Los Angeles, for appellant.

Morse & Shoop and George R. Maury, all of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a final decree of divorce which was rendered and entered in her favor on March 27, 1931, on the theory that she was aggrieved by the court's denial of her opposition to the entry thereof. The plaintiff has also appealed from a subsequent order of court, dated July 10, 1931, denying her application for counsel fees to enable her to defend against an appeal which her husband took from a previous order allowing her $200 attorney's fees during the trial of the cause. There is also another omnibus notice of appeal from three other judgments which were entered in separate actions between the same parties incident to the divorce proceeding, which suits, by stipulation, were consolidated with this cause for trial.

[1] July 29, 1927, the plaintiff filed this suit for divorce on the ground of extreme cruelty. The defendant failed to answer the complaint. August 10, 1927, plaintiff's attorney filed a demand for default, which was duly entered by the clerk on that same day. On November 12, 1927, an interlocutory decree of

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 39 P.2d 203.

divorce was signed by the judge and entered. Based upon the evidence adduced at the hearing, that decree determined that all the allegations of the complaint were true, and thereupon awarded the plaintiff a divorce from the defendant on the ground of extreme cruelty, and also made an award of real and personal property to the respective spouses pursuant to the terms of a written settlement of property rights which had been previously executed by them. This instrument was introduced in evidence. Subsequently the plaintiff moved to vacate the interlocutory decree under the provisions of section 473 of the Code of Civil Procedure, on the ground that it was procured by fraud. From the order denying this motion the plaintiff appealed. The order denying plaintiff's motion to vacate the interlocutory decree was affirmed by the appellate court. Kellett v. Kellett, 110 Cal. App. 691, 294 P. 755. This decision established the validity of the interlocutory decree and settled all the issues therein contained, together with all issues which might have been properly presented on that appeal.

The plaintiff subsequently filed an opposition to the entry of the final decree of divorce on the ground that she was mentally incompetent to understand or conduct the suit for divorce during the time it was pending; that she did not desire a divorce from her husband; and on the further ground that the alleged acts of cruelty were condoned by the spouses having engaged in matrimonial intercourse after the rendering of the interlocutory decree. This opposition was heard upon affidavits which were filed by the respective parties. The plaintiff also averred that a separate suit had been commenced by her which was then pending in the superior court of Los Angeles county to set aside the interlocutory decree on the grounds last mentioned. Counteraffidavits were filed by the defendant upon this hearing which contradicted all the material averments of the plaintiff. This opposition to the entry of the final decree was formally heard by the court and denied. On March 27, 1927, the court signed and filed a final decree of divorce in exact accordance with the terms and conditions of the interlocutory decree. A motion for new trial was denied.

Upon supplemental application therefor, an order to show cause was issued, and upon hearing thereof the court made an order on May 4, 1931, for the defendant to pay plaintiff $200 as attorney's fees and costs which were incurred by her in presenting her motion for a new trial. From this order the defendant perfected an appeal. Subsequently, pending that appeal, the plaintiff made another application for an additional allowance of counsel fees and costs with which to defray the expenses of the appeal of the defendant from the previous order. This last application was denied on July 10, 1931. From the final decree of divorce, and from this last-mentioned order denying plaintiff's application for additional counsel fees and costs, she has appealed.

[2] The appeal is ineffectual with respect to the judgments in the other three cases which were consolidated with this case for the purpose of trial, for the reason that none of the pleadings or proceedings in any of those cases are contained in this record on appeal. It is therefore impossible for this court to ascertain what issues were contained in any of those cases. This notice of appeal recites that it is taken from "the order denying plaintiff's motion to resist defendant's application for final decree of divorce, entered * * * on the 19th day of March, 1931, and entered in book 787, page 112, on the 27th day of March, 1931, * * * being Case No. D-65544; and from the judgment rendered in * * * case No. D-92871, * * * and from the judgment rendered in * * * case No. 306434, * * * and from the order denying plaintiff's motion for new trial."

The stipulation consolidating the other three cases with the present action for trial, mentioned them by serial numbers as above recited, and provided that they "may be consolidated with the above case No. D-57350 (which was the Superior Court number of this case) for hearing, and that all the matters therein contained may be heard and adjudicated at this time, and the decision entered herein shall be in complete adjudication of each case herein designated."

The record on appeal in this case was perfected under the provisions of section 953a of the Code of Civil Procedure. It does not contain any of the pleadings, proceedings, findings, or judgments in any of the three cases which were consolidated with this action for trial, except that the findings in one case were subsequently filed in this court. This appeal contains no record from which this court may determine what the issues of those cases were. The only judgment which is contained in this record is the decree of divorce which was entered in this case. That decree makes no reference to either of the other three cases which were consolidated for trial with this action. For the foregoing reasons it is impossible for us to determine the merits of either of these three consolidated cases. Section 954 of the Code of Civil Procedure declares that "If the appellant fails to furnish the requisite papers, the appeal may be dismissed." Pursuant to this section the purported appeals from the judgments which were rendered in the superior court of Los Angeles county, in actions numbered D–65544, D–92871, and 306434, should be dismissed.

The appeal from the judgment in the present case is based upon the contention that it is void and not supported by the evidence, chiefly because the plaintiff was mentally incompetent during the time of the maintenance of the divorce suit and did not understand the nature of the proceeding and did not desire a divorce from the defendant, and because the spouses had engaged in matrimonial intercourse since the rendering of the interlocutory decree, which resulted in condoning the alleged charges of cruelty and authorized the court to refuse to enter a final decree.

The opposition to the rendering of the final decree was heard upon affidavits and oral testimony. The evidence regarding the mental condition of the plaintiff and with respect to the alleged cohabitation of the spouses after the instituting of the divorce suit is conflicting. There is ample evidence to support the decree of divorce on both of these issues.

[3] The questions regarding the validity of the agreement settling the property rights between the spouses, and affecting the two deeds of conveyance of real property which passed between them in fulfillment of that settlement, are affirmed by the decision of the appellate court which was rendered on appeal from the order refusing to set aside the interlocutory decree. Kellett v. Kellett, 110 Cal. App. 691, 294 P. 755. That decision becomes the law of this case with respect to the validity of those instruments. It is binding upon this court to the extent of determining the status of the parties and the distribution of the property rights which are included therein. 34 C. J. 742, § 1154; 9 Cal. Jur. 762, § 113; 9 R. C. L. 459, § 270; McMillan v. McMillan, 215 Cal. 435, 10 P.(2d) 465; De Haven v. Superior Court, 114 Cal. App. 253, 300 P. 95; Klebora v. Klebora, 118 Cal. App. 613, 5 P.(2d) 965.

[4] There is no doubt that a final decree of divorce or an interlocutory decree may be vacated upon a proper motion in the original action or by means of an independent equitable suit for intrinsic fraud. 9 Cal. Jur. 748, § 101; Hendricks v. Hendricks, 216 Cal. 321, 14 P.(2d) 83. But when the decree is secured by collusion of the parties, a court of equity will not interfere with the judgment. In the case last cited the court says: "Equity will not vacate a judgment obtained through the collusive connivance of the parties to the action. To warrant such relief there must be a showing of coercion, imposition or fraud upon the party complaining. Bancroft v. Bancroft, 178 Cal. 359, 362, L. R. A. 1918E, 1029, 173 P. 579; Lanktree v. Lanktree, 42 Cal. App. 648, 651, 183 P. 954. However, the fraud or the means of coercion must be extrinsic or collateral to the subject of dispute in the action wherein the order or judgment complained of was entered. If a judgment or order is the creature of extrinsic fraud, it may be vacated. Where, however, evidence of the coercion or duress or the fraud could have been presented to the court or to an attorney of the complainant's own choosing during the pendency of the action so that full examination of the facts could be made and full protection given to the rights of the parties, equity will not interfere but will leave the parties to the fraudulent transactions where they have placed themselves. Mitchell v. Cline, 84 Cal. 409, 416, 24 P. 164."

[5] During the trial of this cause the appellant was represented at all times by her attorneys. Any coercion or fraud which may have been exercised by the defendant to procure the plaintiff to secure a divorce should have been presented to the trial court in the motion which was made to vacate the interlocutory decree pursuant to section 473 of the Code of Civil Procedure, from which an appeal was prosecuted to the appellate court. Moreover, the execution of the agreement settling property rights, and the maintenance of the suit for divorce by the plaintiff, together with the default of the defendant, indicate that the parties may have previously agreed to the procuring of the divorce. However, the alleged fraud of the defendant and the alleged mental incapacity of the plaintiff were fully presented to the trial court in this action and passed upon adversely to her contention. Since the evidence respecting these issues is conflicting, and there is substantial evidence to support the order denying plaintiff's opposition to the entry of the final decree, the final decree of divorce should be affirmed.

[6] The appeal from the last order refusing to allow the plaintiff additional counsel fees and costs was also heard upon affidavits which were filed by the respective parties. The evidence regarding the plaintiff's necessity therefor is also conflicting. Necessarily, the question of the allowance of counsel fees in a divorce proceeding rests in the sound discretion of the trial court. Stewart v. Stewart, 156 Cal. 651, 656, 105 P. 955; Gay v. Gay, 146 Cal. 237, 79 P. 885; 19 C. J. 197, § 484. In the authority last cited it is said: "The awarding of costs in divorce cases is not a matter of right, but rests in the sound discretion of the trial court." Except for an abuse of that discretion the order of the trial court may not be interfered with on appeal.

Since there is substantial evidence in the present case to support the order of the court dated July 10, 1931, denying plaintiff's last application for additional counsel fees and maintenance, it is affirmed.

For the foregoing reasons, the purported appeals from the judgments in actions numbered D–65544, D–92871, and 306434 are dismissed, and the final decree of divorce is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

135 Cal.App. 208

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. BOARD OF SUP'RS OF RIVERSIDE COUNTY et al. (LOVELAND ENGINEERS, Inc., Intervener).

Civ. 666.

District Court of Appeal, Fourth District, California.

Nov. 7, 1933.

Rehearing Denied Dec. 5, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. **Certiorari 🔑68.**
On certiorari to review proceedings before board of limited jurisdiction, involving question whether facts presented conferred jurisdiction, court may review evidence.

2. **Certiorari 🔑68.**
On certiorari to review proceedings of board of limited jurisdiction, involving question whether facts presented conferred jurisdiction, review is strictly limited to facts before board.

3. **Waters and water courses 🔑225**
Proceedings by board of supervisors in organization of irrigation district are reviewable on certiorari (St. 1897, p. 254, as amended).

4. **Certiorari 🔑64(2).**
Where evidence before inferior board does not establish jurisdictional facts, finding of jurisdictional facts does not preclude inquiry by court on certiorari whether finding is supported by evidence.

5. **Waters and water courses 🔑225**
Where return to writ of certiorari to review proceedings before board of supervisors in organization of irrigation district was incomplete, order requiring supplemental return *held* proper (Code Civ. Proc. § 1075).

6. **Appeal and error 🔑901.**
Appellants have burden to show error from record.

7. **Courts 🔑35.**
Where superior court directed filing of supplemental return to writ of certiorari and order for judgment recited that all parties were heard after full return was made, presumption arises that statute requiring full hearing after supplemental return was complied with, in view of presumption in favor of court of general jurisdiction (Code Civ. Proc. § 1075).

8. **Waters and water courses 🔑225**
Oral unsworn report of clerk made to board of supervisors as to number of qualified signers to petition for organization of irrigation district, *held* insufficient to support jurisdictional finding of board as to sufficiency or number of signatures to petition (St. 1897, p. 254, §§ 1, 2, as amended by St. 1919, pp. 714, 715, §§ 1, 2).

9. **Waters and water courses 🔑225**
Matter of canvassing vote at election for organization of irrigation district, declaring result of election, and declaring district organized, *held* not reviewable on certiorari to review proceedings of board of supervisors in matter of organization of irrigation district (St. 1897, p. 256, § 9, as amended by St. 1919, p. 718, § 3).

Appeal from Superior Court, Riverside County; F. A. Leonard, Judge.

Proceedings by the Security-First National Bank of Los Angeles (substituted for Henry E. Cooper, deceased), against the Board of Supervisors of Riverside County and others, wherein the Loveland Engineers, Inc., intervened, to review the proceedings and orders of the Board of Supervisors in connection with the organization of the Hemet Irrigation District. From a judgment annulling the proceedings and orders of the Board of Supervisors, and from an order refusing to vacate the judgment, the defendants appeal.

Attempted appeal from order denying a new trial dismissed, and judgment, and order refusing to vacate the judgment, affirmed.

See, also, 127 Cal. App. 115, 15 P.(2d) 200.

Earl Redwine, Dist. Atty., of Riverside, and James A. Hall, of Hemet, for appellants.

A. Heber Winder, of Riverside, for respondent.

BARNARD, Presiding Justice.

A writ was issued in the trial court for the purpose of reviewing the proceedings and orders of the board of supervisors of Riverside county in connection with the organization of the Hemet Irrigation District, which proceedings had been taken under the Act of March 31, 1897 (Stats. 1897, p. 254), and the various acts amendatory thereof. After a hearing on the matter, an order and judgment were entered annulling the proceedings and orders of the board of supervisors on the ground that the board was without jurisdiction to make the orders in question. The defendants named in the petition and an intervener have appealed from the judgment and from an order refusing to vacate the same, and have attempted to appeal from an order denying a new trial.

[1] The main attack upon the judgment is founded upon the contention that under authority of Halpern v. Superior Court, 190 Cal. 384, 212 P. 916, the recitals in the reso-

lutions and orders passed by the board, to the effect that evidence had been received and that certain facts existed, are conclusive. The case referred to involved the orders of a court of general jurisdiction and is not controlling here. An exception to the general rule, that the evidence will not be reviewed on certiorari, applies in the case of a board or tribunal of limited jurisdiction where a question is raised as to whether the facts presented to such a board were sufficient to confer jurisdiction. In Garvin v. Chambers, 195 Cal. 212, 232 P. 696, 700, the court said:

> "It is a fair summary of the decisions of this state, dealing with the scope of statutory certiorari, to say that the evidence adduced upon the hearing before an inferior board or tribunal having limited jurisdiction may be brought up to the reviewing court upon certiorari for the sole purpose of determining whether or not, from the evidence before it, the finding of a jurisdictional fact by such inferior board or tribunal is sustainable, and if there be no evidence to sustain such decision it must be annulled."

[2, 3] It is equally well settled that in such a case the inquiry is strictly limited to the facts which were before the board and on which it acted in making its orders. The scheme provided in the Irrigation District Act for the organization of an irrigation district imposes certain judicial functions on a board of supervisors and their proceedings therein are subject to review on certiorari. Imperial Water Company v. Supervisors, 162 Cal. 14, 120 P. 780.

The main question to be here decided is whether the record, as reviewed in the trial court, sustains the finding made to the effect that the board did not have jurisdiction to make the orders attacked.

A return, certified as correct by the county clerk as ex-officio clerk of the board of supervisors and custodian of its records, was filed on March 21, 1927. This return shows that at the time set for hearing the petition for organization of this irrigation district oral and written protests were presented; that "after some discussion the matter was referred to the Clerk of this Board and the County Assessor to check over the names on the petition to see if they are registered voters and property owners, matter continued one week"; and that a bond was presented and approved. On March 28 the matter was continued another week. On April 4, 1927, the board passed a resolution finding the petition sufficient, in which, after reciting that the board had received evidence and had caused the signatures attached to the petition to be examined and compared with the signatures of the electors of the proposed district as shown by the great register and with the assessment roll of the property owners residing within the district, it was resolved that the board "Find: That the signatures attached to said petition to organize said Hemet Irrigation District are genuine. That the persons who signed said petition to the number of 500 are qualified. That the petitioners include the holders of title or evidence of title to more than 20 per cent in value of the lands included within the proposed district, according to the equalized County Assessment roll of Riverside County, State of California, for the year last preceding." It was further found that the petition and the petitioners had fully complied with the requirements of the act therein mentioned and that a copy of the petition with a copy of the notice of presentation had been forwarded to the state engineer. On June 13, 1927, the board passed a resolution reaffirming its previous resolution of April 4, reciting that a favorable report had been received from the state engineer; that notice of final hearing had been given as provided in the act; and that the board had received and heard all pertinent testimony in connection therewith and had carefully considered all applications for the exclusion of lands from the district. The resolution then proceeded to fix the boundaries of the district and to divide the territory of the district into five divisions.

Under date of September 19, 1927, the minutes of the board recite that the board "proceeded in the regular way of canvassing the vote which is as follows, to-wit: for the formation of a Hemet Irrigation District 268 votes were cast, against the formation of a Hemet Irrigation District 263 votes were cast." On the same day a resolution was passed reciting that an election had been duly and regularly held to determine whether the said irrigation district should be organized; that the board had duly and regularly canvassed the returns of said election, and containing an order that certain described territory was duly and regularly organized as an irrigation district.

[4] While the resolution as passed on April 4, 1927, and as reaffirmed on June 13, 1927, recites that evidence had been received, that the signatures to the petition are genuine, and that "the persons who signed said petition to the number of 500 are qualified," the return discloses no evidence as having been presented to the board in support of these facts. So far as the return itself is concerned, the only indication that any evidence was received is the recital to that effect and the finding made in the resolution passed by the board. While the matter of checking the names with the great register and assessment roll was, on March 21, 1927, referred to the clerk of the board and the county assessor, there is nothing to show that these officials made any report to the board or, if so, what that report was. With

reference to the finding of a board on jurisdictional facts, the court said in Garvin v. Chambers, supra:

> "But when the board or tribunal in question has power to act only upon the establishment of a certain set of facts which necessarily form the foundation of jurisdiction, and, therefore, may be denominated jurisdictional facts, and there is no evidence whatever to show the existence of such facts, a finding by such board or tribunal that those facts do exist cannot foreclose inquiry by a court of competent jurisdiction, upon certiorari, as to whether or not the order sought to be reviewed is without any evidence to support it, or is absolutely contrary to the uncontradicted and unconflicting evidence upon which it purports to rest."

It appears that this matter came on for hearing before the trial court on February 5, 1932, and that after argument the same was submitted. Thereafter and on April 2, 1932, the trial court entered an order reciting that a further return in the matter was necessary and ordering that an amended and/or further return be made which should include the certificate of the clerk of the board setting forth all the testimony, if any, submitted to the board prior to the adoption of its resolution of April 4, 1927, with a similar certificate as to all testimony submitted to the board before the passing of its resolution of June 13, 1927, together with a showing as to all oral testimony taken or received at the hearings before said board relating to said matters including any evidence, if any, taken or received as to the genuineness of the signatures to the petition filed or any evidence with reference to the persons whose names were subscribed to the petition. It was further ordered that if no evidence or oral testimony was taken or if taken and no record was preserved, then such fact should be certified in the return with a statement by way of certificate as to what had transpired before the board relating to these matters; and that a certificate should be returned identifying and describing any and all election returns or written documents or copies of returns or election results, if any, submitted to the board at its meeting on September 19, 1927.

In response to this order a certificate was filed by the clerk of the board setting forth that he was personally present and acted as clerk of the board on April 4, 1927; that no evidence and no testimony was given before the board on that date or at any time prior thereto as to the sufficiency or number of valid signatures to the petition for the organization of this district; that at that time and meeting no witnesses were sworn and no affidavits or certificates were filed with reference to the same; that at that time and place the only statement made relative thereto was the unsworn oral statement of the clerk of the board that "there were about five hundred valid signatures to said petition"; that no other statement, oral or otherwise, was then or at any other time made to the board with reference to said matters; and that the board adopted the resolution finding the petition sufficient with only said statement before it. The clerk further certified that at the meeting of June 13, 1927, no evidence, testimony, statements, or certificates, oral or written, under oath or otherwise, were received or given. The clerk's certificate further set forth that at the meeting of the supervisors on September 19, 1927, the said clerk removed from each of five unsealed envelopes containing the words "Semi-Official Returns" a copy of the result of the votes cast at the several polling places in the proposed irrigation district; that a true copy of these semiofficial returns was set forth in the return theretofore filed; that these semiofficial returns constituted the only record or evidence of the return of the election presented to or considered by the board or used by it in canvassing the returns; and that certain packages purporting to be the official returns from this election, which had never been opened, were still in the possession of the county clerk. This additional return, in the form of a certificate of the clerk of the board was filed on April 6, 1932. On April 15, 1932, an order and judgment were filed annulling the proceedings and orders of the board of supervisors in declaring the Hemet Irrigation District duly organized.

Subsequently the appellants moved to vacate the judgment and for a rehearing, both of which motions were denied. In support of these motions four affidavits were filed. One affiant stated that he was present at the meeting of the board of supervisors when the sufficiency of the petition for the formation of this district was considered; that he does not remember whether or not the clerk of the board testified concerning the same, but he does remember that the attorney for the district was sworn and testified as to the number of acres of land in the district, the number of acres owned by the persons signing the petition, and as to his opinion of the value of the land owned by the persons signing the petition as compared with the value of all of the land in the proposed district. An affidavit by one who had been a member of the board on April 4, 1927, states that on that day the clerk of the board made an oral report "the substance of which gave the board to understand that the petition was all right and had been signed by five hundred persons qualified to sign the same." The affidavit of the then district attorney stated that on April 4, 1927, the clerk of the board "made an oral report and in substance gave the board to understand that the petition was all right and had been signed by five hundred persons qualified to sign the same." The fourth affidavit was by the attorney for the district and recited that he attended the meeting of the board on April 4, 1927, on which occasion the clerk of the board made a report to the board, in substance, as follows: "I have checked the names of the persons who signed the petition for the formation of the Hemet Irrigation District, with the Great Register of the County of Riverside, and with the Assessment Roll of the County of Riverside and I find that there are more than 500 valid signatures of persons who are qualified to sign same." This affidavit further states that the affiant was sworn as a witness before the board on April 4, 1927, and at that time gave certain testimony which is set forth relating to the acreage in the proposed district and the comparative value of that portion owned by the signers of the petition.

[5-7] When the matter was submitted to the court, the return contained no showing as to any evidence having been before the board when the resolutions of April 4, 1927, and June 13, 1927, were passed, or as sustaining said orders. The return did disclose that certain matters with reference to checking names had been referred by the board to the clerk of the board and to the county assessor and failed to show that any report had ever been made to the board by the two parties to whom this matter had been referred. In this situation the court ordered that a further return be filed setting forth the evidence actually presented to the board of supervisors at its hearing, if any there was, and certifying as to what had transpired at that time. This order was proper under the circumstances (Code Civ. Proc. § 1075). The appellants contend that this Code section was not complied with in that, after the filing of the supplemental return or certificate of the clerk, the court decided the matter which had theretofore been submitted without a further hearing and without notice to them. While the appellants state in their brief that no further hearing was had or notice given, these facts nowhere appear in the record. The order for judgment entered by the court on April 15, 1932, contains the recital, "It appearing to the court that a full return has been made in the above matter and the court having heard all parties and having fully considered the matter and finding that the said Board of Supervisors made its orders herein without jurisdiction." * * * This being an order of a court of general jurisdiction all presumptions are in its favor and, among other things, it must be presumed that section 1075 of the Code of Civil Procedure was fully complied with. So far as the record shows, a further hearing may have been had with all parties present and with notice waived. It is incumbent upon the appellants to show error from the record and none here appears.

It is not necessary here to decide the question raised as to whether, in such a proceeding as this, the return made, including the certificate of the clerk of the board purporting to show all that transpired before the board in connection with the making of the orders in question, may be attacked by affidavits of other parties present at the meetings of the board with reference to what actually occurred before the board. See Borchard v. Board of Supervisors, 144 Cal. 10, 77 P. 708. If it be assumed that the affidavits here presented in support of the motions made after judgment do in fact contradict the return made by the clerk of the board and tend to show that any substantial evidence was presented to the board, and if it be further assumed that such contradictory evidence may be considered in such a proceeding as this, the fact remains that no conflicting evidence was before the court when judgment was rendered, with the further fact that these affidavits were presented and considered by the court on the motion to set aside the judgment and on the motion for a new trial and it thus appears that the court has passed upon any possible conflict in the evidence and has resolved the same against the appellants.

[8] Assuming that an oral unsworn report of the clerk made to the board of his finding as to the number of qualified signers to the petition would be sufficient, even where the matter had been referred both to the clerk and the county assessor, it could hardly be held that a statement that "there were about five hundred valid signatures" to the petition is sufficient evidence of the facts required under sections 1 and 2 of the Irrigation District Act (as amended by St. 1919, pp. 714, 715, §§ 1, 2). In our opinion, the record which was before the trial court for review sustains the finding made to the effect that the board of supervisors was without jurisdiction to make the orders and take the proceedings in question.

[9] Section 9 of the Irrigation District Act (as amended by St. 1919, p. 718, § 3) provides that the board of supervisors shall canvass the votes cast at the election held to determine whether or not an irrigation district shall be organized and if, upon such canvass, it appears that a majority of the votes cast are "Irrigation District—Yes," the board shall by order declare the territory duly organized as an irrigation district. The respondent points out that in this instance the majority of the votes cast were not in favor of the organization of the district. The return shows that the only evidence before the board upon its canvass of the votes cast at the election consisted of certain returns made and signed by the elec-

tion officers of the five respective election precincts which had been established for the purpose of this election. Each of these returns sets forth the total number of votes cast in the particular precinct, followed by a statement of the number of "Irrigation District—Yes" votes and the number of "Irrigation District—No" votes. From these returns it appears that a total of 537 votes were cast, that 268 votes were for "Irrigation District—Yes" and that 263 votes were for "Irrigation District—No." While it thus affirmatively appears from the only evidence before the board that a majority of the votes cast in this election, which was held for the purpose of determining whether the district should be organized, was not in favor of the organization of the district, the matters of canvassing the vote, declaring the result, and declaring the district organized are not properly reviewable on a writ of certiorari. Borchard v. Supervisors, 144 Cal. 10, 77 P. 708. However, such a situation illustrates the value of the rule that the board's declaration that it has acquired jurisdiction is not conclusive.

The attempted appeal from the order refusing a new trial is dismissed. The order refusing to vacate the judgment and the judgment are each affirmed.

We concur: MARKS, J.; JENNINGS, J.

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135 Cal.App. 341

BRUNNER v. HUMASON et al.

Civ. 1406.

District Court of Appeal, Fourth District, California.

Nov. 16, 1933.

Hearing Denied by Supreme Court Jan. 15, 1934.

1. Deeds ⚿56(2).

Whether deed has been delivered depends upon grantor's intention to be determined from surrounding circumstances.

2. Husband and wife ⚿273(12).

Evidence *held* to sustain finding that deceased did not intend to deliver to his daughter deed to community property so as to entitle daughter to establish title in property as against deceased's surviving wife.

> Evidence disclosed that deed had been executed which deceased called gift deed and which was kept in safety deposit box to which both deceased and his wife had access, that deceased told several persons that in case he and his wife died together, deed would be delivered to his daughter, but that if he died first, his wife would acquire land.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Helen Brunner against Ida Schilling Humason, formerly Ida Schilling, and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Franklin J. Cole, of Los Angeles, and A. E. Crane, of Topeka, Kan., for appellant.

Franklin G. West and S. B. Kaufman, both of Santa Ana, for respondents.

BARNARD, Presiding Justice.

The plaintiff was the daughter of John Schilling. In 1889, and after the death of the plaintiff's mother, John Schilling married the defendant Ida Schilling Humason, who lived with him for about forty years until his death, which occurred on November 7, 1929, after which she married the defendant Dan W. Humason. During their marriage the Schillings acquired a piece of real property in Orange county which was on September 1, 1922, conveyed to them as joint tenants with the right of survivorship. In this action the plaintiff seeks to establish that this property was conveyed to her during the lifetime of John Schilling.

The complaint alleges that John Schilling was in 1922 and for a long time prior thereto had been the sole and separate owner of the property here in question; that on September 1, 1922, he deeded the property to Virginia T. Smith, and on the same day she deeded the property to John Schilling and his wife as joint tenants; that thereafter John Schilling and his wife executed a deed conveying all of this property to the plaintiff, which deed John Schilling delivered to Ida Schilling to be delivered to the plaintiff at the time of his death; that John Schilling informed the plaintiff of this fact and she signified her acceptance of the transfer; that prior to the execution of this deed Ida Schilling for a good and valuable consideration agreed with John Schilling that upon his death she would deliver the deed to the plaintiff; that in pursuance of said agreement Ida Schilling also executed the deed and became the trustee and agent of John Schilling for the purpose of delivering the deed to the plaintiff; that Ida Schilling has violated this agreement and refuses to deliver the deed; and that by reason of the unconditional delivery of the deed to Ida Schilling for the purpose named and by reason of her agreement the plaintiff became the owner of all of the property described in the deed. It is further alleged that this deed contained a provision giving a life estate in the property to Ida Schilling, and that in consideration of this provision she executed and agreed to deliver the deed. In a second cause of action these allegations are repeated; it being further alleged that Ida Schilling fraudulently took this deed with the intent to deceive John Schilling and with no intent to deliver the same, and that she now holds the property in trust for the plaintiff.

The court found that John Schilling was never the sole and separate owner of the property; that he never conveyed the same to Virginia T. Smith, but that on September 1, 1922, the said Virginia T. Smith executed and delivered a deed conveying said property to John Schilling and Ida Schilling as joint tenants with the right of survivorship; that John Schilling and Ida Schilling executed a deed to the plaintiff, but that John Schilling did not deliver the same to Ida Schilling to be delivered to the plaintiff at the time of his death; that Ida Schilling did not agree that she would deliver the deed to the plaintiff upon the death of John Schilling; that Ida Schilling did not execute the deed pursuant to any agreement to deliver the same to the plaintiff upon the death of John Schilling; that Ida Schilling did not become the trustee or agent of John Schilling for the purpose of delivering the deed; that the plaintiff did not become the owner of the property or any part thereof by reason of any unconditional delivery of this deed or for any other reason; that the deed did not provide that Ida Schilling should have a life estate in the property; that Ida Schilling did not agree to deliver the deed to the plaintiff in consideration of any such provision; that neither John Schilling nor Ida Schilling intended to divest or did divest themselves or either of them of any title to the property during the lifetime of John Schilling; that upon the death of John Schilling the title to this property vested in Ida Schilling as the survivor; and that there was never a delivery of the deed referred to by either John Schilling or Ida Schilling to any person. The court further found that there was never a delivery of this deed to Ida Schilling either for delivery to the plaintiff or for delivery to any other person; that Ida Schilling did not take possession of said deed for the purpose of defeating a conveyance of the property; that she is not fraudulently withholding said deed from the plaintiff; that she does not hold said deed in violation of any trust imposed upon her or accepted by her; that she does not hold said deed or the property described therein in trust for the plaintiff; and that, on the contrary, the said deed was never delivered to Ida Schilling for the purpose of divesting John Schilling of title to the premises described therein. Judgment was entered for the defendants, and the plaintiff has taken this appeal.

The appellant particularly attacks the findings to the effect that this deed was not delivered; that neither of the grantors named therein intended to divest themselves of title to the property; that Ida Schilling did not agree to deliver the deed to the plaintiff; and that no consideration existed for any such an agreement. While a number of points are raised, they are all based on the contention that under the evidence it must be conclusively held that there was such a delivery of the deed as to immediately pass title to the appellant.

We will first briefly review the evidence introduced by the appellant. The first witness called to our attention testified that some time during 1927 John Schilling read over to her what he called a "gift deed"; that the deed referred to the property here in question and was from John Schilling and his wife to Helen Brunner; that he did not tell her where he was keeping the deed; and that he told her he did not expect to deliver the deed, but expected his wife to do so after he was gone. A sister of John Schilling testified that in 1927 John Schilling told her that he and his wife had made a gift deed to the plaintiff; that his wife would deliver it at his death; and that he was happy to have provided for the future of his wife and daughter. A daughter of the plaintiff testified that she heard John Schilling tell her mother that he and his wife had made a gift deed to her, that his wife had agreed to deliver it when he was gone, and that his wife would have the use of the property while she lived. Two witnesses testified that shortly before this suit was filed Ida Schilling admitted to them that she had agreed to deliver the deed to the appellant upon her husband's death, and one of them testified that he heard John Schilling in his lifetime say that he had provided for both his wife and daughter, that there was a gift deed which he had left with his wife and which she had promised to deliver to his daughter, that his wife was to have a life estate in the property, and that his daughter was to have the property after his wife's death. Another witness testified that John Schilling had stated to him that upon his death the property was to revert to Mrs. Schilling and upon her death was to revert to his daughter and her children. Finally, the appellant testified that in 1927 her father told her that he had made out a gift deed to her, that he had given this to his wife and that "she promises after I am gone to give it to you"; that her father further told her that he and his wife had decided a gift deed was better than a will because it would cut out all probate proceedings, and that his wife was to have the use of the property while she lived; and that her father never said anything to her about what was to be done with the deed in the event his wife died first.

Turning to the evidence introduced by the respondents, a witness who had known the Schillings for about nineteen years, testified that in the spring of 1925 Mr. and Mrs. Schilling had an accident in which their automobile ran off a grade; that about that time John Schilling told him he had made a deed so his daughter would get his property in the event both he and his wife were killed in an automobile accident, that if either he or his wife survived the other the survivor would have the property, but that if they were both killed his daughter would get the property; that this deed was in their lock box in the bank and would never be in the hands of any one unless they were both killed; that again in 1927 John Schilling told him he had things fixed so that if he died first his wife would have the property and if they both died together it would go to his daughter Helen; and that in 1929, shortly before he died, John Schilling told him that he did not think he was long for this world; that he had things arranged so his wife would get his property; that it was to be hers "with no strings on it" if he died first; and that he often remarked, "I hope if I pass out first mother enjoys it and spends it while she is alive." Another witness testified that in the spring of 1927 John Schilling read to her what he called a gift deed to Helen and told her that in no event was the deed to be delivered to Helen until after he was dead. The respondent Ida Schilling Humason testified that she lived with John Schilling for about forty years before his death; that in the latter part of February, 1925, she and her husband signed what she called an agreement that said on it "Gift Deed"; that part of the instrument was printed, part typewritten, and part written in with pen; that before she signed it her husband told her that they would fix the property so that if both of them should be killed at one time it should go to his daughter; that the instrument provided that if her husband died first she was to have the property, it being community property with the right of survivorship and that if both were killed it should go to his daughter; that it contained nothing about a life interest in the property going to her; that she did not acknowledge her signature; and that they put it in their lock box. She further testified that she never promised to hold the deed for John Schilling or for herself as trustee or in any other capacity, and did not agree to deliver it to the appellant when her husband died; that she received nothing for signing it; that she never stated to any one that she and her husband had executed a gift deed which her husband had left with her to be delivered upon her husband's death, and she had never heard her husband tell any one that such a thing had been done; that she never told any one that she had agreed with her husband to deliver the deed to the appellant upon her husband's death; that she and her husband were the only ones who had access to their safety deposit box and so far as she knew the instrument in question had never been removed from the box until after her husband's death when she took it out and destroyed it; that after the execution of the deed she and her husband lived upon the premises and continued to lease portions thereof to various tenants from time to time; that in 1927 they borrowed money on a mortgage on the property; and that she had made a will giving the property to the appellant's children. One witness testified that in 1927, upon the orders of John Schilling, he erected a number of additional buildings upon this property. Another witness testified that after John Schilling died the plaintiff told him she understood there was a deed to her in the safety deposit box, but she did not know whether or not the deed had been delivered. Several other witnesses testified that at various times John Schilling had told them that the property was held as community property with the right of survivorship and that he had arranged matters so that in the event both he and his wife were killed the property would go to his daughter. It appears from the evidence that on May 25, 1927, the Schillings borrowed $2,200 from a bank, giving as security a mortgage upon this property, which mortgage contained the following clause: "The mortgagor guarantees and affirms that said property is now free from any secret equities, trusts or encumbrances made or suffered by or known to the mortgagor, except as herein recited."

With respect to the matter of consideration the appellant's position is considerably weakened by the fact that although the complaint alleged that John Schilling was the sole and separate owner of the property and that he gave his wife a life interest therein in consideration of her signing the deed, the court found, upon ample evidence, that John Schilling was never the sole and separate owner of the property, but that the same was held in joint tenancy. From the beginning Mrs. Schilling had an interest in the property which would become a sole ownership upon the death of her husband.

[1-2] It is well settled that whether or not a deed has been delivered depends upon the intention of the grantor, and that this intention is to be determined from all of the surrounding facts and circumstances. Most of the evidence shown by the record indicates that John Schilling did not intend this deed to take effect until after his death, and then only in the event both he and his wife were killed at the same time. And further, that he fully understood the meaning of the joint tenancy deed under which he and his wife held the property, and that the same would belong to either of them upon the death of the other. All of the statements made by him are consistent with an intention that the deed to the daughter was not to take effect in any event until his death. Most of the statements are also consistent with the idea that the deed was not to be delivered even

at his death if his wife were still alive. In none of the statements made by him was anything said with reference to what should occur if he himself outlived his wife. Many of the statements made are hard to reconcile with the existing fact of joint tenancy if Schilling intended the deed to take effect at his death and while his wife was still living, and are still harder to reconcile with all the known facts if he intended the deed to take effect immediately upon its execution. There is an entire absence of evidence as to the time when and the circumstances under which any supposed delivery took place. It is significant that the deed remained in the lock box to which Schilling and his wife both had access, that he had it in his possession and read it to an outsider nearly two years after it was executed, that he continued to deal with the property as his own, that he borrowed money upon the property and executed a mortgage in which he affirmed that he and his wife were the owners thereof and that no other person had any interest therein, and that he continued to state that he had things so arranged that if anything happened to either himself or his wife the other would have the property.

While it may well be doubted whether the evidence is sufficient to have supported a finding in favor of the appellant, it fully sustains the findings made since, in any event, it supports the conclusion that Schilling did not intend to make a present transfer of the property, but intended the deed to take effect only upon his death (Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703), and since portions thereof support the further conclusion that the deed was not intended to be delivered except in the event of the death of both of the grantors.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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135 Cal.App. 91

CUNNINGHAM v. REYNOLDS et al.

Civ. 4934.

District Court of Appeal, Third District, California.

Nov. 6, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. Animals 🔑61.

One taking up stray animals can recover only his actual expense and damage not to exceed 15 cents per animal (Gen. Laws 1931, Act 387, § 3).

2. Animals 🔑61.

Word "damages," as used in statute respecting stray animals, is compensation in money for detriment suffered by one person from unlawful act or omission of another (Gen. Laws 1931, Act 387, § 3; Civ. Code, § 3281).

[Ed. Note.—For other definitions of "Damage; Damages," see Words & Phrases.]

3. Animals 🔑61.

Where impounder of sheep detained them after owner tendered sufficient amount to pay actual expense and damages, owner was entitled to difference in value of market and feeder lambs which he lost and for loss of ewes which became lost (Gen. Laws 1931, Act 387, § 3).

4. Appeal and error 🔑1122(1).

Where case was unusually free of conflict, many facts having been established by stipulation, District Court of Appeal would modify fact findings made by trial court (Const. art. 6, § 4¾).

Appeal from Superior Court, Lake County; R. M. Rankin, Judge.

Action by E. L. Cunningham against J. C. Reynolds and another. From the judgment, plaintiff appeals.

Judgment modified and, as modified, affirmed.

See, also (Cal. App.) 23 P.(2d) 837.

Hale McCowen, Jr., of Ukiah, for appellant.

H. G. Crawford, of Lakeport, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff brings this action in claim and delivery for the recovery of 169 ewes claimed to be wrongfully withheld by the defendants, together with special damages for the difference in value between the market lambs and feeder lambs alleged to have been lost through the wilful acts of the defendants. Defendants, by their answer, justify their detention of the ewes under the terms of the Estray Act (Deering's General Laws 1931, p. 177, Act 387), and claim a lien thereon for damages, costs, and expenses, as provided by the statute.

The 169 ewes of plaintiff, of the stipulated value of $350, strayed upon the lands of the defendants, who impounded them as provided in the act. On the day following their impoundment, plaintiff tendered to defendants the sum of $35 to cover the costs, damages, and expenses, and demanded their return. This offer was rejected and the return of the sheep refused.

It was stipulated, subject to a motion to strike, that the reasonable cost per day of keeping and caring for the sheep was $.03. It was also established, by testimony not contradicted, that range sheep, as were the ewes here in question, would produce 100 per cent. lamb crop. These ewes, at the time of their impoundment (September 4th), had not been bred, and to produce a market lamb it was necessary to have them bred not later than September 15th. A market lamb was described as one that could be sold fat from the side of the ewe; whereas, a feeder lamb required additional feeding to make it ready for market. The difference in price between a market lamb and a feeder lamb was established at $1.50 per head more for the market lamb than the feeder.

Defendants base their refusal to accept the tender of plaintiff upon their construction of section 3 of the Estray Act, which provides: "§ 3. * * * Any person claiming such estray animal or animals shall * * * pay the taker-up all damages, expenses and costs incurred. * * * Such damages, expenses and costs shall be estimated as follows: * * * 3. The sum of not to exceed fifteen cents per day for the keeping and care of each * * * animal."

[1] Defendants contend they are entitled to $.15 per day, regardless of the actual damage or expense they may have suffered, while appellant maintains that the taker-up can recover only his actual expense and damage, not to exceed $.15 per animal. The latter is undoubtedly the intention of the act. It is not a penal statute, but is for the purpose of giving to one who has impounded estrays a speedy remedy for the recovery of damages and costs incurred in taking up trespassing animals.

[2] Prior to the last amendment to the Estray Act (Stats. 1915, pp. 636, 637), the provision then read: "* * * the sum of five cents per day for the keeping and care of each sheep. * * *" St. 1901, p. 604, § 3. This change in language from a definite amount of $.05 to an amount "not to exceed" must be construed as being a deliberate change by the Legislature in the method of the computation of damages.

Damages is the compensation in money for the detriment suffered by one person from the unlawful act or omission of another (section 3281, Civ. Code), and that clearly is the meaning of the word when used in the act in question.

In accordance with the general rule that an injured party is entitled to recover only damages actually suffered, it is plain it is the actual damage, not to exceed $.15 per head, which is allowed by the act.

The court found that $.15 per head for the care of the ewes was a reasonable and proper amount to be allowed defendants as damages incurred, and struck out the stipulation that $.03 per head was the reasonable cost of keeping and caring for them, and computed the total amount of expense and cost incurred and damage suffered as $1,026.05, up to the date of the trial, and ordered judgment accordingly.

[3] We must conclude that the trial court erred in striking out the stipulation referred to, and, therefore, the finding that $.15 was a reasonable and proper charge, is contrary to the evidence, and not supported thereby. The court should have found that the tender by plaintiff of $35 to defendants was sufficient to entitle them to the possession of the sheep, and as a result of defendants' wrongful detention, plaintiff was damaged by the difference in value of the market and feeder lamb in the sum of $253.50, and by the loss of 10 head of ewes, which testimony showed had become lost or wandered away, at $2 per head, or $20, or a total loss to plaintiff of $273.50.

[4] Under section 4¾ of article 6 of the state Constitution, it is provided that a reviewing court may make findings of fact contrary to those made by the trial court, which findings may be based upon the facts adduced before the trial court, either with or without the taking of evidence by the court of appellate jurisdiction.

The evidence in this case was unusually free of conflict, many of the facts having been established by stipulation of the parties, and we believe this to be a proper case for the exercise of the constitutional power granted. Therefore, the findings of fact heretofore filed in the trial court are hereby modified as follows:

Paragraph III should be entirely eliminated.

Paragraph IX should be amended as follows: "That from the 4th day of September, to the 6th day of September, 1932, said defendants used reasonable care to preserve the said 169 head of stray sheep from injury but since the commencement of this action one of said 169 head of stray sheep died, and nine thereof escaped from the possession of said defendants, and said defendants now have in their possession 159 head; that the loss of said ten head of sheep was unexplained and unjustified by said defendants; that said sheep were worth $2 per head."

Paragraph X should be amended as follows: "That the sum of three cents per day for the keeping and care of each of said sheep from the 4th day of September to the 6th day of September, 1932, is the reasonable sum of the damages, expenses and costs incurred by said defendants by reason of taking up such animals."

Paragraph XI should be eliminated; paragraph XIV should also be eliminated.

Paragraph XV should be amended to read as follows: "That said 169 head of sheep are ewes and had not been bred on September 4, 1932, and have not yet been bred; that the said defendant has had possession wrongfully of said sheep from September 6, 1932, to October 17, 1932; that said period is the usual time for breeding said ewes; that by reason of the defendant being in possession of said sheep the breeding will be delayed and the lambs will be feeder lambs; and that market lambs are worth $1.50 per head more than feeder lambs; that if the ewes had been bred at the usual times the lambs would have been market lambs."

The conclusions of law should be modified as follows:

"I. That the defendants deliver to said plaintiff the said 159 head of sheep so taken up by them as estrays and remaining in their possession or in default thereof the payment of $330.

"II. That the plaintiff do have and recover judgment against the said defendants for the sum of $273.50 as damages for loss on lambs and for loss of 10 head of ewes.

"III. That the defendants do not now and have not had since September 6th, 1932, any lien or claim upon said sheep and

"V. That plaintiff is entitled to a judgment against the defendants for his costs expended in this action."

For the reasons given, upon the modification of the findings of fact and conclusions of law, the judgment of the trial court, as so modified, is hereby affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

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135 Cal.App. 205

PEOPLE v. MAIOLI.

Cr. 1283.

District Court of Appeal, Third District, California.

Nov. 7, 1933.

1. Criminal law 🔑1159(2).

Court of Appeal cannot sustain conviction on suspicion or conjecture.

2. Forgery 🔑44(½).

Evidence *held* insufficient to sustain conviction of forgery as failing to show that defendant had no authority to issue forged checks when uttered.

3. Forgery 🔑44(½).

To prove forgery, instrument to which accused signed another's name must be shown to have been false by proof that he signed such name without authority.

4. Forgery 🔑44(½).

Accused's lack of authority to sign another's name to checks must be shown by testimony of person having power to give such authority to warrant conviction of forgery, and bank official's testimony as to limitations on bank's authority to honor checks is insufficient.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Hector Maioli was convicted of forgery, and he appeals.

Reversed.

Herbert E. Paul, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Against defendant an information was filed charging forgery. He was tried and convicted, and now appeals from the judgment and the order denying the motion for a new trial.

Defendant issued a check signed "Maioli Bros.," payable to Hector Maioli and indorsed by Hector Maioli. This check was drawn on the Commercial Bank of Patterson, and at that time there was an account therein in the name of Maioli Bros. Defendant presented this check to a merchant, and received in return merchandise and the balance in cash.

[1, 2] It is urged by appellant upon this appeal that, where the offense is forgery of the name of an existing person, the people must affirmatively establish, first, the signing and passing of the check; secondly, the intent to defraud; thirdly, the lack of authority; and, fourthly, knowledge of such lack of authority. It is to the proof of lack of authority appellant principally directs his attack upon the judgment.

An official of the bank to which the check was directed testified there was an account in the bank in the name of Maioli Bros., and that the signature of either of two certain parties was sufficient to authorize withdrawal of funds therefrom. The name of defendant was, of course, not one of those so authorized.

To a representative of the sheriff's office, defendant made a statement admitting he had written the check in question and signed Maioli Bros. thereto, and that he presented the same to the complaining witness and received cash and merchandise therefor. Nothing was asked him by what authority or upon whose order he signed and issued the check in question.

The defendant took the stand in his own behalf, and again admitted the issuing of the check. He also admitted having issued other checks signed Maioli Bros., upon which he received cash, all of which were returned by the bank as irregular, and all of which were made good by members of defendant's family. Again no question was asked as to any authority to sign Maioli Bros. to the check. It might be inferred from the testimony of defendant that he did not have authority to sign Maioli Bros., but we cannot sustain a conviction upon suspicion or conjecture. Practically the entire cross-examination of the district attorney was devoted to the consideration of previous checks issued by defendant and whether or not at the time they were issued defendant knew them to be forgeries. We find no reference to the check here in question except the following:

"Q. What did they (the family) say? A. Well, the first checks I wrote, they told me that if I would stay home and work, they would make them good, so I stayed home and worked and they made them good.

"Q. Stayed home and worked it out? A. Yes, sir.

"Q. Do you mean to sit there and tell this jury that you didn't know that the checks that you gave to McAulay (complaining witness) to Spenker and to Merchan were not good? What is your answer? A. No.

"Q. Do you mean that you didn't know that they were not good? A. Oh, yes, I knew.

"Q. You knew that they were not good, didn't you? A. Yes.

"Q. And you knew when you passed them and got the money that these people that got the checks were going to be out ten dollars or collect it from somebody, didn't you? A. No, sir, I knew my folks were going to make it good.

"Q. You knew your folks were going to make it good? A. Yes, sir."

Neither of the Maioli Bros. was called as witnesses to testify as to any authority or lack of authority in defendant.

We believe the people's case is fatally defective, in that it fails to show the defendant had no authority to issue the checks at the time of their utterance.

[3] "To prove that an accused person signed the name of another to an instrument, and that he passed such instrument as genuine, does not prove the commission of a crime. It must still be shown that it was a false instrument, and this is not proven until it is shown that the person who signed another's name did so without authority. Until this proof is made, it is not shown to be a false instrument, and the defendant is not put to his proof at all." People v. Whiteman, 114 Cal. 338, 46 P. 99, 101.

In the case of People v. Lundin, 117 Cal. 124, 48 P. 1024, 1025, the defendant was accused of the forging of a check by signing the name of another thereto. The prosecution called two witnesses named John F. Johnson, the named affixed to the check. The first knew nothing of the defendant, and the second testified that he had known the defendant some seven or eight years, and that he did not sign the check, and that the signature was not his handwriting, and that he had no account at the bank upon which it was drawn. Commenting upon the testimony, the court said: "No question was asked, and no testimony introduced tending to show whether or not defendant was authorized to sign the name of 'John F. Johnson' to the check. Under the previous rulings of this court we are compelled to say the evidence was insufficient to warrant a conviction."

In the recent case of People v. Hidalgo, 128 Cal. App. 703, 18 P.(2d) 391, 392, it was held that, where two persons are authorized to sign their names under the name of a corporate drawer, the prosecution must show that neither of such persons had signed the check, nor that they had authorized their names to be signed by defendant.

"The most that appeared was that Baker Ice Machine Company had a banking account with Seaboard National Bank, and that as far only as the bank was concerned, it would honor checks drawn against said account which were signed by certain designated individuals. Neither by the minutes, nor by the records, of Baker Ice Machine Company was it shown that no other person or persons * * * was or were respectively authorized by the corporation to draw checks on the said banking account." People v. Hidalgo, supra.

[4] Therefore it seems to be clear that, to show lack of authority to sign a check, testimony of the person who had the power to give such authority is essential, and that the testimony of an official of the bank as to the limitations on the bank's authority to honor checks is not an adequate substitute. We must therefore hold that there is no evidence of lack of authority in the defendant to sign the name of Maioli Bros. to the check.

Defendant alleges error in the giving of certain instructions, but, in view of our conclusion, we do not believe that it is necessary to comment upon that objection.

The judgment and the order are reversed.

We concur: **R. L. THOMPSON, J.; PLUMMER, J.**

135 Cal.App. 270

GRAFF v. T. W. CORDER, Inc.

Civ. 9078.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1933.

Hearing Denied by Supreme Court Jan. 8, 1934.

1. Limitation of actions 🔑197(1).

Evidence, in suit on note allegedly barred by limitations, justified finding that plaintiff knew for some time prior to expiration of reasonable time for completion of building project that project, completion of which was to mature note, had been abandoned.

2. Appeal and error 🔑728(2), 758(2).

Particulars in which evidence is alleged to be insufficient to support finding of trial court should be specified in bill of exceptions, or pointed out in brief.

3. Limitation of actions 🔑197(1).

Evidence, in suit on note allegedly barred by limitations, *held* to justify finding that reasonable time for completion of building project, completion of which was to mature note, expired in November, 1926, over four years before action was brought.

4. Limitation of actions 🔑48(3).

Suit on note given in payment of plaintiff's services in leasing defendant's property *held* barred by limitations, where building project provided for in lease, completion of which was to mature note, was abandoned with plaintiff's knowledge and reasonable time of completing such project expired over four years prior to bringing action.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by B. H. Graff against T. W. Corder, Incorporated. Judgment for defendant, and plaintiff appeals.

Affirmed.

H. U. Brandenstein and James J. Cronin, Jr., both of San Francisco, for appellant.

Decoto & St. Sure and Burton Latham Walsh, all of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on a promissory note. The defendant pleaded the statute of limitations and had judgment, from which the plaintiff has appealed on the judgment roll and the bill of exceptions.

The promissory note was executed on November 6, 1925, as part payment for services rendered by plaintiff in negotiating a lease of real property owned by the defendant. The note which was made payable on demand was accompanied by an agreement which was made a part of the same transaction and which recited that the note should not become due until the completion of a building contemplated to be erected pursuant to the terms of the lease and that the note should not be presented for payment "until after said contemplated building is completed and ready for occupancy." The lease called upon the defendant as owner of the property to add three stories to an existing building at a cost which should not be in excess of $180,000. It ran for a term of twenty years at a monthly rental of $4,400 for the first half of the period and $5,500 for the remainder. It stipulated that if the cost of the improvements should exceed the sum of $180,000 then "by consent of both parties hereto" the rentals therein agreed to would be increased in an amount proportional to such additional cost. It was understood that the existing portion of the building was under lease to various tenants and that their rights were to be protected. Plans and specifications were prepared for the construction of the improvements to the building and bids of general contractors were received ranging from $202,000 to $218,000. These bids did not include the cost of a number of reserve items nor the architect's fee. In February, 1926, the lessee was notified that the building could not be constructed as contemplated and efforts were made to procure his agreement to pay an additional rental proportionate to the increased cost of construction. This the lessee declined to do, and in March, 1927, all negotiations between the lessee and the defendant were discontinued. During these negotiations it had been found that the tenant of one of the stores located in the central part of the existing building refused to move or to give up his lease. Under the plan accepted by the owner this particular store was desired in order to provide a central entrance to the upper floors contemplated to be constructed under the terms of the lease. On July 1, 1927, the lease of this tenant expired.

The trial court found that the owner and the lessee could not agree upon the final details of the plans and specifications and the rental of the building and that the contemplated building was never constructed and that for some time prior to November 7, 1926, plaintiff knew that the building thereof had been entirely abandoned; that a reasonable time in which to construct the building contemplated was the period of one year after November 7, 1925; that on this date, to wit, November 7, 1926, a cause of action based on the written instrument arose in favor of the plaintiff and against the defendant; that this action was not commenced within four years following the time the cause of action arose. From these findings the trial court concluded that the cause of action was barred.

[1] On this appeal the appellant stated that "the sole issue, therefore, is from what date should the statutory period be calculated." The appeal is taken on a bill of exceptions which does not contain any specifications of error nor state any particulars in which the evidence is claimed to be insufficient to justify any of the findings of the trial court. In support of the issue stated to be involved the appellant in his opening brief confines his attack to finding No. 5 wherein the trial court found that plaintiff knew prior to November 7, 1926, that the contemplated building had been abandoned. No attack is made on finding No. 6 wherein the trial court found that a reasonable time in which to construct the building was the period of one year after November 7, 1925. Appellant concedes that one year was the reasonable time in which to construct said building but argues that that period should not begin until July 1, 1927, because it was not until that date that the owner was relieved from the lease of the subtenant occupying the central store. But this factor was only one obstacle delaying the construction of the building. Another and far more important obstacle was the failure of the parties to agree upon the increased rentals made necessary because of the excess cost in the construction of the building. The evidence discloses that the lease, the promissory note, and its accompanying agreement were all prepared and written by the appellant; that he alone represented to the owner and to the lessee that the additions to the building could be constructed for a sum not in excess of $180,000. It was upon his representations that the rentals were fixed in the lease to pay a return on that cost. The evidence was that this representation of cost was not based on estimates made by the architect. Taking the evidence as a whole, the trial court could properly have found that the appellant knew from the outset that the building could not have been constructed as represented, and these facts taken with the evidence of plaintiff's familiarity with the neighborhood of the proposed building are sufficient to support the finding that he knew that the building as contemplated in the lease had been abandoned.

[2-4] But the judgment does not depend upon this finding alone. The trial court found on all the evidence that a reasonable time for construction of the building was one year from November 7, 1925. If the evidence is sufficient to support this finding the judgment must be sustained because the action was not commenced within the statutory period. If the evidence is insufficient for that purpose the particulars in which such evidence is alleged to be insufficient should have been specified in the bill of exceptions or should have been pointed out in the briefs. The suggestion is made by the appellant that because of the difficulty in adjusting the rights of the subtenant, a reasonable time for the construction of the improvements should not commence until the termination of the subtenant's lease on July 1, 1927, because the plans contemplated the use of his portion of the building for an entrance to the upper floors. But this central entrance was desirable though not essential to the construction of the improvements. Other plans were fully discussed and it was a reasonable inference which the trial court might have drawn from all the evidence that if the matter of cost and rental could have been adjusted the rights of the subtenant could have been easily taken care of. It is in the evidence that the owner urged the lessee to agree to give this subtenant a long term lease of another store in the building and to pay his expense of moving. It is also in the evidence that the owner and the lessee abandoned all negotiations under the terms of the lease in March, 1927. From this evidence the trial court might well have inferred that the parties took an unreasonable time to settle their difficulties and to proceed with the construction of the improvements. We cannot say from the evidence that the trial court erred in finding that a reasonable time for the completion of the building expired in November, 1926.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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135 Cal.App. 334

FLAGG v. SLOANE et al.

Civ. 1058.

District Court of Appeal, Fourth District, California.

Nov. 15, 1933.

Hearing Denied by Supreme Court Jan. 12, 1934.

1. Corporations ⚷243(2).

Absent fraud, agency, express trust, or other special circumstances, only record owner of corporate stock may be compelled to pay deficit in purchase price.

2. Contracts ⚷167.

Contract must be interpreted according to law in force at time of its execution which formed part of such contract.

3. Corporations ⚷243(2).

Where corporation commissioner forbade issuance of stock, and none was ever issued to attorney who was to be paid in stock, attorney could not be held liable for unpaid portion of purchase price (Corporation Securities Act [St. 1917, p. 673, as amended]).

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

4. Appeal and error 🔑907(3).

Where appeal is on judgment roll, appellate court must presume that evidence sufficient to sustain finding was introduced in trial court.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by George L. Flagg, trustee of the estate of California Land Buyers' Syndicate, bankrupt, against Harrison G. Sloane and others. From a judgment for defendants, plaintiff appeals. On named defendant's motion to dismiss appeal or affirm judgment.

Judgment affirmed, and motion to dismiss appeal denied.

Ed. P. Sample and William H. Wylie, both of San Diego, for appellant.

Harrison G. Sloane, of San Diego, for respondents H. G. Sloane and Ed Fletcher, Jr.

Hamilton, Lindley & Higgins, of San Diego, for respondent O. E. Darnall.

MARKS, Justice.

This is an action to recover the unpaid portion of the purchase price of stock in the California Land Buyers' Syndicate, a bankrupt corporation. Judgment was rendered for respondents and this appeal followed. It is taken on the judgment roll, which is practically incorporated in appellant's opening brief. Respondent Sloane has moved to dismiss the appeal or affirm the judgment as to him because it appears that as to him the questions presented "are so unsubstantial as not to need further argument" (section 3, rule V, Rules of the Supreme Court and District Courts of Appeal), and that the appeal is frivolous and for delay.

It appears from the findings that R. L. Stewart promoted the organization and incorporation of California Land Buyers' Syndicate, which was incorporated June 11, 1926. On June 2, 1926, Stewart and Sloane entered into a written contract whereby the latter was employed as the legal adviser of the former with his compensation to be paid in shares of the common stock of the corporation which the two would make an "effort" to have issued to Stewart for $1 per share. The commissioner of corporations issued an amended permit authorizing such purchase by Stewart and providing that the stock should be placed in escrow and not sold, offered for sale, agreed to be sold or otherwise transferred or conveyed until his further order. Stewart purchased 5,531 shares of this stock, which was placed in escrow. None of it was transferred to Sloane, nor could it have been, as the commissioner of corporations gave no permit for such conveyance. First National Bank v. Thompson, 212 Cal. 388, 298 P. 808. Sloane never appeared upon the books of the corporation as the owner of any of its stock.

[1] The rule prevailing in California governing the liability for an unpaid portion of the purchase price of stock in cases of this kind where fraud, agency, or an express trust or other special circumstances are not involved, is that only the record owner of the stock may be compelled to pay the deficit in the purchase price. A "purchaser does not become personally liable to the corporation for subsequent calls until he has his transfer entered on the corporate books, or in some other manner comes into privity with the corporation as a stockholder." Geary St., etc., Co. v. Bradbury Estate Co., 179 Cal. 46, 175 P. 457, 460; Baines v. Babcock, 95 Cal. 581, 27 P. 674, 30 P. 776, 29 Am. St. Rep. 158; People's Home Savings Bank v. Rickard, 139 Cal. 285, 73 P. 858; People's Home Savings Bank v. Stadtmuller, 150 Cal. 106, 88 P. 280; Perkins v. Cowles, 157 Cal. 625, 108 P. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158; McCarty v. More, 181 Cal. 738, 186 P. 140.

[2-4] Appellant as his sole ground of a reversal of the judgment against Sloane maintains that the trial court's finding to the effect that this respondent was employed only as attorney for Stewart and the two were not joint adventurers is directly in conflict with the terms of a written contract between them and is therefore contrary to the evidence. There are two answers to this argument: First, a contract is to be interpreted according to the law in force at the time of its execution which the courts must regard as a part of its terms. 6 Cal. Jur. 310, § 186. The Corporate Securities Act (St. 1917, p. 673, as amended) was in effect at the time of the execution of the contract, which was prior to the organization of the corporation. No stock could be issued by the prospective corporation or title given to any person except as permitted by the commissioner of corporations. The amended permit incorporated in the findings clearly prohibited any attempt on the part of Stewart to give to any other person any interest in any of the stock in question. Under the terms of this permit Sloane could not acquire any interest in this stock without consent of the commissioner of corporations, which was never given. Second, the appeal is on the judgment roll, and we are required to presume that evidence sufficient to sustain the findings was introduced in the trial court. If it were necessary we would have to assume that another written contract was executed between the two men which sustained the conclusion that Sloane and Stewart were not joint adventurers; that Sloane was neither the owner nor had any interest in the stock in question; that he acted in the matter solely as the attorney of Stewart; that his fee might be

paid out of the stock in question if and when such a transaction was approved by the commissioner of corporations or the stock released from escrow, if ever, but not before such time.

The record supports the theory that Sloane had no ownership in the escrowed stock. This being so, no recovery could be had against him for any part of its purchase price, and the questions on which the decision of the cause depends, in so far as he is concerned, are so unsubstantial as not to need further argument.

The judgment in favor of respondent Harrison G. Sloane is affirmed. His motion to dismiss the appeal is denied.

We concur: BARNARD, P. J.; JENNINGS, J.

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135 Cal.App. 180

KETCHAM et al. v. MODESTO IRR. DIST. et al.

Civ. 4780.

District Court of Appeal, Third District, California.

Nov. 7, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. Waters and water courses ⇔262.

Generally, irrigation district is bound to exercise reasonable care in construction and maintenance of canals and ditches, and is liable for damages caused by seepage or flooding due to faulty construction or negligent maintenance.

2. Waters and water courses ⇔262.

Under Constitution, irrigation district, maintained for distribution of water for public use, is liable for damages to land by seepage regardless of negligence in maintenance or construction of water system (Const. art. 1, § 14).

3. Appeal and error ⇔1001(1).

Where verdict against irrigation districts was supported by substantial evidence that damage to land was caused by seepage from water system, appellate court could not interfere.

4. Waters and water courses ⇔156(2).

Grants of predecessors in title for irrigation canals estopped successors from claiming damages caused by seepage from such canals used for exclusive benefit of district's members, but did not extend to damages resulting from seepage from reservoir on land acquired from others or to damages caused by seepage due to additional water carried for another district not party to such grants.

5. Waters and water courses ⇔133.

Prescriptive right to use of water must be based on actual, open, notorious, and hostile control and use under claim of exclusive right for uninterrupted period of more than five years.

6. Waters and water courses ⇔137.

Where irrigation district remedied slight damage caused by seepage in 1919, no further damage occurred until 1923, and protest was made by landowners in 1927, district acquired no prescriptive right through adverse increased use of canals for more than five years before 1927.

7. Judgment ⇔240.

Where seepage causing injury came principally from canal operated for joint benefit of irrigation districts, joint judgment was proper, though slight damage may have been caused by seepage from reservoir owned by only one district.

8. Appeal and error ⇔928(4).

Where record does not show by whom erroneous instructions favoring appellants were offered, presumption is that they were offered by appellants.

9. Appeal and error ⇔882(12).

Conflicting instructions as to liability of irrigation districts for damages due to seepage could not be complained of by district, where erroneous instructions were offered by such districts and jury were otherwise properly instructed as to liability.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by A. E. Ketcham and others against the Modesto Irrigation District and another. From a joint judgment for plaintiffs, defendants appeal.

Affirmed.

L. J. Maddux, of Modesto, and Hankins & Hankins, of San Francisco, for appellants.

J. W. Hawkins, of Modesto, for respondents.

Mr. Justice R. L. THOMPSON, delivered the opinion of the court.

From a joint judgment of $7,500 which was rendered pursuant to a verdict returned against two separate irrigation districts, as compensation for damages resulting to agricultural land from the seeping of water from an irrigation ditch, the defendants have appealed.

The appellants seek a reversal of the judgment on the grounds that: (1) The plaintiffs are estopped from claiming damages to their land from seepage of water from a ditch, for the construction of which their predecessors in title conveyed a strip of land through their property; (2) an action for damage which results from the natural and ordinary seepage of water from a ditch, in the absence of negligence in the construction or maintenance thereof, does not lie; (3) the defendants have acquired prescriptive rights to maintain the canal in the present condition by operating it adversely to the claims of plaintiffs for more than five years without objection; (4) a joint judgment against two separate water districts may not be lawfully rendered for damages which result from seepage from separate sources which are controlled by the respective districts; and (5) the judgment is based upon inconsistent instructions which are irreconcilable.

The Modesto irrigation district and the Waterford irrigation district are organized as separate entities under the statutes of California for the purpose of acquiring and furnishing water to their respective districts. These water districts are contiguous to each other and are adjacent to the Tuolumne river east of Modesto. Both districts have been in existence for many years. The Modesto district comprises 81,000 acres of land. The Tuolumne river flows westerly through Stanislaus county, passing through the outskirts of the city of Modesto. Lake Warner is a small body of water located eighteen miles east of Modesto and one mile north of the Tuolumne river. There is a gradual slope of sandy loam soil extending from this lake southerly toward the river. A few feet beneath the surface of the soil there is a hardpan substantially impervious to water.

The plaintiffs own a tract of agricultural bottom land situated between this lake and the river. Plaintiffs' land is a part of a larger tract formerly owned by John W. and Ann M. Roberts, husband and wife. November 4, 1891, Mr. and Mrs. Roberts made an agreement to convey to the Modesto irrigation district a strip of land running easterly and westerly midway between the lake and the Tuolumne river, through their premises, a distance of nearly two miles and "150 feet wide for a right of way for the canal of said District as the same is now or may hereafter be located, together with the right of ingress and egress over the lands hereinafter described to and from said right of way." Seven days later, in consideration of the sum of $1,820, they deeded that strip of land to the Modesto irrigation district, pursuant to the terms of the agreement, together with "the right to pass and repass over and upon all the lands and premises owned by the parties of the first part adjacent to said main canal, with men, teams and otherwise with material as may be necessary for the construction, repair, maintenance and operation of the aforesaid canal." Subsequently John W. Roberts died. His estate was distributed to his widow, Ann M. Roberts. In 1909, the widow, in consideration of the sum of $450, made a further deed of conveyance to the Modesto irrigation district of another strip of land in the same tract to be used for canal purposes, together with a similar easement over adjacent lands "necessary, proper or convenient for the construction, repair, operation and maintenance of the aforesaid canal." In 1910, for the further consideration of $135, she made a third deed to another strip of land in that tract to be used for the same purpose. This deed contains the same language respecting the use of the demised land for a canal and the easement appurtenant thereto, which was contained in the former instruments of conveyance. Ann M. Roberts died in 1911. The plaintiffs' land, which is involved in this suit, was acquired by them from the estate of Ann M. Roberts by decree of distribution which was made January 10, 1913. In the meantime the Modesto irrigation district acquired title to Warner Lake and converted it into a reservoir in which to store water for use in the district. This reservoir contains an area of 2400 acres. The Modesto irrigation district constructed an open dirt canal fifty feet in width and five and a half feet in depth from the La Grange dam situated in the Tuolumne river seven miles east of the plaintiffs' land and extending westerly through the Roberts' property along the strip of land theretofore purchased. The main canal also conveyed a large quantity of water from the Tuolumne river into the reservoir for storage. It is estimated this canal diverted from the Tuolumne river some 275,000 acre feet of water per annum. Prior to the construction of the reservoir, the season during which the canals were used to convey water to the consumers was confined chiefly to May, June, and July. After the reservoir was completed and the canal system was perfected, the company was enabled to furnish irrigation during practically the entire year.

From the time the plaintiffs acquired their land in 1913, they were engaged in producing therefrom annual crops of grain, corn, alfalfa, and melons. There is evidence that the land in that vicinity consists of a fertile, porous, sandy silt soil. While there is a conflict of evidence regarding the seeping of water from the reservoir or the canal, there is substantial evidence that no appreciable damage to plaintiffs' land occurred on that account until 1919. Some water accumulated that year on the flat on plaintiffs' land. In 1919 they complained to the Modesto irrigation district of seepage. There is evidence that the Modesto district then constructed a lateral ditch by means of which it drained the land and repaired the damage; that the plaintiffs thereafter raised good crops without serious trouble from further seepage until 1924. It appears that from 1924 to 1927, there was an increased seepage of water from the canal of the defendant Modesto irrigation district, resulting in greater damage to the lands of the plaintiffs. In 1927, the plaintiffs protested against this seepage and consequent damage, and demanded that the defects in the system which permitted this seepage of water should be remedied. There is substantial evidence that the Modesto district then promised to correct the defects complained of, and that it did thereafter construct certain lateral ditches and drain the surface water from the land of plaintiffs, and perform other acts for the purpose of preventing the seepage complained of. It also appears, subject to a conflict of evidence, that during the following two years, the lands of plaintiffs became seriously permeated with water which seeped from the canal of the Modesto irrigation district to an extent that it stood upon the surface of the land, in certain depressed locations, in ponds of some considerable size. The plaintiffs furnished evidence that the soil was saturated with water from that source to an extent that it became waterlogged and soured by the forcing of alkali to the surface, and destroying the natural fertility of the soil and plaintiffs' crops.

August 11, 1919, the Modesto irrigation district executed a written contract with the Waterford irrigation district, which was duly recorded in the records of Stanislaus county October 14, 1919, by the terms of which the first-mentioned district agreed that "the Modesto canal shall be increased and enlarged to the end that each year thereafter it shall be of sufficient capacity to carry the amount of water up to 250 second feet, required by the Waterford Irrigation District at said time." In consideration of the sum of $254,000, to be paid by the last-mentioned district to the Modesto district, it was agreed the Modesto district irrigation system was to become the regular carrier of a large quantity of water for the benefit of the Waterford district and its consumers, in specified increased quantity not to exceed the designated 250 second feet. Pursuant to this agreement it appears that in order to fulfill the increased demands upon the Modesto district it constructed in 1923, jointly with the Turlock irrigation district, the Don Pedro storage reservoir with a capacity in normal years of 260,000 acre feet of water, a part of which was carried through the canals of the Modesto district. It was estimated that since the construction of Don Pedro reservoir for the joint benefit of the Modesto and Turlock districts approximately 86,000 acre feet of water were diverted from that reservoir through the canals of the Modesto district.

It does seem apparent that to meet the increased obligations created by its agreement with the Waterford district, the Modesto district made substantial improvements in its system, and on that account actually did greatly increase the quantity of water which was thereafter carried through its canals, and stored in its reservoir. This increased quantity of water in the canals would naturally result in an increase of the seepage therefrom to the detriment of the lands of plaintiffs.

This suit for damages was commenced November 2, 1929. The cause was tried with a jury. A verdict of $7,500 was returned against the defendants. A joint judgment for that amount was accordingly rendered against both irrigation districts. From this judgment the defendants have appealed.

[1] The ordinary rule is that an irrigation district is bound to exercise reasonable care in the construction and maintenance of its ditches and canals, and when property is injured by seepage or flooding due to faulty construction or negligent maintenance of an irrigation ditch or canal, the irrigation district is liable for the resulting damage. 26 Cal. Jur. 152, §§ 356–359; Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 P. 814; Turpen v. Turlock Irr. Dist., 141 Cal. 1, 74 P. 295; McPherson v. Alta Irr. Dist., 14 Cal. App. 353, 112 P. 193; Nahl v. Alta Irr. Dist., 23 Cal. App. 333, 137 P. 1080; 15 R. C. L. 486, § 38; Stephenson v. Pioneer Irr. Dist., 49 Idaho, 189, 288 P. 421, 69 A. L. R. 1225, note page 1232; 3 Kinney on Irrigation (2d Ed.) p. 3088, § 1675. The general rule regarding the liability for negligence in the construction or maintenance of a ditch which results in damages to adjacent property because of percolation of the water, is well expressed in the authority last cited. It is there said: "The seepage of water from ditches, canals, or other works, is but one method of its escape from such works. Therefore, the same duty devolves upon the owner of such works to so construct them as far as possible so that the water will not seep or percolate therefrom to the injury of lands of others below. The law upon this subject and that of overflow and leakage, discussed in the last section, is tersely expressed in the legal maxim, sic utere tuo ut alienum non laedas, which expressed in English and applied to the subject under discussion, is: 'The owner of such works must so use, maintain, and operate his works as not to injure the property of another.' And, as in other cases, the owner is held not to be the insurer against all damages incurred, he is held liable in damages for all injuries which are the direct and proximate result of his actual negligence, or the failure to exercise ordinary and reasonable care." To the same effect are the following authorities, to wit: Parker v. Larsen, 86 Cal. 236, 24 P. 989, 21 Am. St. Rep. 30; Nola v. Orlando, 119 Cal. App. 518, 6 P.(2d) 984; Fleming v. Lockwood, 36 Mont. 384, 92 P. 962, 14 L. R. A. (N. S.) 628, 122 Am. St. Rep. 375, 13 Ann. Cas. 263; Howell v. Big Horn Basin Co., 14 Wyo. 14, 81 P. 785, 1 L. R. A. (N. S.)

596; 27 R. C. L. 1210, § 128; 15 R. C. L. 486, § 38.

[2, 3] The foregoing rule, however, is not applicable to the facts of the present case for the reason that the defendants are both irrigation districts which are maintained for the distribution of water for public use. The damaging of private land by the seeping of water from the reservoir or canals of an irrigation district which are constructed and maintained to supply water for public use, may not occur, under the inhibition of article 1, § 14, of the Constitution of California, without making just compensation therefor. It has been held this obligation is imposed upon one who takes or damages private property for public use, regardless of whether the acts complained of are the result of negligence. Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818. In the order of the Supreme Court denying a hearing in the case last cited, after a decision had been rendered therein by the District Court of Appeal, the court said: "In so far as the opinion of the District Court of Appeal appears to indicate that the plaintiffs cannot recover damages for the injury to their land unless it appears that the flooding thereof which caused the injury was the proximate result of the negligence of the defendant in the construction and maintenance of its canal, we disapprove the same. The canal is constructed for public purposes and to serve the purpose of distribution of water to public use. Apparently the damage to the plaintiffs is caused directly by seepage of water carried in said canal through the intervening soil onto the adjoining land of the plaintiffs. In such cases the plaintiff is secured a right to damages by the constitutional provision that private property shall not be damaged for public use. Article 1, § 14. In such cases the care that may be taken in the construction of the public improvement which causes the damage is wholly immaterial to the right of the plaintiff to recover damage, if the improvement causes it. This was expressly decided in Reardon v. San Francisco, 66 Cal. 505, 56 Am. Rep. 109, 6 P. 317, and Eachus v. Los Angeles, 103 Cal. 614, 42 Am. St. Rep. 149, 37 P. 750."

This language of the Supreme Court is peculiarly applicable to the facts in the present cause, and is conclusive of the principle there decided. Upon the foregoing authority, and upon principle, it appears to be immaterial whether the defendants in this case were guilty of negligence in the construction or operation of their water systems or not, provided it satisfactorily appears the seepage of water from the reservoir or ditches actually damaged the property of the plaintiffs as alleged. Since there is substantial evidence to support the claim that plaintiffs' land was damaged by seepage of water from the canal, the implied finding of the jury, in that regard, is conclusive on appeal.

[4] The appellants contend, however, that the prior grants of land by the predecessors in title of which the land of the plaintiffs was a part, which grants were expressly made for the purpose of constructing and maintaining irrigation canals, estops them from now recovering damages resulting therefrom, since, similar to the rule in eminent domain, the selling price of the land is deemed to have included all damages incident to the purpose for which the land was sold.

Unquestionably this is the rule which would ordinarily apply under such circumstances. Sternes v. Sutter-Butte Canal Co., 61 Cal. App. 737, 743, 216 P. 66, 69; Hunt v. Sutter-Butte Canal Co., 66 Cal. App. 363, 368, 225 P. 884; Groff v. Reclamation Dist., etc., 97 Cal. App. 22, 274 P. 993; 26 Cal. Jur. 159, § 359; 2 Kinney on Irr. 2029, § 1123. In the Sternes Case above cited it is said: "It thus appears by an unbroken line of authorities, and also as well as by good reasoning, that whenever a grant of a right of way is executed by a landowner he thereby estops himself from afterwards prosecuting any action for the past, present, or future damages that may have occurred, or reasonably be expected to occur, by reason of the necessary, natural, and ordinary use of the utility or public service for which the right of way is granted. And this includes the natural, reasonably to be anticipated, and ordinary injury resulting to adjacent land from seepage, if the land is of a character that admits of or may be reasonably expected to admit of such action of the waters taking place."

So also it is said in 26 Cal. Jur. 156, § 359: "One who grants a right of way may not afterwards prosecute an action for such damages, since it is the rule that when a person conveys a right of way over his land, which might have been condemned, it will be conclusively presumed that all the damages to the balance of the land, past, present and future, were included in the consideration."

It follows from the foregoing authorities that the plaintiffs in this case would be estopped by the deeds of their predecessors in title from recovering damages to their land from seepage of water which naturally resulted from the sole use of the canal by the Modesto irrigation district to carry water for its own benefit for the reason that such damages must have been reasonably anticipated by the grantor. Since a strip of land 150 feet in width was granted "for canal purposes," through a sandy soil, it may be assumed the grantor must have reasonably anticipated ordinary damages would result to adjacent land from seepage of water from a canal running to its full capacity, which was constructed 50 feet in width along the entire length of the demised tract, as a result of carrying the water belonging exclusively to the grantee, Modesto irrigation district. Since the land was conveyed "for canal purposes," and the deed is silent with respect to the manner of construction or the requirement of a concrete lining to the ditch or other artificial means of preventing seepage of water, it may be assumed that such unusual, impracticable, and highly expensive method of fortifying the canal against seepage was not contemplated or required by the parties.

While the language of the deeds estops the plaintiffs from asserting damages to their land from seepage of water conveyed through the canal for the exclusive benefit of the grantee's regular members, the estoppel does not apply to damages which may have resulted from seepage from the reservoir which was not constructed on land acquired from the plaintiffs' predecessors in title. The maintenance of the reservoir was not included in the language of the deeds. Nor does the estoppel apply to damages which accrued by virtue of the added burden of carrying in the canal of the grantee a large quantity of water for the use and benefit of the Waterford irrigation district which was not a party to the deeds. It must be assumed that seepage of water from an unlined canal which passes through sandy soil will be augmented by the pressure which results from a substantial increase of the body of water which flows therein. If the grantee could escape liability for damages even though the canal was used to carry water for another irrigation district, it might also multiply the burden upon adjacent land by becoming the carrier for numerous other enterprises not contemplated by the terms of the deed. This may not be done. It may not be reasonably said the grantors should have anticipated the canals would be used by the grantee to carry water for the use or benefit of other water districts. Since there is evidence from which it may be reasonably assumed the damages to plaintiffs' land resulted because of the greatly increased burden after the Modesto irrigation district began to carry a large quantity of water belonging to the Waterford irrigation district, we are of the opinion the defendants may not be relieved from liability for damages under the doctrine of estoppel. The defense of estoppel was thereby waived. It is impossible to segregate the damage which may have accrued from the water belonging exclusively to the grantee from that which resulted in the carrying of the water belonging to the Waterford district. Moreover, it may be true that no substantial damage would have resulted except for the carrying of the increased quantity of water belonging to the Waterford district.

[5, 6] The defendants contend they acquired a prescriptive right to maintain the canal for carrying water to its full capacity in the manner in which it was used by operating it adversely for a period of more than five years prior to February 15, 1927, without opposition. When complaint of damage from seepage was made by the plaintiffs on the last-mentioned date, it was stipulated between the parties that the statute of limitations would be waived from that date until November 1, 1929, at which time the complaint in this action was filed. It is true that the statute of limitations for damage resulting from seepage of a canal begins to run from the time of discovery of such seepage and resulting damage, and not necessarily from the time of the construction of the ditch. 1 Wiel on Water Rights (3d Ed.) p. 494, § 463; Middlekamp v. Bessemer Irrigating Co., 46 Colo. 102, 103 P. 280, 23 L. R. A. (N. S.) 795. It is true that some damage from seepage was complained of by the plaintiffs in 1919, but it appears this slight accumulation of water on the lands of plaintiffs was removed by the defendant Modesto irrigation district by draining the land. The evidence shows that good crops were thereafter raised on that land. The plaintiffs do not complain of further damage by seepage until 1923. It may not be said the statute of limitations continued to run during the period of time when no substantial damage from seepage occurred after the cause therefor had been removed by the affirmative acts of the defendants.

It is true that a property owner may waive his right to damages for the wrongful flooding of his land by a public utility water company, by failure to exercise diligence in taking action within the statutory period of time to prevent the wrong, and that prescriptive rights may be thus acquired by a claimant, in the absence of protest for the statutory period of time. Collier v. Merced Irrigation District, 213 Cal. 554, 2 P.(2d) 790; Conaway v. Yolo Water & Power Co., 204 Cal. 125, 266 P. 944, 58 A. L. R. 674. But adverse use of water which will mature a prescriptive right thereto must be accompanied by actual, open, notorious control and use; it must be adverse and hostile to the plaintiffs' title; it must be under a claim of exclusive right; and it must be continuous and uninterrupted for a period of more than five years. Galbreath v. Hopkins, 159 Cal. 297, 113 P. 174; 2 Kinney on Irrigation (2d Ed.) p. 1875, § 1048; 27 R. C. L., p. 1290, § 201; 1 Cal. Jur. 549, §§ 38–41. We are of the opinion the evidence in this case amply supports the implied finding of the jury that the defendants did not acquire a prescriptive right to flood the lands of plaintiffs. It shows that the slight damage which resulted from seepage of water in 1919 was protested by the plaintiffs and remedied by the Modesto district by digging a drainage ditch to remove the water. This indicates that both parties recognized the fact that the irrigation district had no lawful right to thus flood plaintiffs' property. Moreover, the presence of substantial evidence indicates that for a period of time thereafter no appreciable damage resulted from seepage. The plaintiffs could not be bound by a claim of right to perform certain acts, of which claim they had no knowledge. Furthermore, assuming without so deciding, that the Modesto district did acquire a prescriptive right to carry its own water through the canal in spite of damage to plaintiffs' land from seepage, that privilege would not secure for it the further prescriptive right to subsequently augment the damage by also carrying a large additional quantity of water for another irrigation district.

[7] The appellants assert that the joint judgment which was rendered against both defendants, as separate irrigation districts, is invalid for the reason that the Waterford irrigation district had no control or interest in the Modesto reservoir, from which it was contended some of the damage to plaintiffs' land emanated on account of seepage therefrom. In support of this contention of the invalidity of the joint judgment, the appellants rely chiefly upon the cases of Miller v. Highland Ditch Company, 87 Cal. 430, 25 P. 550, 551, 22 Am. St. Rep. 254, and Slater v. Pacific American Oil Company, 212 Cal. 648, 300 P. 31. These cases may be readily distinguished from the facts of the present one. In this case, by the terms of the written agreement which was executed in 1919 between the two irrigation districts, they became jointly interested in the diverting dam and the main bypass canal through which the water for both districts was conducted. Assuming the evidence may show that the Waterford district did not make use of water from the reservoir, still it does satisfactorily appear that substantially all the damage which resulted to plaintiffs' land came from seepage from the main canal which was operated and conducted for the joint benefit of both defendants. The reservoir is situated nearly a mile north of the plaintiffs' land. The defendants contended, and the great weight of evidence sustains their claim, that the reservoir occupied a natural depression which was protected against seepage of water by hardpan or clay which was substantially impervious to leakage. It seems highly improbable that water from the reservoir percolated through the soil to the damage of plaintiffs' property to such a great distance. The defendants were joint tort-feasors in maintaining and operating the canal to the plaintiffs' detriment. We are satisfied that a joint judgment was properly rendered under the circumstances of the present case.

In the Miller Case, supra, the facts were quite different from those which appear in this case. In that case the flood waters descended through a natural canyon to a depression in a flat, where they collected near the plaintiff's land. The water from the canyon, however, did not flow upon his land. Several different individuals dug separate ditches by means of which the water was artificially drained from the pool and conducted upon the plaintiff's land, to his damage. There was no concerted plan between these men who dug the several ditches. Each one acted upon his own initiative independently of the others. They did not co-operate in the construction or operation of any of these ditches. No two of them joined in the digging or use of any one of them. The Supreme Court quite properly said: "An action at law for damages cannot be maintained against several defendants jointly when each acted independently of the others, and there was no concert, or unity of design, between them."

Exactly the same situation existed in the Slater Case, supra. In the present case, there was concerted action and co-operation between the defendants in maintaining a water canal for the joint benefit of both parties. This constituted them joint tort-feasors with respect to all the damage which resulted herefrom. We are of the opinion that since the defendants were joint tort-feasors with respect to the operation of the canal from which substantially all the damage came, it would not invalidate the joint judgment merely because one of the joint tort-feasors also independently maintained a reservoir which contributed to a slight extent to the damage which resulted chiefly from their common enterprise.

[8, 9] Finally, the appellants contend the judgment should be reversed for the reason that the court gave to the jury contradictory instructions which are irreconcilable. It is true that contradictory instructions were given to the jury regarding the basis upon which damages must be predicated. Certain instructions informed the jury that a verdict for damages could not be rendered against the defendants unless the evidence disclosed the fact that such damages were the result of negligence in the construction or operation of the reservoir or canal. Other instructions informed the jury that damages might result as a violation of article 1, § 14, of the Constitution of California, by merely injuring the property of the plaintiffs from seepage of water from the canal, even in the absence of negligence in the construction or maintenance of the reservoir or canal. In accordance with the law as we have heretofore stated the rule, the instructions are erroneous which informed the jury that a verdict could not be rendered against the defendants in the absence of evidence of negligence in

constructing or maintaining the reservoir or canal. These erroneous instructions are all favorable to the appellants. We assume they were all offered by the defendants. Since the record on appeal fails to indicate which party offered these instructions, in support of the judgment it will be presumed they were offered by the appellants. Knight v. Gosselin, 124 Cal. App. 290, 297, 12 P.(2d) 454; 2 Cal. Jur. 870, § 509; Gray v. Eschen, 125 Cal. 1, 57 P. 664. The appellants may not complain of erroneous instructions which were given to the jury at their own request since the jury was elsewhere correctly instructed with respect to the same subject. Under such circumstances, it may not be assumed these instructions were prejudicial to them. Treadwell v. Nickel, 194 Cal. 243, 271, 228 P. 25, 37; Barkhaus v. Producers' Fruit Co., 192 Cal. 200, 210, 219 P. 435. In the Treadwell Case, supra, it is said in that regard: "The giving of conflicting instructions upon a material point is undoubtedly error, but a party may not be heard to complain that instructions are inconsistent, if it appear that the inconsistency arises through the giving of instructions at his request which are inconsistent with, or contradictory of, other instructions given at the request of the other party which are pertinent to the issues of the case, and which are correct statements of the law."

We find no reversible error in the giving of the instructions.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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135 Cal.App. 161

MENGES v. ROBINSON et al.

Civ. 1412.

District Court of Appeal, Fourth District, California.

Nov. 6, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. Bills and notes ⚿337, 509.

That purchaser of note knew he was paying less than face value, and investigated financial condition of some of makers, but made no investigation as to consideration received by makers, could be considered in determining good faith of purchaser and was sufficient to put purchaser on inquiry as to consideration.

2. Bills and notes ⚿509.

In suit on note, evidence of circumstances leading up to making of note *held* admissible on issue whether plaintiff purchased note in good faith and without notice, regardless of whether fraud appeared.

3. Bills and notes ⚿525.

In suit on note, evidence sustained implied jury finding that plaintiff was not holder in due course for value and without notice.

4. Appeal and error ⚿1033(8).

Plaintiff in suit on $5,000 note could not complain that evidence did not support verdict of $1,000.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Mark M. Menges against Richard L. Robinson and others. From a judgment in his favor granting insufficient relief, plaintiff appeals.

Affirmed.

See, also, 23 P.(2d) 526.

George H. Gobar, of Fullerton, for appellant.

R. Y. Williams, Chas. D. Swanner, and Head, Wellington & Jacobs, all of Santa Ana, for respondents.

BARNARD, Presiding Justice.

The plaintiff brought this action on a note for $5,000 dated August 18, 1931, due six months after date, payable to "Myself." The note was signed and also indorsed on the back by all of the defendants except Chas. F. Carrere, and was also indorsed "Without recourse, Chas. F. Carrere." It is alleged in the complaint that the note was made, executed, and delivered to Chas. F. Carrere and that it was by him indorsed to the plaintiff in good faith in the usual course of business and for a valuable consideration. The defendants Mott and Bosch answered setting up failure of consideration and partial failure of consideration, and also alleging that the plaintiff fraudulently conspired with the said Carrere to obtain said note for a nominal consideration and that the plaintiff took the note with full knowledge and notice of all equities between Carrere and the other defendants. The jury returned a verdict in favor of the plaintiff for $1,000, and from the judgment which followed the plaintiff has appealed.

The main grounds for reversal urged are that the evidence conclusively shows that the appellant was a holder in due course and that the court erred in permitting testimony with reference to what had occurred prior to the execution of the note. It appears that Carrere was a stock salesman with whom the appellant had been doing business for about two years prior to this transaction. On at least two occasions the appellant bought certain "aeroplane stock" through Carrere, and later, through him, traded this stock for certain shares of stock in the Commonwealth Mining Company. While the appellant testified that he was and had been the owner of these several blocks of stock, none of said stock had ever been transferred to his name on the books of the respective corporations, and all thereof had been carried at all times in the name of Carrere. There is evidence that the mine supposed to be operated by the Commonwealth Mining Company was an old abandoned mine in Idaho; that a part of the tunnels were caved in; that the timbering was rotted out and caved in in places; that the mine was in an unsafe condition; that there was no work going on; and that no dividends had ever been paid on the stock.

Shortly before the note here in question was executed, the appellant visited this mine and decided, as he testified, that he "would like to get rid of" his stock. He also testified that he talked to Carrere about disposing of this mining stock for him and that Carrere told him "he might possibly be able to sell my stock for me," and that he "told me he would get me out of this deal." About that time Carrere approached the other defendants, who had organized another mining company and desired to raise money with which to operate, and told them that if they would give him a note for $5,000, he could and would dispose of it for that amount of cash and thus furnish them with the means of operating. This resulted in the execution of the note here in question which was given to Carrere to sell for $5,000, and by him turned over to the appellant a few days later. The appellant testified that he gave Carrere a check for $1,500 and 7,000 shares in the Commonwealth Mining Company for the note. However, the appellant's shares stood in Carrere's name on the books of the corporation and it does not appear that any transfer was ever made. Carrere turned over to one of the makers of the note other than these respondents $500 in cash and a certificate for 12,000 shares in the Commonwealth Mining Company, which certificate was in the name of a man named Wilson, with an assignment from Wilson to the appellant, but which was not assigned or signed by the appellant. The appellant testified that he knew nothing about these 12,000 shares and had never seen that certificate. At the trial the respondents offered to return the $500 they had received and deposited the certificate for 12,000 shares of stock in court for the appellant. The appellant testified that Carrere had offered him several trades for his stock and that, when he brought in this note, it looked as good to him as anything he had seen and that he completed the deal after first inquiring into the financial responsibility of respondents Bosch and Mott. While he testified that he bought the note outright from Carrere and had no knowledge of how Carrere acquired it, it also appears from his testimony and from his deposition, which was received in evidence, that Carrere told him that if he could raise some money on the note he could take his stock but that he would have to have some cash to complete "this deal." He further testified that he did not know what the deal was, but he admitted that he knew that Carrere was acting as an agent for the makers of the note in attempting to raise money on the note with which to buy something. When asked in regard to the indorsement without recourse by Carrere, he testified: "The only reason I had him sign it was to vouch for the signatures of those men." There is other evidence that the shares of the Commonwealth Mining Company were at that time of little or no value.

[1-3] There is evidence to indicate that Carrere was the appellant's agent in trying to get rid of the stock referred to and that the appellant knew that Carrere had possession of the note as the makers' agent for the purpose of raising money on the same. The jury was justified in believing that the appellant knew that he was paying far less for the note than the amount it called for. That fact, with the fact that he investigated the financial condition of some of the makers while making no investigation as to the consideration that the makers had received for the note, constitutes a suspicious circumstance which is to be considered in determining whether the purchase of the note was made in good faith and is of itself sufficient to put the purchaser of the note upon inquiry as to the consideration. Jordan v. Grover, 99 Cal. 194, 33 P. 889; Witty v. Clinch, 207 Cal. 779, 279 P. 797. The further fact that the appellant admitted knowledge that Carrere was acting as the agent of the makers of the note in attempting to raise money thereon indicates that at the time he paid an inadequate consideration for the note he knew that he was not dealing with Carrere as the owner of the note; that Carrere had not paid for the same; and that the real consideration was to be what he himself paid. Whether or not fraud appears, we think the evidence of the circumstances leading up to the making of the note was properly received upon the issue as to whether the appellant purchased it in good faith and without notice, and that the same is sufficient to sustain the implied finding of the jury that he was not a holder in due course for value and without notice.

What we have already said disposes of the contentions made that the court erred in denying a motion for an instructed verdict and a later motion for judgment notwithstanding the verdict, both of which points are merely stated without argument or authority.

[4] The appellant's criticism of two instructions and a portion of a third are entirely without merit. One other point is stated but

not argued, to the effect that the amount of the judgment, $1,000, is not supported by the evidence. While the amount of the verdict would have been better supported had it been for $500 instead of $1,000, the appellant is in no position to complain of any error in his favor. Moore v. Borgfeldt, 96 Cal. App. 306, 273 P. 1114. It may be added that under the evidence the jury could have allowed an additional nominal amount for the value of the stock delivered to one of the makers of the note. While the evidence as to such value is somewhat indefinite, the appellant presents nothing on the point justifying a reversal. The record indicates that the action was fairly tried and that the result was rather more favorable to the appellant than otherwise.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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135 Cal.App. 368

BROOKS et al. v. FAULKNER et al.

Civ. 8942.

District Court of Appeal, First District, Division 1, California.

Nov. 20, 1933.

1. Pleading ⚿36(3).

Admission in cross-complaint that deed had not been placed in escrow on a certain date did not prevent court from finding that escrow was opened on following day.

2. Appeal and error ⚿533(1).

Opinion of trial judge is not part of record, and cannot be considered by appellate court.

3. Appeal and error ⚿900.

Every intendment and presumption not contradicted by or inconsistent with record on appeal must be indulged in favor of superior court's judgment.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Earl Brooks and others against J. E. Faulkner and another, in which defendants filed a cross-complaint. Judgment for defendants, and plaintiffs appeal.

Affirmed.

See, also, 125 Cal. App. 137, 13 P.(2d) 748.

Michael F. Brown and M. I. Church, both of Los Angeles, for appellants.

Elijah M. Smuckler, of Los Angeles, for respondents.

JAMISON, Justice pro tem.

This is an action for specific performance of a contract for the sale of certain real property in the city of Los Angeles and for damages. Judgment was rendered for defendants, and from this judgment plaintiffs appeal. This appeal was brought up on the judgment roll alone.

It appears from the pleadings that on May 15, 1928, George M. White and Myrtle E. White, his wife, executed a deed of trust in the sum of $50,000 to respondent Faulkner. Thereafter the said Whites defaulted, and following the procedure required by law, the trustee proceeded to offer said property for sale. Same was purchased by said Faulkner on December 26, 1929, and on that date a trustee's deed was issued to said Faulkner, which was recorded on January 7, 1930. On August 12, 1929, appellant Brooks purchased the said property from the Whites, and continued to be the owner until the said trustee's deed was issued to Faulkner. On October 11, 1929, the said Brooks began an action against Faulkner and other defendants to enjoin the sale under said deed of trust. On January 3, 1930, said Faulkner commenced an action against said Brooks, the Boyds, E. D. Bunn, and W. A. Spaulding for the unlawful detainer of the said premises. Thereafter, on January 17, 1930, an agreement in writing was entered into between Faulkner and Brooks, the Boyds, E. D. Bunn, and W. A. Spaulding wherein the parties agreed that the action to enjoin the sale under the deed of trust should be dismissed, and that judgment be entered in the unlawful detainer action as follows: That the defendants (in that action) are to deliver possession of said premises on or before March 9, 1930, and, if not so delivered, plaintiff shall be entitled to a writ of assistance on the 10th day of March, 1930, or as soon thereafter as plaintiff shall make application therefor; that the said Faulkner will leave in the hands of his attorney, Elijah M. Smuckler, a good and sufficient deed of said property to said Brooks; that said property shall be subject to the taxes for the year 1930–31, the second half of the taxes for the year 1929–30, and a deed of trust for a balance of $48,750; that said deed be placed in escrow by the said Smuckler at any time before March 9, 1930, that he is called upon to do so by the said Brooks and the Boyds; that said Brooks, the Boyds, or any of them, through said escrow, is to deliver to said Smuckler for said Faulkner the sum of $51,250 cash as consideration for said deed on or before March 9, 1930. Said agreement also provided that the first deed of trust on said property (evidently referring to the deed of trust for $48,750) became due and payable on the 9th day of February, 1930, and, if the same were foreclosed pending the negotiations of the parties thereto, the said appellants agreed to hold and save harmless the said Faulkner.

It appears from the pleadings that on the 8th day of March, 1930, some time in the forenoon of that day, appellants Pierce and the Boyds appeared at the office of Smuckler and demanded that he immediately place in escrow the deed described in said agreement in compliance with the terms of the agreement; that, complying with said demand, Smuckler went with the said Pierce to the escrow department of the Title Insurance & Trust Company; that they did not arrive there until 12:30 p. m., and, that day being Saturday, the said department was closed when they arrived; that no further demand was ever made upon Smuckler or Faulkner to comply with the agreement; that on or about the 9th day of March, 1930, the Mortgage Guaranty Company, the holder of the incumbrance described in said agreement, demanded of said Faulkner all amounts then due and unpaid on the first deed of trust on said property; that on said date Faulkner paid to said company the sum of $1,250; that on about March 14, 1930, the said company again demanded payment of the remainder of the debt secured by said deed of trust, and thereupon Faulkner paid to said company on said deed of trust the further sum of $32,500, leaving an unpaid balance on said incumbrance of $15,000.

The trial court found that appellants did not comply with the provisions of said agreement relating to the acceptance of same, and did not ever place the sum of $51,250, or any other amount, in escrow as provided for in said agreement or option, and that appellants never did tender the said sum, or any sum of money, in the manner prescribed by the said agreement. The court further found that respondents did on the 9th day of March, 1930, open an escrow with the Title Insurance & Trust Company covering the property, and that the said escrow was still pending at the date of this trial, and that respondent Faulkner was at all times able, willing, and ready to complete his part of said agreement and option; that it is untrue that Faulkner ever refused to comply with his obligation under said contract; that it is untrue that on October 11, 1929, or at any other time, the said Smuckler was the duly authorized and/or acting agent of Faulkner, but it is true that said Smuckler acted as attorney at law for said Faulkner and in no other respect.

[1] There was evidence, documentary and oral, introduced in the trial of this case, but none of it is contained in this record on appeal. Appellants rely wholly upon alleged admissions of respondents in their answer and cross-complaint for their contention that the trial court failed to find material issues alleged in the pleadings, and also that the findings are contrary to the admitted facts in the pleadings. It is admitted by the cross-complaint that on the 8th day of March, 1930, Daniel Pierce, B. F. Boyd, and Paul Boyd appeared at the office of Smuckler and demanded of him that he place in escrow the deed, in compliance with the terms of the agreement; that Smuckler thereupon went with said Pierce for the purpose of placing the deed in escrow, but failed to do so, owing to the fact that the said escrow office was closed. However, the court found that Faulkner did on or before the 9th day of March, 1930, open an escrow with the Title Insurance & Trust Company covering said property; that same was still pending when this case was tried, and that it is untrue that Faulkner ever failed to comply with his obligation under the said agreement. None of the evidence being before us, we cannot say that this finding was not supported by the evidence. The fact that appellants and Smuckler failed to place the deed in escrow on the 8th day of March, 1930, is not conclusive that it was not so placed at a later date, in the absence of the evidence adduced at the trial.

[2, 3] Appellants have incorporated in the record on appeal the opinion of the trial judge. The law is well settled that the opinion of the judge of a trial court is not a part of the record on appeal which the appellate court can consider on appeal. In re Fahlman, 84 Cal. App. 248, 257 P. 893; DeCou v. Howell, 190 Cal. 741–751, 214 P. 444. It is also a well-established principle that every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the judgments of the superior courts. 2 Cal. Jur. p. 852, and cases cited.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

135 Cal.App. 202

MOREAS v. FERRY.

Civ. 4969.

District Court of Appeal, Third District, California.

Nov. 7, 1933.

1. Automobiles 🔑**181(2).**

Invitee who was injured by "kicking" of automobile which he was requested to crank by automobile owner *held* not "guest" within statute providing that person who, as guest, accepts ride in any vehicle, moving on public highways, and while so riding receives injuries, can recover only if owner was willfully negligent (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

[Ed. Note.—For other definitions of "Guest," see Words & Phrases.]

2. Automobiles 🔑**211.**

Invitee who, on request of motorist, attempted to crank automobile and was injured by automobile "kicking," *held* not contributorily negligent nor did he assume risk (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

3. Automobiles 🔑**173(1).**

Automobile owner *held* liable to invitee who, on owner's request, attempted to crank automobile and was injured by automobile "kicking," since owner owed duty of having automobile in reasonably safe condition (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

Appeal from Superior Court, Sacramento County; Forrest A. Plant, Judge.

Action by Jose Moreas against John V. Ferry. Judgment for plaintiff, and defendant appeals.

Affirmed.

Charles L. Gilmore, of Sacramento, for appellant.

Mento & Read, of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In an action for personal injuries plaintiff had judgment, from which defendant appeals.

[1, 2] It is the contention of appellant that the relationship of host and guest existed between the parties hereto at the time the injury was received, and the provisions of section 141¾ of the California Vehicle Act (as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693) applied, and inasmuch as plaintiff failed to show intoxication or willful misconduct, the judgment is not supported by the evidence. We are unable to agree with this theory of appellant.

The testimony discloses that defendant, accompanied by his wife, drove in their Ford automobile to the home of plaintiff, whereupon plaintiff and his wife accepted the invitation to accompany defendant and Mrs. Ferry in their car to a theater. Upon arrival they found the showhouse crowded and then decided to seek another place of entertainment. Defendant, seated behind the steering wheel, requested plaintiff to crank the car. This he proceeded to do and gave it two half turns and upon the third attempt it "kicked back," as he described it, causing the crank to strike his forearm, inflicting the injuries complained of.

The complaint is in two counts, the first based on the failure to warn an invitee of dangerous or defective conditions connected with the starting equipment of the automobile, which appellant requested or invited respondent to crank for appellant's benefit and advantage, appellant being charged with the actual knowledge of the existence of certain dangerous and unrepaired defects, which were unknown to respondent.

The second count alleges that appellant moved and altered the position of the retard and time lever attached to the mechanism of the automobile engine while respondent was attempting to crank the car, whereupon the engine forced the crank with great force and violence around and against the arm of respondent. The judgment was based upon the first count in the complaint.

The complaint alleges that respondent "was the guest of defendant and a passenger of defendant in said automobile," but this allegation, if material at all, was inserted therein in aid of the claim that respondent was an invitee.

From an analysis of section 141¾ of the California Vehicle Act, it is apparent that under the facts here alleged its provisions are not applicable. It is therein provided, "any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways * * * and while so riding * * * receives or sustains an injury. * * *" The injury here received was not inflicted in any vehicle moving upon any highway and was not inflicted while so riding.

The trial court was correct in its holding that respondent was not a guest within the meaning of the section referred to, nor does the evidence disclose that respondent was guilty of contributory negligence, nor that he assumed the risk, if any, in complying with the request of appellant.

An automobile mechanic, called as an expert, testified that a Ford properly adjusted, would not "kick." Such a thing occurs only when it is out of repair, defective, or unless the spark is too far advanced.

In the case of Buckingham v. San Joaquin Cotton Oil Co., 128 Cal. App. 94, 16 P.(2d) pages 807, 809, it was contended as here, that the injuries to respondent were owing to his own negligence. The court said, "It is a well-settled rule that the owner of the premises must exercise ordinary care to render them reasonably safe to persons whom he induces to come thereon by invitation, express or implied * * * and appellant owed to respondent, as such invitee, the duty of maintaining the property in a safe condition and exercising reasonable care in protecting him from injury."

[3] In this case the danger was not obvious. It was known to appellant but not known or suspected by respondent. "It has been held that the owner of an automobile owes to one * * * the duty of having the automobile in a reasonably safe condition, and is liable * * * for injuries from defects in the automobile of which the owner knew." 42 Cor. Jur., pp. 1059, 1077, and cases cited.

The evidence supports the findings and the judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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135 Cal.App. 249

SILVA et al. v. MacAULEY et al. *

Civ. 4964.

District Court of Appeal, Third District, California.

Nov. 8. 1933.

Rehearing Denied Dec. 8, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. Fish 🔑16.

Owners *held* entitled to damages suffered because of illegal seizure of truckload of crabs, and illegal seizure and detention of truck, by defendant deputy fish and game commissioners (Pen. Code, § 628, subd. c; Deering's Gen. Laws 1931, Act 2874, §§ 3, 24).

2. Fish 🔑16.

Where crabs are illegally seized, owner may replevy them from officer seizing crabs, or, if crabs have been destroyed, may have action for their value (Pen. Code, § 628, subd. c).

3. Fish 🔑13(3).

Statute prohibiting transportation of crabs "from" designated fish and game district *held* not to prohibit transportation of crabs "through" such district (Pen. Code, § 628, subd. c).

Pen. Code, § 628, subd. c, prohibiting the transportation of crabs "from" designated districts, means the transportation of crabs taken from the waters of the designated districts; the word "from" always implying a starting point, whether it be of time, place, or condition; and meaning: Having a starting point of motion; noting the point of departure, origin, withdrawal, etc.; out of, starting at, as, he traveled "from" New York to Chicago.

[Ed. Note.—For other definitions of "From" and "Through," see Words & Phrases.]

4. Constitutional law 🔑70(1).

Court may not, by construction, make act not prohibited a crime.

5. Fish 🔑16.

Officers' seizure in H. county of crabs caught off Oregon shore *held* not justified by statute prohibiting transportation of crabs "from" H. county; hence officers were guilty of conversion, and, crabs not being returned, were liable to owners for their market value at time of conversion, with interest (Pen. Code, § 628, subd. c; Deering's Gen. Laws 1931, Act 2874, §§ 3, 24; Civ. Code, § 3336).

6. Evidence 🔑99.

In action against deputy fish and game commissioners for conversion of truckload of crabs, conversation between policeman and truck driver, not in commissioners' presence, *held* incompetent to show that truck driver misled commissioners into believing transportation was illegal (Pen. Code, § 628, subd. c).

7. Appeal and error 🔑692(1).

Exclusion of testimony regarding what took place before justice *held* not shown to be error, where offered record was not made part of transcript.

8. Fish 🔑16.

Deputy fish and game commissioners' liability for illegal seizure of plaintiffs' crabs was not affected by fact that justice of peace, after seizure, erroneously held plaintiffs' truck driver guilty of misdemeanor in transporting crabs (Pen. Code, § 628, subd. c).

9. Officers 🔑116.

Officer seizing property unlawfully, although under color of office, and principal in whose behalf he acts, are liable to action for damages.

10. Officers 🔑116.

Public officer is liable in damages to one specially injured by his neglect, refusal to

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*Rehearing denied 27 P.(2d) 791.

perform, or negligent performance of, official ministerial duty, to extent of such special injury, regardless of officer's intentions.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by L. Silva and another against E. L. MacAuley and others, including Dave Dondero. Judgment for plaintiffs, and Dave Dondero and other defendants appeal.

Affirmed.

Hearing denied by Supreme Court; SHENK and CURTIS, JJ., dissenting.

Eugene D. Bennett, of San Francisco, and U. S. Webb, Atty. Gen., and Jess Hession and Emmett J. Peterson, Deputy Attys. Gen., for appellants.

Charles Kasch, of Ukiah, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs had judgment against the appellants for the sum of $428 damages suffered by them for and on account of the destruction of a certain lot of crabs, and the taking by the appellants and depriving the plaintiffs of the use of a certain automobile.

The findings of the court, which are amply supported by the testimony, are to the effect that on or about the 1st day of July, 1932, the plaintiffs had brought into the state a truckload of fresh crabs consisting of 30 sacks which had been caught in the Pacific Ocean off the state of Oregon, and were transporting the same through the counties of Del Norte, Humboldt, Mendocino, Sonoma, and Marin to the city and county of San Francisco. The truck was in charge of an employee of the plaintiffs. That said crabs were being transported through fish and game district No. 1½, and to a point in fish and game district No. 2 outside said district No. 1½, being taken through this district as a part of transporting the same from the state of Oregon to the city of San Francisco. That on or about the 2d day of July, 1932, near the county of Mendocino, the appellants, purporting to act in their official capacity as deputy fish and game commissioners, without any search warrant or legal process, intercepted the aforesaid truck, arrested the driver thereof, took possession of the crabs, and disposed of the same to persons unnecessary to mention herein, and deprived the plaintiffs of their property, against their will and without their consent, and to their damage, for which judgment was given by the court, as aforesaid.

The findings also are to the effect that the appellants at the same time took and retained possession of the plaintiffs' truck and deprived the plaintiffs of the use thereof, for which damages were allowed by the court.

The court further found that at the time of the seizure of said crabs they were not being transported through fish and game district No. 1½ into fish and game district No. 2, in violation of the provisions of section 628 of the Penal Code.

The appellants justify their seizure of the crabs referred to and base their appeal upon subdivision (c) of section 628 of the Penal Code, which at the time involved read as follows: "Every person who ships or offers for shipment, or who transports or carries any species of crabs from fish and game districts 1½, 2½, 5, 6, 7, 8 and 9, either to a point outside of the state, or to any part of the state other than in districts 1½, 2½, 5, 6, 7, 8 and 9, or who holds any crabs in live cars within said fish and game districts is guilty of a misdemeanor." The provision of the Codes as to the disposition of crabs seized by the officers, not being material, is not set forth herein.

Prior to the filing of the findings herein, the learned judge of the trial court filed a written opinion in this cause which so clearly sets forth the facts and the law applicable thereto that we adopt the following excerpts therefrom as the opinion of this court:

"The evidence in this case is uncontradicted that plaintiffs were engaged in the business of purchasing crabs at Port Orford, in the state of Oregon, and transporting the same along the Redwood highway from the state line of California on the north through the counties of Del Norte, Humboldt, Mendocino, Sonoma and Marin to the city and county of San Francisco.

"That part of Del Norte and Humboldt counties through which the crabs were transported is within fish and game district No. 1½, and that part of Mendocino county through which they were transported is within fish and game district No. 2. (Sections 3 and 24 of Act 2874, Deering's Gen. Laws, vol. 1, p. 1350.)

"Defendants justify their seizure of the crabs under subdivision (c) of section 628 of the Penal Code, and their distribution under subdivision 2 of section 642 of the Political Code. Presumably, the claim of defendants is that the truck was to be used as evidence on the trial of the case, and was, therefore, the subject of seizure. People v. Chaigles, 237 N. Y. 193, 142 N. E. 583, 32 A. L. R. 680; Henderson v. United States (C. C. A.) 12 F.(2d) 528, 51 A. L. R. 424.

[1] "If Del La Torre, at the time of the arrest and seizure, was not engaged in a violation of subdivision (c) of section 628, Penal Code, plaintiffs are entitled to be reimbursed for the damages which they suffered by reason of what, in such cases, would be an illegal seizure and conversion of the crabs, and an illegal seizure and detention of their truck.

[2] "A person whose property is illegally seized may replevy the same from the officer seizing it, or, if it has been destroyed, he may have an action for its value. In such case, the burden is upon defendants to prove a justification under the statute. Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 390.

[3-5] "Subdivision (c) above referred to makes it unlawful for any person to transport or carry any species of crabs from fish and game district No. 1½, in which Humboldt county is located, to any point outside the state of California, or to any point within the state other than certain districts of which Mendocino county is not one.

"The question therefore arises whether the foregoing subdivision of section 628 prohibits the transportation of crabs *through* Humboldt county, if the point of origin of the shipment is without the state boundary. To hold that it does would require that the word 'from' in the statute be interpreted to include the word 'through.'

"A court may not legislate; that power is reserved to the lawmaking body of the state. The legislature has declared it a public offense to ship crabs *from* a designated district to another, but has not prohibited such shipment *through* the district. If it had been the intention of the legislature to forbid the transportation *through* a district, it could readily have so enacted, but it did not.

"The court may not, by construction, make that a crime which is not prohibited. (16 Cor. Jur., p. 65.)

"The Supreme Court of the United States has said: 'Where a law is plain and unambiguous, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.' (U. S. v. Fisher, 2 Cranch, 399, 2 L. Ed. 304.)

"The supreme court of Indiana quotes approvingly the following language from Wharton Dog. 569: 'The best rule by which to arrive at the meaning and intention of the law is to abide by the words which the law-maker has used.' (Case v. Wildridge, 4 Ind. 51.)

"The word 'from' always implies a starting point, whether it be of time, place or condition. In Standard Dictionary it is defined as: 'Having a starting point of motion; noting the point of departure, origin, withdrawal, etc.; out of, starting at, as, he traveled from New York to Chicago.'

"In Case v. Wildridge, supra, the supreme court of Indiana had before it a case arising under the law of succession of that state. The statute provided that property received by the deceased 'by descent *from* the mother' should vest in the brothers and sisters of the deceased. The court held that this did not include property that the deceased acquired *through* her mother from the maternal grandfather. In other words, that 'from' does not mean 'through.'

"The Supreme Court of the United States, speaking through Mr. Justice Story, in passing upon a statute of succession of the state of Rhode Island, says: 'A descent *from* a parent to a child cannot be construed to mean a descent *through* and not *from* a parent.' (Gardner v. Collins, 2 Pet. 58, 7 L. Ed. 358.)

"If the crabs in question were being transported from Humboldt county at the time of the seizure, it could as readily be contended that when they reached Sonoma county they were being transported from Mendocino county. It is not a crime to transport crabs from Mendocino county, and therefore, if defendants' construction is correct, even if crabs were originally taken in Humboldt county and shipped from that county, they would be contraband only so long as the last district through which they passed was a prohibited district. This certainly would not make effective the laws for the protection of crabs. It seems clear that section 628 of the Penal Code which prohibits transportation of crabs *from* Humboldt county, does not prohibit transportation *through* Humboldt county. Hence, the officers were not justified in their seizure of the crabs and truck involved in this action. The act of the defendants constituted a conversion of the crabs (24 Cal. Jur., p. 1024), and the measure of damages is laid down by section 3336 of the Civil Code. The crabs were not returned to plaintiffs; hence, the latter are entitled to the market value at the time of the conversion, with interest."

By using the name of the element in which crabs abound, the meaning of the statute under consideration is made plain. Prohibiting the taking of crabs from district 1½ means taking crabs from the waters within district 1½, where crabs are found. It means simply this, and nothing more. Thus it is readily perceived that a statute prohibiting the taking of crabs from the waters within district 1½ has no application or relevancy whatever to the conveyance of crabs over the highways in Humboldt or Mendocino counties, when the crabs are taken from the waters of the Pacific Ocean adjoining Port Orford, a location some 300 miles to the northward, and beyond the jurisdiction of the state. The intent of the Legislature and the meaning of the statute was and is to prohibit the taking of crabs from the waters of district 1½. There is nothing in the statute which suggests that the Legislature intended to penalize the bringing into the state of crabs taken from the waters other than the districts mentioned. Nor is there any persuasive force to the contention that holding that a statute prohibiting the taking of crabs from the waters where crabs abound in district 1½ means the same and includes the conveyance through the district, of crabs taken elsewhere, would add to the difficulties of enforcing the provisions of section 628 of the Penal Code. An act which is perfectly right and lawful cannot be held criminal in order to enable prosecuting officers to enforce the penal provisions of a statute.

As applied to this case the statement which we have made is rendered doubly clear. The record shows that just south of the line between the states of Oregon and California a quarantine station is maintained through which all trucks and automobiles coming down the road known as the "Redwood Highway" must pass through on their journey southward. Though spoken of as a "checking station" the testimony discloses that the truck in which the confiscated crabs were being transported passed through the quarantine station, or was checked through as described by the truck driver. No attempt was made to surreptitiously bring the crabs into the state of Oregon. No difficulty was presented in ascertaining from whence the crabs were brought. The slightest investigation would have disclosed their source. Nor is there anything in the record supporting the contention that the defendants were misled by any act of the plaintiffs or of the truck driver. Their own testimony shows that they acted upon a "tip that a truckload of crabs was passing through." The defendants themselves made no contention before the trial court that they were misled. No questions were asked by them of the truck driver, from what waters the crabs had been taken. The defendants appear to have been wholly indifferent as to whether the crabs were taken from Port Orford or any other place; they were simply seizing a truckload of crabs that was passing through. Had any questions been asked of the truck driver as to the source of the crabs, the truth or falsity of his answers as to where they had been obtained could have been ascertained in a very few minutes. A telephone inquiry to the quarantine station to which we have referred would have furnished the information within a short space of time. Common knowledge, of which we must take notice, establishes these facts. It is a matter of everyday occurrence that connection is had by telephone between points several hundred miles distant within a very few minutes, frequently before the one placing the long distance call is allowed to hang up the receiver.

[6] The only reference to the record upon which the contention is made that the officers were misled is the following conversation which took place after the truck driver had been stopped. (Question of the truck driver): "What did they say to you? A. Well, just as I drove by, they gave me the siren and stopped me and said, 'What have you in the truck?' and I told them 'Fish', and they said 'Yes?' They got a searchlight and went to the back and lifted up the canvas from the truck and said, 'Crabs, hauling crabs, are you?' and I said 'Yes,' so he told me to turn around and drive back to the garage." On the way back a police officer by the name of Fisk spoke to the truck driver and said, "My God, man, don't you know you are wrong doing this, might get in wrong?" To which the truck driver replied, "A fellow has to take a chance once in a while." This latter conversation occurred after the crabs had been seized and the truck driver was being taken on his way to jail. So far as the record is concerned it does not appear that the conversation between the police officer and the truck driver was heard by the defendants. It does appear that they took no action in relation thereto, and, as we have said, made no inquiries as to what waters the crabs had been taken from. The testimony of the truck driver does not include the conversation. The conversation between the police officer and the truck driver, not having been shown to have been had in the presence of the defendants, or repeated to them, should have been excluded.

[7, 8] No error is shown, in the exclusion of the testimony of what took place before a justice of the peace when the truck driver was taken before him. The offered record is not made a part of the transcript, and therefore there is nothing before us upon which we would be authorized to disturb the ruling of the trial court. The fact that the justice of the peace made the mistake of holding the truck driver guilty of a misdemeanor in conveying the crabs through Mendocino county, which holding was promptly set aside by the trial court, is wholly immaterial. The crabs had been seized and disposed of prior to that date, and the tort in wrongfully seizing the plaintiffs' property was committed by them prior thereto, and was in nowise dependent upon the mistakes of the justice of the peace.

[9] In the recent case of Abbott v. Cooper et al., 23 P.(2d) 1027 (opinion filed June 29, 1933), the Supreme Court had occasion to pass upon the liability of officers acting in excess of their authority, and held that whenever officers purport to act in the line of their official duty, but in excess of their authority, a tort is committed, and that liability for such tort is thereby fixed not only upon the officials committing the tort, but also upon the principals. The civil liability of an officer committing a tort appears to be exactly the same as that of a civilian. Thus, whenever an officer seizes property unlawfully, even though under color of his office, an action for damages may be maintained against him, and, if acting in behalf of a principal, also against the principal, the same as though the damages were inflicted by private individu-

als. The reported cases generally have to do with principals whose deputies have committed the tort. However, both deputy and principal are governed by the same rule, and subject to the same liability.

In 1 A. L. R., page 236, the law is thus stated: "The general rule has long been settled that sheriffs and other officers performing similar duties are liable civilly but not criminally for the acts and omissions of their deputies when acting officially or under color of the office." This general rule is supported by a long list of cases cited, which are too numerous to be set forth herein, and therefore are only referred to.

To the same effect is a long list of cases found in 18 A. L. R., page 197, in annotations following the case of Manwaring v. Geisler, 191 Ky. 532, 230 S. W. 918, 18 A. L. R. 193, a case in which a motorcycle policeman was held liable for an injury caused by his negligence when riding his motorcycle to a fire. Here, again, the cases are too numerous to be listed herein.

In 39 A. L. R., page 1306, the rule is laid down and supported by numerous authorities that a peace officer is liable upon his bond for negligence causing personal injury or death.

In 53 A. L. R., page 41, is found another annotation supporting the rule that peace officers are liable for injury to property.

In Antin, administrator, etc., v. Union High School District No. 2 etc., 130 Or. 461, 280 P. 664, 669, 66 A. L. R. 1271, the Supreme Court of Oregon held as follows: "A public officer, however, is responsible to a private party for his own negligence or wrongful acts when acting beyond the scope of his authority."

[10] In 23 Cal. Jur., page 323, the text reads: "A sheriff is answerable for the wrongful acts of his deputy, committed under color of his office, and in the pretended discharge of his duty, for, as has been seen, the acts of a deputy within the scope of his duties are considered in law as those of the principal." The rule, of course, likewise applies, but where the principal is liable for the wrongful acts of a deputy, the deputy himself would be personally liable for his tort. In all such cases the question of good faith on the part of the officer is wholly immaterial where the plaintiff is not asking for any wilful or punitive damages. This principle is succinctly set forth in 21 Cal. Jur., page 908, as follows: "It is elementary that a public officer is liable to respond in damages to one specially injured by his neglect, or refusal to perform, or by his negligent performance of an official ministerial duty to the extent of such special injury, regardless of intentions, whether good or bad."

Other cases might be cited, but the annotations found in A. L. R. to which we have referred establish the liability of a public officer for his wrongful acts, or where he acts without, or in excess of his, authority. In this case damages were allowed only to the extent of the property damage suffered by the plaintiffs. The good faith or bad faith of the appellants becomes wholly immaterial.

What we have said disposes of all the questions tendered for consideration, and renders unnecessary a review of the many cases cited by the appellants which are not controlling here. The damages allowed are amply supported, though in relation to the use of the truck, the testimony is conflicting. Under such circumstances the allowance cannot be disturbed.

The judgment is affirmed.

We concur: **PULLEN, P. J.; R. L. THOMPSON, J.**

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135 Cal.App. 283

In re PARRISH'S ESTATE.

WRIGHT v. DeFOSSET et al.

Civ. 9326.

District Court of Appeal, Second District, Division 2, California.

Nov. 13, 1933.

Hearing Denied by Supreme Court Jan. 12, 1934.

1. Wills ⚷334.

Finding in will contest that decedent's mind was in weakened condition was not finding that decedent was incompetent to make will.

2. Wills ⚷334.

Finding that decedent did not subscribe will *held* not inconsistent with other findings that she did where complete finding of facts clearly showed determination that decedent signed, but that signature was not voluntary act.

3. Wills ⚷302(2).

Evidence justified finding that purported will signed by decedent resulted from fraud of legatee and one of witnesses.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Proceedings by Theresa M. DeFosset and others to contest the will of Alice Parrish, deceased, opposed by Matilda A. Wright, proponent. From a judgment declaring the will invalid, proponent appeals.

Affirmed.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Anne O'Keefe and Ralph C. Curren, both of Los Angeles, for appellant.

C. T. Vincent and J. J. Laton, both of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This is an appeal from a judgment of the superior court in which a purported will of Alice Parrish, deceased, was declared invalid. The proponent of the will, Matilda A. Wright, who was both a specific and the sole residuary legatee, as well as the executrix by the terms of the instrument, is the appellant. The respondents are nephews and a niece of deceased, and were the contestants below. The case was tried by the court without a jury, and briefly the findings are to the effect that the purported will, although signed by decedent, resulted from the fraud of the proponent and John P. Roche, one of the witnesses to it.

The terms of the proposed will (which we shall hereinafter generally refer to as the will) gave $1,000 each to Maud T. DeFosset, a niece, and Oliver Walker, a nephew, and $2,000 to Matilda A. Wright, sometimes referred to as Mrs. Wright. The writing designated Mrs. Wright as "my beloved nurse." $1 is left to each of any other lineal heirs who might establish themselves as such. The estate may be taken as of a value around $10,000, under depressed times. Mrs. Wright had been in the employ of Mrs. Parrish for some six months as housekeeper and personal attendant. Mrs. Parrish was unwell during all of this time, and several months before her death suffered a paralytic stroke which disabled her left arm and hand and her right leg. At this time she was about 81 years old. Thereafter she sat in a chair throughout the daytime. Shortly before her death she suffered another stroke. The housekeeper had not known Mrs. Parrish before the service began. John P. Roche claims to have had a slight acquaintance with Mrs. Parrish before Mrs. Wright's employment, though there is testimony in the case to the contrary. He appeared at the residence of deceased several times, and according to some testimony was quite friendly with Mrs. Wright. On one occasion after the first stroke, according to his testimony, Mrs. Parrish spoke to Roche about taxes and a will. She complained that a Mr. Johnson, who had advised her in a business way, had not responded to her request to draw a will. After some conversation, Roche agreed to draw her will, and secured the data. He wrote it out on a typewriter and later brought his neighbor, a Mr. Sellars, to the Parrish home, where the instrument was signed by Mrs. Parrish and by Roche and Sellars as witnesses. Thereafter Roche put the will in his office safe. This, according to him, was at Mrs. Parrish's request, coupled with a request for complete secrecy of the whole transaction. Mrs. Wright was in the house when the will was signed, but did not come into the room with the other three. She claims that she knew nothing about the drawing of the will and that she did not know she was a beneficiary until after the death of its maker. There is testimony that Mrs. Parrish had drawn a will before these events occurred and that she had expressed a desire to make changes therein. It also appears that the incinerator of a neighbor was habitually used by Mrs. Wright, but that a short time before the passing of Mrs. Parrish—according to one witness, two days before the funeral—a small stove was put up on the Parrish premises and a lot of papers belonging to decedent were burned. Mrs. Wright says these papers had been separated from others by Mrs. Parrish and that she had been instructed to discard them. It is undenied that a small bag was kept by Mrs. Parrish almost constantly within her reach; that in it were papers, keys, etc.; and that this bag appeared almost empty immediately after her death.

Several neighbors had been in the habit of dropping in on Mrs. Parrish during her lifetime, and they are unanimous in their testimony that Mrs. Wright was not gentle or considerate of the deceased and that Mrs. Parrish often spoke of her with dislike. Some of the neighbors also say that Mrs. Wright spoke disrespectfully of her employer. Mrs. Wright says she was not called "nurse," but the will, as we have seen, refers to her as "my beloved nurse." Several witnesses speak of Mrs. Parrish's crying, and one witness testified as follows as to a conversation with her: "She [Mrs. Parrish] says, 'Do you know what they made me do?' 'No, I don't know what they made you do; what was it?' She says, 'They made me sign a paper.' I says, 'Who made you sign a paper?' 'They did.' I says, 'Where did you sign your paper?' She says, 'They pushed me up there to that table,' and I says, 'And you don't know what you signed?' 'No, I don't know what I signed,' and she commenced to cry and she says, 'I am afraid I have signed my home away and I will die in the poorhouse,' and I said, 'Why, Mrs. Parrish, whatever made you do a thing like that?' and she says, 'Well, if you were afraid of them as I am you would do anything; I am helpless.' Directly so and she cried and she cried, and I says, 'I would not stand for it, but who are they and who were you talking about? Who come in here and done that?' 'Why,' she says, '[Her] sweetheart and her beau.' I says, 'Who are they; what is his name?' and she says, 'Mr. Roche.'" Decedent's nephews had not paid a great deal of attention to her, and Roche testified that Mrs. Parrish wanted to leave but $1 to Lewis J. Walker because of some misunderstandings between them. Mrs. DeFosset, the niece, had lived with Mrs. Parrish some years ago and had corresponded with her, though there was a period of several years when the correspondence lagged or ceased. However, they were corresponding cordially during the last months of decedent's life. There is testimony to the effect that Mrs. Parrish at one time referred to a will she had drawn, and that some one had tried to force her to sign another will. Neighbors' testimony also is to the effect that she had mentioned the propriety of her leaving her property to her niece. The testimony further shows that during the last few weeks of Mrs. Parrish's life Mrs. Wright discouraged the neighbors' calls, and that the latter did not communicate with them as to the serious nature of her employer's illness.

The court found that Mrs. Parrish was sound of mind though mentally and physically weakened, and that she was imposed upon by Mrs. Wright and Roche. It is proper here to state that the evidence does not justify any serious criticism of the witness Sellars. He merely accompanied Roche to the Parrish home and there witnessed the will. The examination of Roche in court indicated that he was quite hard of hearing. The findings indicate that the court believed that the instrument was not the will of deceased, but that its terms were fraudulently written to benefit Mrs. Wright. The court quite pointedly examined Roche as to the unusual situation of a sick woman leaving a comparatively small sum to her nearest kin and handsomely remembering her housekeeper of but a few months. We may add that the unusual situation is not helped by the fact that there were some unpleasant differences between the two during those months and that the testimony is almost if not quite conclusive that no degree of affection grew up between these elderly women.

It seems to us the opportunity for enforcing the will of Mrs. Wright upon the sick woman was present. The evidence is remarkably clear that the whole business of making the will was kept within the housekeeper's circle and away from any one who had known decedent upon a friendly basis. There is more than suspicion in this case, and the unusual events rise to the dignity of circumstantial evidence. Estate of Gallo, 61 Cal. App. 163, 165, 214 P. 496. The cases upon this point are considered in Estate of Hamburger, 126 Cal. App. 455, 14 P.(2d) 802.

[1] The court found that decedent's mind was in a weakened condition. Appellant thinks she was misled during the trial by the court when it declared that the allegation of decedent's incompetence to make a will was not sustained by the evidence. But incompetence of a mind to make a will and a weakened mind are quite different.

[2, 3] Appellant also claims that the findings are inconsistent, as in one instance the court finds that decedent did not subscribe her name to the alleged will and in other parts of the findings it is found that she did so. It is true there is this inconsistency, but it is perfectly clear from a reading of the complete finding of fact that the court did determine that decedent signed the document presented for probate in the presence of the subscribing witnesses, but that it was not her voluntary act, and that she did not knowingly sign the proffered instrument as her last will and testament.

The evidence supports the findings and the judgment is affirmed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

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135 Cal.App. 173

3-H SECURITIES CO. v. KIBBY, County Treasurer.

Civ. 4761.

District Court of Appeal, Third District, California.

Nov. 7, 1933.

1. Constitutional law 🔑193.

Legislature may validate irregular sales of public property.

2. Waters and water courses 🔑231.

Where Attorney General commenced publication of notice of intention to commence action to dissolve river water storage district, district was in "process" of "dissolution," authorizing district board of directors to transfer certificates of sale of land by resolution at private sale (Gen. Laws 1931, Act 9126, §§ 16, 21; St. 1919, p. 751).

> "Process" is the writ or mandate that serves as the means used for bringing a defendant into court to answer an action, civil or criminal; in a broader sense, any writ, order, notice, summons, or other writing by which a court exercises its jurisdiction over the parties or subject-matter of any action or proceeding; also, collectively, the whole of such mandates or other writing in an action or proceeding. "Dissolution" ordinarily means an act or process of dissolving or breaking up, separation into component parts, disorganization.
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> [Ed. Note.—For other definitions of "Dissolution" and "Process," see Words & Phrases.]

3. Waters and water courses ⚷231.

1931 amendment to California Water Storage District Act *held* ratification of sale by resolution at private sale of land which had been transferred to district for delinquent taxes (Gen. Laws 1931, Act 9126, §§ 16, 21).

4. Judgment ⚷702.

Attorney general's quo warranto proceeding which became final, dissolving river water storage district, *held* conclusive against county treasurer in proceeding by purchasers of lands from district to compel treasurer to issue deeds for property sold by district by resolution of board of directors at private sale (Gen. Laws 1931, Act 9126, §§ 16, 21; St. 1919, p. 751).

5. Property ⚷11.

One can transfer property which he owns, and transfer is good against whole world (Civ. Code, § 1044).

6. Waters and water courses ⚷231.

Assignee of purchaser of land from river storage district which had been transferred to district for delinquent taxes *held* not precluded from compelling county treasurer to issue deed for land, though statute provided that purchaser was entitled to deed, since by statute any property might be transferred (Gen. Laws 1931, Act 9126, §§ 16, 21; Civ. Code, § 1044).

7. Mandamus ⚷168(4).

Evidence *held* to show that assignee was holder and owner of river storage district's certificate of sale of land which had been transferred for taxes to district, entitling assignee to mandamus compelling county treasurer to issue deed for land (Gen. Laws 1931, Act 9126, §§ 16, 21).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Petitions in mandamus by the 3-H Securities Company against G. W. Kibby, Treasurer of Merced County, were consolidated. From a judgment granting writs of mandate, defendant appeals.

Affirmed.

F. M. Ostrander and S. P. Galvin, both of Merced, for appellant.

Norris J. Burke and Hatfield, Wood & Kilkenny, all of San Francisco, for respondent.

BURROUGHS, Justice pro tem., delivered the opinion of the court.

Three separate petitions for writs of mandate were consolidated for trial in the court below, and have also been consolidated for the purposes of appeal. The writs were granted by the court; hence these appeals. The following statement of facts is sufficient for an understanding of the questions presented for decision:

The San Joaquin River water storage district, hereinafter referred to as the district, was organized November 26, 1923, under the California Water Storage District Act, approved June 3, 1921 (Deering's General Laws, 1931, vol. 3, p. 5103, Act 9126). On March 4, 1924, an assessment was levied on the property within the district under the provisions of section 16 of said act. Proceedings were regularly had for the collection of the assessments, and, the assessments upon the several pieces of property mentioned in the petitions herein not having been paid, the properties were offered for sale at public auction. There were no bidders for the properties described in cases Nos. 9107 and 9108, and said properties were struck off to the district as provided in section 21 of the act, and certificates of sale therefor issued to the district by the county treasurer as ex-officio treasurer of the district. There was a bidder for the property described in action No. 9086, and the property was thereupon sold to the bidder, and a certificate of sale issued to her. Under the terms of the act, three years from the date of the sale is allowed for redemption of the property by the owner or any party interested. It is admitted that the time has expired and no redemption has been made. It is also admitted that all of the proceedings up to and including the sales were regular and in accordance with the statute.

The board of directors of the district, by a resolution dated February 25, 1929, authorized the president and treasurer of the district to execute and deliver to Miller & Lux, Inc., all necessary instruments of transfer, vesting in the latter full and complete title to all the certificates of sale and tax deeds referred to in said resolution, which included those set forth in actions Nos. 9107 and 9108. On March 6, 1929, a conveyance was made by the district to said Miller & Lux, Inc., in accordance with said resolution conveying to them all of the certificates of sales and tax deeds and the real property referred to, and by mesne conveyances all of said property was conveyed to the petitioner herein, who in due time demanded of the treasurer of Merced county, as ex officio treasurer of the district, that he convey all of said property to petitioner, but the treasurer refused, and still refuses, to make such conveyance.

With regard to action No. 9086, the proceedings differed from the others to the extent that the property described in the petition was not sold to the district, but to one R. Mazza, and a certificate of sale was issued to her. Thereafter Mazza, by a separate instrument, assigned and transferred to the petitioner herein the certificate of sale issued to her by the said district, and conveyed to petitioner the real property therein described. Thereafter demand was made upon the county treasurer as ex officio treasurer of the district for a deed to said property, which demand was also refused. These actions are the outcome of such refusals.

We will first discuss the questions presented in actions No. 9107 and No. 9108, where the property was sold to the district for the delinquent assessments above referred to. It is admitted that the proceedings were regular up to and including the sale to the district and the issuance of the certificates of sale. Therefore it becomes unnecessary to further refer to such proceedings, for, in so far as these parties are concerned, the land thereby became the property of the district, and the real question involved is whether or not the property was legally sold by the district to the predecessors in interest of the respondents. Section 21 of the act above referred to provides: "If no redemption shall be made within said three years, the purchaser or the district, if the property shall have been sold to the district, * * * shall be entitled to a deed executed by the county treasurer or his successor in office."

It is further provided in said section that: "The board of directors may sell such property sold to the district at any time at a public auction after notice given for the same period and in the same manner as herein provided for sale of delinquent assessments."

And it is further provided in said section that: "Said county treasurer or county treasurers must prepare and as soon as the same is complete publish once a week for two consecutive weeks in each county wherein lands of the district are situated, in one notice a list of all delinquencies."

At the time of the passage of the resolution by the board of directors of the district and the execution of the instruments of conveyance of said property to Miller & Lux, Inc., the foregoing method of sale of property for delinquent assessments was the only method provided by the act. And it is claimed by the appellant that this method should have been followed by the board of directors of the district, and the transfer to Miller & Lux, Inc., under the resolution above referred to, was void, and does not authorize the treasurer to issue a deed thereunder. In support of this claim, it is argued by the appellant that tax proceedings are in invitum and must be strictly followed, otherwise a deed issued thereon is void. However, it will be observed that the original owner of this land is not a party to these proceedings, and, in so far as the parties here are concerned, the tax proceedings were admitted to be regular and conveyed title to the district. Such being the case, there is no necessity to examine into this subject, for the original owner was divested of all title or right of redemption after the expiration of the three years for redemption.

[1] Did the board of directors of the district have a right to sell the property by resolution at private sale in the face of section 21 of the act, which provides the only method of disposition of the property to be at public auction? If there had been no further legislation upon this subject, we do not believe that it would be seriously contended that the method of sale of the interest of the district pursued by the board of directors would have conveyed title. However, in 1931, section 21 of the said act was amended. The purpose of the amendment was to cure any infirmities in sales such as the one before us. That the state Legislature may validate irregular sales of public property has been settled in Thompson v. Thompson, 52 Cal. 154, and Muller v. Carey, 58 Cal. 538. By the amendment above referred to, in addition to providing for a sale of the property of the district at public auction, it is provided: "The board of directors may also dispose of said property at a private sale, without any notice, when the district is in the process of dissolution and such sale is deemed for the best interests of the district; the consideration received from the sale of said property may be past or present consideration, but must not be less than that herein provided for in the case of sales at public auction; and in any case where a district in the process of dissolution has sold and transferred any of its property at a private sale, for valuable consideration, such sale and transfer is hereby validated and approved."

[2-4] It is contended by the appellant that, at the time the transfer of the certificates of sale in actions No. 9107 and No. 9108 were made by the district to Miller & Lux, Inc., the district was not in process of dissolution. The evidence on this score discloses that, prior to the said transfer, resolutions to the effect that it was not feasible to carry on the district, that the district should be dissolved, that the Attorney General should bring an action to dissolve the same, and also other resolutions relating to ways and means of abandoning the district and disposing of the property, had been passed. Under the Statutes of 1919, page 751, which prescribed the method of dissolving such a district, the Attorney General, before commencing the action, was required to publish for two consecutive weeks in a newspaper situated in the county where the greater portion of the land in the district was located a notice of his intention to begin such an action. The evidence shows that this notice was in the course of publication at the time of the passage of the resolution transferring the said property and certificates of sale to Miller & Lux, Inc. This publication of notice was required by the act as a prerequisite to the commencement of the action, and without question was jurisdictional, and

constituted an integral part of the process of dissolution of the district. Webster's New International Dictionary defines the word "process" as follows: "Law. The writ or mandate that serves as the means used for bringing a defendant into court to answer an action, civil or criminal; in a broader sense, any writ, order, notice, summons or other writing by which a court exercises its jurisdiction over the parties or subject-matter of any action or proceeding; also collectively, the whole of such mandates or other writing in an action or proceeding (in this sense being essentially equivalent to procedure)." Such seems to be the definition given to the word by lexicographers, and in Doe Run Lead Co. v. Holmes, 283 Mo. 648, 685, 223 S. W. 600, 601, the word "dissolution," as used in its ordinary meaning, means: "An act or process of dissolving, or breaking up, separation into component parts, disorganization." We think, without further citations of authority, it is clear that, when the Attorney General commenced the publication of notice of intention to commence the action, the district was in process of dissolution. The complaint to dissolve the district recited that the district no longer owned or held any property. The answer filed in said proceeding by the district admitted this fact, and the decree entered in the action also held that the statements in the complaint were true, and, as it was the duty of the court to dispose of all the property owned by the district upon its dissolution, we think that the decree constituted a conclusive determination that the sale to Miller & Lux, Inc., was valid. We are satisfied from the foregoing that the amendment to the act passed in 1931, supra, was clearly a ratification of the sale made to Miller & Lux, Inc. Further, we are satisfied that the quo warranto proceeding taken by the Attorney General, and which has become final, is also conclusive against the appellant in actions numbered 9107 and 9108.

[5-7] In action No. 9086, what has already been said concerning the assessment and procedure to and including the sale of the land at public auction and the vesting of the title in the individual purchasing the same applies with equal force to this case. It is contended by the appellant that, as section 21 of the act provides that the purchaser is entitled to a deed, and not his or her assigns, it precludes an assignee from obtaining a deed, and, in this case, the certificate of sale was assigned by the purchaser to the petitioner herein and by a separate instrument of assignment. However, section 1044 of the Civil Code provides: "Property of any kind may be transferred, except as otherwise provided by this article." In Miller & Lux, Inc., v. James Co., 179 Cal. 689, at page 692, 178 P. 716, 717, it is said: "It is fundamental that a man can transfer property which he owns and that such transfer is good against the whole world." It was held in Phillips v. Carter, 135 Cal. 604, 607, 67 P. 1031, 1032, 87 Am. St. Rep. 152, that a government land entry was assignable before patent, even though the statute contained no provision for assignment. It was there said: "It is a right which need not in terms be granted by the sovereign authority, for it exists, if not expressly prohibited or opposed to public policy." It is also contended by the appellant that the respondent herein was not shown to be the assignee of the purchaser of the certificate of sale. However, it is alleged in respondent's answer that the respondent herein was the assignee of the purchaser, and that he was the true and lawful owner of the certificate of sale, and the court found such allegation to be true. In support of this finding, the recorded certificate of sale was introduced in evidence. The recorder, instead of copying the certificate at length in a book, simply made a file for these certificates. The method pursued by the county record was a sufficient compliance with the statute. We think the evidence is sufficient to show that the respondent was the owner and holder of the certificate of sale. Without further discussion of the points involved, what has already been said establishes that the judgment of the court was correct, and the writs should issue.

It is therefore ordered that the judgment in each case be, and it is hereby, affirmed.

We concur: PLUMMER, Acting P. J., R. L. THOMPSON, J.

SOUTHERN PAC. CO. v. CITY OF LOS ANGELES et al. *

Civ. 7685.

District Court of Appeal, Second District, Division 1, California.

Nov. 20, 1933.

Hearing Granted by Supreme Court Jan. 18, 1934.

1. Waters and water courses 🔑209.

In action for damages resulting from breaking of city's aqueduct during heavy storm, finding that city was not negligent in constructing aqueduct near mouth of canyon without constructing overhead flume or underpass conduits *held* justified under evidence.

> The evidence disclosed that aqueduct near point where it broke crossed for distance of about 2,000 feet over natural fan-shaped "cone" composed of material which had been swept down from the canyon by freshets, floods, or torrents. The

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 55 P.2d 847.

aqueduct crossed the cone about 800 to 1,000 feet easterly of and 230 feet below its apex, and experts familiar with features of the country testified that aqueduct was safely constructed.

2. Waters and water courses ⚷179(4).

Finding that city's failure to provide drainage over or under aqueduct during years following construction thereof over "cone," which received flood waters from canyon, was not negligence, *held* justified in action for damages resulting from breaking of aqueduct.

3. Waters and water courses ⚷179(4).

Finding that city was not negligent in operating and controlling aqueduct during storm *held* justified under evidence in action for damages resulting from breaking of aqueduct.

4. Evidence ⚷597.

Verdict cannot legally be grounded upon mere conjectures.

5. Waters and water courses ⚷172.

City whose aqueduct near mouth of canyon broke during storm without fault of city, causing washout of railroad's roadbed, owed no duty to railroad to give warning.

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by the Southern Pacific Company against the City of Los Angeles and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

W. I. Gilbert and Kenneth Keeper, both of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Mark L. Herron, Asst. City Atty., and A. A. Scott and Harold L. Green, Deputy City Attys., all of Los Angeles, for respondents.

DESMOND, Justice pro tem.

This is an appeal by a railway company from a judgment rendered in favor of defendants in an action for damages, predicated upon alleged negligence of respondents in constructing, operating, maintaining, and controlling the Los Angeles aqueduct, particularly at a point in Inyo county on the Olancha division thereof, whereby the aqueduct broke, causing appellant to sustain damages to its roadbed, right of way and equipment, and injury and damages to its employees and passengers.

The construction of the Olancha division of the aqueduct commenced about 1907 and was completed about 1911; the break in the aqueduct which constituted the basis of the present action occurred, as nearly as the time could be fixed, in the early morning of November 27, 1926. To understand the facts of the case it is necessary to give some consideration to the physical characteristics of the locale. The aqueduct for many miles south of its point of origin follows a general southerly course on or along the easterly slope of the Sierra Nevada Mountains. At various points where a canyon comes down toward the Owens Valley, a natural fan-shaped "cone," so called, spreads out easterly over the open country, composed of material which during past ages has been swept down from the canyon by freshets, floods, or torrents resulting from rains, cloudbursts or waterspouts. At the point in which we are interested the aqueduct for a distance of about 2,000 feet crosses such a cone about 800 to 1,000 feet easterly of and 230 feet below its apex and about one-half mile west of and above the Southern Pacific tracks. All witnesses agreed that the cone covered about 15 acres of ground and that its catchment area, i. e., the entire area which drained upon it from the canyon, was approximately 250 acres. The aqueduct at this point was a concrete-lined open canal, 35 feet wide at the top, 11 feet wide at the bottom, and 12 feet deep, with evenly sloping sides. Engineers produced at the hearing testified that the aqueduct was designed and built in the Olancha division to carry 900 second feet of water with a freeboard of 15 inches between the water surface and the top of the concrete sides, and that an additional 175 second feet of water could be carried in the canal when it was running full. A second foot is a flow of one cubic foot of water per second past a given point. 25 Cal. Jur. 1044. It appeared that in constructing the aqueduct headgates were placed at the intake by means of which the flow of water into the canal could be shut off partially or entirely, also that waste gates or spillways at Cottonwood gates, a few miles north of the place where the aqueduct broke, would permit all or any part of the stream flowing in the canal to be diverted into Cottonwood creek. Similar gates were installed below Olancha and at other points along the aqueduct. This was a jury-waived trial, and upon the evidence produced the court found "that on the morning of November 27, 1926, defendants' aqueduct broke at a point about five miles east of Cartago in the county of Inyo, state of California, at or near a station known as Monachee, and that as a result of said breaking of said aqueduct, a large volume of water was released therefrom and proceeded to plaintiff's right of way and there washed out and demolished and destroyed the tracks, roadbed, and right of way of plaintiff. That at about the hour of 11:15 o'clock a. m. on said 27th day of November, 1926, a railway train operated by plaintiff while traveling from Owenyo station to Cartago, at

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

a point five miles east of Cartago, near Monachee siding, ran into a washout caused by water from the break in the Los Angeles aqueduct."

There were findings also that the aqueduct between certain engineers' stations, mentioned below, in the district where the break occurred, was constructed by respondent city "with ordinary care and skill in a good and workmanlike manner * * * together with proper drainage along the line of said canal sufficient to care for all seasonable rains or flood water as might reasonably be anticipated to occur at said location. * * *

"That the original topographical sheets between Engineers' Station 2511 plus 36.21 and Engineers' Station 2531 plus .08 of the aqueduct location in the Olancha Division made by competent engineers in the field at the time of the location and construction of the aqueduct in the year 1910 did not show any wash or channel on the ground surface along the contour line of the location of the aqueduct. That at the mouth of the canyon and the apex of the cone, and extending down the cone, there was an old wash or channel 2 or 3 feet wide, but that said channel or wash did not extend down the cone as far as the aqueduct. That reasonable skillful engineering practice did not require overhead drainage over said aqueduct, at the point where the aqueduct filled with sand and gravel, to care for the ordinary water run-off or such run-off as might have been reasonably anticipated would occur from said canyon. That said aqueduct had theretofore withstood all storms without a break for a period of more than thirteen years."

The court further found:

"That the average annual rainfall at Independence, California, located a distance of approximately thirty miles from such break and being the nearest government weather bureau and rainfall measuring station to the aqueduct break, from 1865 to 1926, the time of such break, was 4.9 inches; that during four days immediately preceding such break, beginning on or about the 23d day of November, 1926, 5.10 inches of rain fell at Cottonwood Gates, located a distance of three miles north of the break, of which rainfall 2.78 inches fell the last day of such a period just before such break; that for the same period of four days the rainfall at Independence was 4.69 inches; that during the same period of rainfall the aqueduct did not overflow at any point except at said small watershed. * * *

"That on said 26th day of November it rained at a point one and one-half miles south of Ash Creek in the catchment area of the mountain above and west of the place where the Aqueduct broke, with unprecedented violence and intensity, producing a flood of water on said mountainside above the aqueduct which cut a deep arroyo about one-half mile long, 4 or 5 feet deep and 4 or 5 feet wide from the mountainside emptying into the aqueduct, filling said aqueduct with 6000 cubic yards of sand, gravel, rock and debris, thereby causing water in the aqueduct to back up, wash over and break down the side of the aqueduct and the damages resulting to the plaintiff were caused by a storm which was of such unprecedented and extraordinary nature that it was attributable to a superhuman cause or act of God over which defendants had no control. That defendants were not responsible for the break in the Los Angeles Aqueduct and the resulting injury of plaintiff's track, roadbed and train equipment. * * * That the City of Los Angeles during said storm of November 27, 1926, doubled the number of patrolmen to patrol the aqueduct between the Intake and Olancha Patrol Station and held the water flowing in the aqueduct between the Alabama Gates and Cottonwood Gates at 18 inches below hydraulic grade, and that hydraulic grade in said aqueduct was a point 15 inches below the top of the aqueduct, that during said storm period, the aqueduct was maintained and operated in all respects with due care. * * * That it is not true that by reason of any carelessness, recklessness and negligence of defendants, plaintiff sustained damages to its right of way, roadbed and equipment in the sum of $27,071.79."

There was a general finding on the subject of negligence as follows: "The court finds that it is not true that on the 27th day of November, 1926, or any other day, or at all, that defendants carelessly, recklessly and negligently constructed, operated, maintained and/or controlled said aqueduct and as a result of such negligence that the same broke and injured or damaged defendant's (plaintiff's?) track, roadbed and train equipment."

The court reached the following conclusions of law:

"That defendants City of Los Angeles and Department of Water and Power were and are relieved from all liability for the injury and damage set forth in this action caused by the breaking of the aqueduct November 27th, 1926, for the reason that the storm which filled the aqueduct with sand, rock and dirt and caused the aqueduct break, was of such an unprecedented and extraordinary nature that it was attributable to an irresistible and superhuman cause, or an act of God, over which defendants had no control and could not by reasonable care and foresight have prevented. * * *

"That plaintiff is not entitled to recover judgment against the defendants for any injury or damage resulting from the breaking of the aqueduct November 27, 1926."

Appellant specifies as errors upon which it grounds its appeal the following:

1. Insufficiency of the evidence to sustain the findings and judgment which were made and entered adversely to appellant's claims.

2. That the decision and judgment are against the law.

3. Errors of law occurring at the trial in rulings upon evidence, and errors embodied in the various findings and conclusions that were reached against appellant's contentions.

[1] The trial court was called upon to decide whether the respondents had been guilty of negligence: First, in the construction of the aqueduct at and near the place where the break occurred; second, in maintaining the aqueduct at this point as originally constructed, from the time it was built until the time of the break; third, in operating and controlling the aqueduct during the storm of November, 1926, when the break occurred. For convenience we may consider these as periods of construction, of maintenance, of operation. As to the period of *construction*, appellant contends that good engineering practice would have dictated the building of an overhead flume across the aqueduct from a point somewhere upon the westerly portion of the cone, through which flume the waters that cut a deep gully through the cone and washed 6,000 yards of dirt, sand, gravel, and small boulders into the aqueduct might have been carried away and harmlessly deposited elsewhere.

A suggestion is made also that culverts or underpass conduits for the storm water might have accomplished the same purpose. Considering as established that overhead or underpass drainage would have been feasible and adequate to prevent the break, and on this point there is little or no testimony in the transcript, we are nevertheless impressed with the fact that at least four engineers, called as experts on drainage and water control and all familiar with the aqueduct and physical features of the country in the neighborhood of the break, testified in effect that it was "safe and prudent to construct and maintain such aqueduct at the location described without providing overhead or underground drainage or other drainage for the territory to the west of the aqueduct other than the drainage afforded by the aqueduct."

No contrary expert opinion was offered, and the court, knowing from the hypothetical questions propounded to the engineers who did testify that they had in mind, at the time of answering, the rainfall records and climatic conditions of the area involved as well as the structure and condition of the cone and means provided for turning the water through waste gates, was justified in our opinion in finding that no negligence was attributable to respondents in the construction of the aqueduct. Appellant argues that this concrete canal twelve feet in depth constituted an obstruction to the flow of waters through a natural water course, contending that previously the waters debouching from the canyon and sinking into and through the detrital matter of the cone, had established there a natural outlet or water course which was blocked by the artificial structure of respondents. However, in one of the cases cited by appellant, Hellman Bank v. Southern Pacific Co., 190 Cal. 626, 214 P. 46, 49, we find the following approved instructions: "To constitute a natural water course, there must be a stream usually or periodically flowing in a particular direction. It must flow in a definite channel having a bed, sides, or banks, and usually discharges itself into some other stream or body of water. * * * If a stream has a permanent or at least a periodical source of supply, and runs in a definite channel along a considerable distance, it may then break up into numerous small channels, or percolate into the soil, and sink away and still be, in legal contemplation, a natural water course for the distance that it flows from its source of supply to the point where it breaks up or percolates away or sinks away." In the light of this definition it appears that no natural water course was obstructed by the building of the aqueduct, for the court found upon uncontradicted evidence that the topographical sheets of the area involved "did not show any wash or channel on the ground surface along the contour line of the location of the aqueduct" and "that at the mouth of the canyon and the apex of the cone and extending down the cone, there was an old wash or channel 2 or 3 feet wide, *but that said channel or wash did not extend down the cone as far as the aqueduct.*" (Our italics.) Further, as is said by respondents in their brief: "Assuming that a subterranean stream did underlie this cone, and there is no evidence affording a basis for such assumption, there is nothing in the record to indicate whether the subterranean flow of waters took place five or fifty feet below the surface of the soil. On the easterly side of the aqueduct the ground sloped away to the floor of the plain, the slope being rather a sharp one. If in fact, there was a subsurface flow of percolating waters, it seems to us that the stream would flow under the aqueduct rather than be impeded in its flow and caused to rise to the surface by the aqueduct. In fact, one of the expert witnesses called by respondents, testified upon cross-examination that the aqueduct, built as it was with the sides extending some thirteen feet below the surface, could not impede the downward flow of percolating waters to any material extent, for, in his opinion, the percolating waters, if any, could and probably would flow beneath the aqueduct."

We quote further with approval from the respondents' brief:

"Assuming, however, that defendants did obstruct a natural water course, the rule is thoroughly well settled that defendants are not liable for damages in the absence of negligence on their part.

"We agree with appellant that the rule is (as stated in its opening brief, p. 91) that it is the duty of a person diverting or obstructing a natural water course to provide not only for a normal rainfall, but for such floods or freshets as may occasionally occur, whether they are called ordinary or extraordinary. We deem it self-evident that an ordinary prudent man, where the risk is his own, in the construction and operation of a ditch, canal or reservoir will anticipate and guard against not only the normal rainfall or seasonable storm waters but for such floods or freshets as may occasionally occur.

"However, the owner and operator of a ditch, canal or reservoir is not liable for injury caused by a breaking out of the waters due to an extraordinary or unprecedented flood, or act of God, there being no negligence upon his part. This is the rule announced in the case of Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 P. 766, and quoted approvingly in the case of Kall v. Carruthers, 59 Cal. App. 555, 211 P. 43."

And again:

"The rule is well established in this state that the owner of a dam, ditch or other works for the diversion, transportation or use of water is not an insurer against damage to others resulting from the escape of water, but is liable only when he is guilty of negligence or wrongfully inflicts injury upon others. (26 Cal. Jur. 152.) Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 P. 766; Moore v. San Vicente Lumber Co., 175 Cal. 212, 165 P. 687; Bacon v. Kearney Vineyard Syndicate, 1 Cal. App. 275, 82 P. 84; Hunt v. Sutter-Butte Canal Co., 66 Cal. App. 363, 225 P. 884.

"The owner and operator of a canal, ditch or reservoir is bound to use that degree of care and caution in the construction and management of said ditch or canal to prevent injury to others, which ordinary prudent persons use in like instances when the risk is their own. (Todd v. Cochell, 17 Cal. 97; Moore v. San Vicente Lumber Co., 175 Cal. 212, 165 P. 687.)

"In the early case of Todd v. Cochell, 17 Cal. 97, which is an action for injuries occasioned by the breaking of a reservoir, the court stated, with reference to the measure of care required by defendant, owner of the reservoir, as follows:

"'We understand the law to be well settled, that the measure of care required in such case is that which a discreet person would use if the whole risk were his own. The conduct of the defendant must be viewed with reference to the caution which a prudent man would, under the given circumstances, have observed.'"

[2] In considering whether or not the respondents were guilty of negligence during the *maintenance* period in not providing, during the years following construction of the canal, drainage over or under the aqueduct at or near the place where the break occurred, the court may well have noted that on one other known occasion, the rainfall at Independence for a 24-hour period exceeded that of November 27, 1926, at Cottonwood gates, 2.78 inches. One of the engineers, Mr. Sonderegger, testified that on January 25, 1914, the rainfall was 3.51 inches. Apparently no damage resulted at the point in question from that excessively heavy rainfall, nor does it appear that any channels, gullies, or ravines cut their way across the face of the cone. It may be that it rained steadily in a regular and unceasing downpour of practically the same precipitation, hour by hour, for the entire 24 hours on January 25, 1914; there was no evidence on that point. There was evidence that the rainfall for the 24-hour period ending at 6:30 a. m. November 27, 1926, was most intense in the few hours following midnight of November 26th. The fact that the aqueduct absorbed without difficulty any overflow from the cone during the storm of January 25, 1914, and was unable to do so by reason of choking up with detritus swept into it from the same cone on November 27, 1926, gives substantial weight to the finding by the court that the rainfall during the latter storm was so torrential and unprecedented in character as to constitute an act of God. And it may be said, reasonably we think, that construction of an aqueduct that would and did operate without inconvenience or injury during and following a rainfall of approximately 3.51 inches in a period of 24 hours, in a country where over a period of 61 years the total annual rainfall averaged only 4.9 inches justified the belief in the minds of the owners and supervisors of the aqueduct that all needful precautions against ordinary and extraordinary rainfalls had been taken in the original construction. This brings us to the claim that respondents were culpably negligent in their manner of *operating* and *controlling* the aqueduct during the storm of November, 1926.

[3, 4] It is impossible to say just when the aqueduct broke, for no one was there present at that time. Luke McCoy, assigned to duty as patrolman in the Olancha division, and maintaining his patrol station about three and one-half miles below the break, noticed a sudden drop in the water content of the aqueduct at his station in the early morning of November 27th, first fixed at about 3 o'clock, but "it might have been an hour later or something of that kind. * * * I did not say it was exactly 3 o'clock; I do not know; it might have been a little later or a little earlier, I don't know." This witness testified that he did not know but what Mr. C. H. Van Norman stationed at Independence or Lone Pine and in charge of the operation of the aqueduct in this division had "turned out the

water that caused that drop." At 5 o'clock a. m., approximately, of November 27th, Jesse McElroy, assigned to special duty that night at Cottonwood gates, three or four miles north of the break, reported by telephone to Mr. Van Norman that the water was rising in the ditch "and he told me to get in my car and go south and find out what the cause was, which I did." Meanwhile McCoy had also been instructed by Van Norman, when he notified him by telephone that the water in the canal was falling, to get out as soon as possible and see if he could find anything wrong. At about daylight these two men, one riding north on horseback, the other driving south, discovered the break at about the same time, and, as soon thereafter as McCoy could get to Cottonwood gates (McElroy arriving a little later) the flow from the north was diverted from the canal into Cottonwood creek. The fact that the water was rising noticeably at Cottonwood gates at about 5 a. m. would indicate that the break had not then occurred; otherwise it would seem that the water in the canal would have flowed through the opening caused by the break and that no appreciable rise would be noted at this station north of the break. It is conceivable, however, that in this extremely heavy rainfall enough surface storm water may have poured into the open ditch along the line of the aqueduct north of Cottonwood gates to raise the water appreciably and without any blockade of detrital matter then existing in the canal downstream. In other words, no one could say definitely just when the aqueduct choked up or when it broke; possibly only a very few minutes before McCoy found it in that condition; maybe some considerable time previously. This is all a matter of guesswork, and equally speculative would it be to surmise that the negligence of Luke McCoy, if any existed, was the proximate cause of the damage suffered by the plaintiff. Counsel for appellant puts it as strongly as possible from his point of view when he says in his brief: "Had Luke McCoy performed his duty, as well as followed the instructions of Mr. Van Norman when he noticed and reported the perceptible drop in the aqueduct, the break *might not* have occurred." There is an implication, if not a virtual admission here, that if McCoy had performed his duty faultlessly still the break might have occurred; and in a legal analysis of the situation, as disclosed by the evidence in this case, there might well be the further implication that McCoy may have been negligent and still the break may not have resulted therefrom, or from the negligence of any other employee of the defendants. It would seem, therefore, in view of all the facts of this case, that it would have required a process of conjecture on the part of the trial court to fix liability upon these respondents, and verdicts cannot safely or legally be grounded upon conjectures. As was stated in Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 P. 480: "Unless the negligence is connected with the injury the case stands exactly as if no negligence had been proven. * * * It is as necessary for the plaintiffs to show that defendant's negligence caused the injury as it is for them to show that defendant was guilty of negligence or that the party was injured." See, also, San Joaquin Grocery Co. v. Trewhitt, 80 Cal. App. 371, 375, 252 P. 332, and cases there cited. That the conclusion of the trial court upon a point involving so much uncertainty and guesswork must stand as a final decision appears from the rule as stated by the Supreme Court in Mah See v. North American Acc. Ins. Co., 190 Cal. 421, at page 426, 213 P. 42, 44, 26 A. L. R. 123, and approved by memorandum of that tribunal on petition for hearing in Estate of Wallace, 64 Cal. App. 107, 117, 220 P. 682. The statement is as follows: "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45."

[5] Appellant contends in his opening brief, and without citation of authority, that respondents were negligent in failing to give notice or warning to appellant of the break in the aqueduct. There was evidence that at approximately 7 or 8 o'clock a. m. of November 27th, certain employees of respondents, being in the neighborhood of the break, saw the washed out section of the railway roadbed and even observed the tracks hanging loose at the border of the ditch formed by the washout. There was evidence also that a train of appellant's traveling south at about 40 to 45 miles per hour failed to stop when air brakes were applied, and went into the ditch at 11:15 a. m. with the exception of the last car which remained at or near the edge of the track. In this accident, the locomotive engineer was killed and thousands of dollars' worth of damage was done to the rolling stock

of the plaintiff, all of which seemingly might have been avoided if any employee of the respondents had telephoned a railroad employee or even placed a red flag in the roadbed a few hundred yards north of the washout. Since, however, the trial court found that the damage suffered by appellant was not due to negligence on the part of respondents in constructing, operating, maintaining, or controlling the aqueduct, we feel that, no matter how strongly we may deprecate and regret so needless a tragedy, we must hold that under such circumstances there was no legal duty resting upon defendants to warn the plaintiff of the washout of its roadbed.

Judgment affirmed.

We concur: CONREY, P. J.; YORK, J.

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135 Cal.App. 274

PEOPLE v. ANDRICH et al.

Cr. 2406.

District Court of Appeal, Second District, Division 1, California.

Nov. 9, 1933.

Hearing Denied by Supreme Court Dec. 7, 1933.

1. Criminal law 🔑982.

Defendants pleading guilty to grand theft of bovine animal *held* not entitled to probation where they used rifle and shotgun in killing stolen steer (Pen. Code, § 487, subd. 3, and § 1203).

2. Constitutional law 🔑208(1).
Larceny 🔑2.
Statutes 🔑86.

Statute making it grand theft to steal bovine animal, theft of other kinds of animals petty theft, and theft of any animal grand theft if value exceeds $200, *held* not unconstitutional as class legislation (Pen. Code, § 487, subd. 3; Const. Cal. art. 1, §§ 11, 21; art. 4, § 25; Const. U. S. Amend. 14, § 1).

3. Constitutional law 🔑250.

Statute providing that theft of bovine animals shall constitute grand theft *held* not unconstitutional as denying equal protection of laws (Pen. Code, § 487, subd. 3; Const. Cal. art. 1, §§ 11, 21; Const. U. S. Amend. 14, § 1).

Appeals from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Mike Andrich and another were convicted of grand theft, and they appeal.

Affirmed.

Max Schleimer, of Los Angeles, for appellant Andrich.

Mathew M. Pendo, of Los Angeles, for appellant Trutich.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

CONREY, Presiding Justice.

[1] These defendants, together with one Oreb, were by the information charged with the crime of grand theft in that they did willfully, etc., steal a bovine animal, of the personal property of the Santa Catalina Island Company. To this information they pleaded guilty and applied for probation. In denying these applications for probation and in sentencing appellants to imprisonment in the state prison at San Quentin, the court based its action upon the sole ground that the probation law, as found in section 1203 of the Penal Code, does not authorize, and in fact prohibits, probation in this case. In killing the steer which was stolen by the defendants, and as a part of such stealing, they used a rifle and shotgun. The judge stated that if it were not for the above-mentioned provisions of the probation law he would have admitted the defendants to probation.

In section 1203 of the Penal Code it is provided that "probation shall not be granted to any defendant who shall have been convicted of * * * grand theft * * * and who at the time of the perpetration of said crime * * * was armed with a deadly weapon (unless at the time he had a lawful right to carry the same), nor to a defendant who used or attempted to use a deadly weapon in connection with the perpetration of the crime of which he was convicted. * * *" The only point presented upon behalf of defendant Trutich is that it was not within the intention of the Legislature to restrict probation "to the extent of including (the theft of) a bovine animal." The language of the statute is so clear and plain that we find no reason for any construction thereof which would justify the exception for which appellants contend. The point is without merit.

[2, 3] Appellant Andrich, in addition to the same point above mentioned, contends that subdivision 3 of section 487 of the Penal Code, upon which the information was based, is class legislation, and therefore unconstitutional, and that for this reason the information charging the theft of "a bovine animal" does not state or charge the commission of any crime. The alleged defect in the statute is said to be that according to the terms of the section the theft of certain animals constitutes grand theft, and the theft of other kinds of animals constitutes petty theft, and the theft of any animal constitutes grand theft if the value exceeds $200. It is claimed that because the degree of the crime depends in one case upon the value of the animal

and in the other upon the kind of animal stolen, therefore that the section does not have a uniform operation, and that the Legislature had no legal right to "classify the punishment" as it did.

We are of the opinion that the classification of offenses contained in the challenged statute is justified by differences between thefts of the different kinds of animals which may be stolen, and that the distinctions made by the law have not interfered with the uniform operation thereof within the meaning of the constitutional provision that all laws shall have a uniform operation. We are further of the opinion that the said law does not deprive any person of the equal protection of the law. Summarizing the objections of appellant Andrich to the validity of said subdivision 3 of section 487 of the Penal Code, they are that the subdivision is obnoxious to sections 11 and 21 of article 1, and section 25 of article 4 of the Constitution of California, and repugnant to section 1 of the Fourteenth Amendment to the Constitution of the United States. We think that these points are all without merit.

The judgments are, and each of them is, affirmed.

We concur: HOUSER, J.; YORK, J.

135 Cal.App. 766

PEOPLE v. ROSENBERG.

Cr. 258.

District Court of Appeal, Fourth District, California.

Dec. 16, 1933.

1. Criminal law ⚷1144(18).

Appellate court must presume that order granting defendant new trial was based partly on insufficiency of evidence to sustain conviction, in absence of contrary showing, where motion therefor was made on all statutory grounds, though referring specifically to ground of newly discovered evidence only (Pen. Code, § 1181).

2. Criminal law ⚷1156(2).

Order granting defendant new trial for insufficiency of evidence to sustain conviction must be affirmed, unless abuse of discretion be clearly shown (Pen. Code, § 1181).

3. Criminal law ⚷951(2).

Defendant's right to apply for new trial after conviction is not suspended while application for probation is pending (Pen. Code, §§ 1181, 1182).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Vic Rosenberg was convicted of burglary, and, from an order granting his motion for a new trial, the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and S. A. Bristow, Deputy Dist. Atty., both of San Diego, for the People.

W. K. Brown, Edgar B. Hervey, and J. Franklin Armstrong, all of San Diego, for respondent.

BARNARD, Presiding Justice.

The defendant was convicted of the crime of burglary, and this appeal is from an order granting his motion for a new trial.

The first point raised is that the court abused its discretion in making the order complained of. It is argued that, while the motion was made on all of the statutory grounds set forth in section 1181 of the Penal Code, it referred specifically only to the ground of newly discovered evidence; that counsel for respondent presented that ground alone in his argument; that the court was therefore limited to that ground in considering the motion; and that the order must be reversed, since the showing was not sufficient to sustain an order based upon that ground.

[1] Necessarily the appellant concedes that the motion was made upon all of the grounds named in the statute. In making the motion, the following language was used: "At this time, your Honor, the defendant, Victor Rosenberg, moves the court for its order to set aside the verdict of the jury in this case and granting him a new trial upon all of the statutory grounds set forth in section 1181 of the Penal Code, particularly upon the ground of newly discovered evidence, which newly discovered evidence is set forth in an affidavit which I will file with your Honor at this time." While the appellant contends that the only ground argued was the matter of newly discovered evidence, there is nothing in the record to sustain the contention. The appellant also relies upon a statement made by the trial judge immediately prior to granting the motion. This statement is immaterial and not properly a part of the record, but, if it were to be considered, it indicates that other grounds were presented and considered. The court stated that he considered the showing as to newly discovered evidence to be insufficient and, after commenting on certain claims of misconduct on the part of the jury and of the district attorney and on an error in the instructions, used language plainly showing that he was not satisfied with the sufficiency of the evidence in its entirety. Irrespective of the statement made by the court in granting the motion, it appears that the motion was made upon all of the grounds named in the statute and, in the absence of any showing to the contrary, we must presume that the order was based in part upon the insufficiency of the evidence. People v. Dewar, 49 Cal. App. 263, 193 P. 156.

[2] If the question of the sufficiency of the evidence was before the court, as we think it was under the motion as made, nothing is called to our attention to indicate any abuse of discretion, much less the clear showing required in such a case. In People v. Knutte, 111 Cal. 453, 44 P. 166, the court said:

"The case is argued here by both parties upon the assumption that the new trial was granted upon the ground that the evidence was deemed insufficient to sustain the verdict; and, while no specific ground is stated in the order of the court, it may be safely taken, from the court's action in advising the jury to acquit, that this assumption of counsel is correct. It has been so repeatedly held here as to become axiomatic that where a new trial is granted upon this ground, or where it is one of various grounds upon which the trial court may have based the order, its action will not be disturbed, except in a case showing a manifest and unmistakable abuse of discretion. This discretion is, of course, not arbitrary, but, like any other judicial function, is to be exercised under the sanction of the judicial oath; and, the strong presumption being always that it was so exercised, it will require in any case a very clear showing to the contrary to overcome such presumption, and enable us to say that the power of the court in that respect was abused. While it is the exclusive province of the jury to find the facts, it is, nevertheless, one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he, nevertheless, exercises a very salutary supervisory power over their verdict. In the exercise of that power, he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found; and if, in his sound judgment, it does not, he should unhesitatingly say so, and set the verdict aside. People v. Lum Yit, 83 Cal. 130, 23 P. 228. * * *

"Nor does it affect the question that the evidence in the case may have a legal tendency to prove all the material facts. Guilt is to be established beyond a reasonable doubt; and, while there may be some evidence to support each fact, this does not signify that it is necessarily such as to satisfy the conscience of the judge that a case is made which warrants conviction."

In People v. Canfield, 173 Cal. 309, 159 P. 1046, 1048, in commenting on the effect of article VI, section 4½, of the Constitution, in such a connection, the court said: "But this section of the Constitution was not designed to take from the trial court and transfer to the appellate courts the high discretion vested in that tribunal. The judge, who presided at the trial of the cause, who heard the testimony, who observed the jurors and had an opportunity also of testing the truth of the defendant's statements by noticing his demeanor, was in a peculiarly favorable position for determining justly the question whether or not the defendant had been accorded a fair trial. * * * We can hardly manufacture in fancy an hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge."

[3] The only other point raised is that the court had no power to grant a new trial while an application for probation was pending. It appears that the respondent applied for probation, and that the hearing on this application was continued from time to time. On the date last set in this manner a motion for a new trial was made and the court granted the same without first passing upon the application for probation. The appellant maintains that the right to move for a new trial was suspended during the pendency of the application for probation, and that this right could not be revived until such time as the application for probation had been passed upon. The only authorities cited are People v. Winner, 31 Cal. App. 352, 160 P. 689, and People v. Lamattina, 38 Cal. App. 82, 175 P. 484. Neither of these cases supports the contention made. The only limitation placed by the statute upon the time for applying for a new trial is that the same must be made before judgment. Pen. Code, § 1182. If the circumstances are such that a new trial should be granted, it would seem to be unnecessary to continue with probation proceedings. No good reason appears why the right to apply for a new trial should be suspended during the time an application for probation is pending, and, in the absence of either reason or authority, we do not feel compelled to lay down any such rule.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

135 Cal.App. 364

PAUL v. WALBURN.

Civ. 1094.

District Court of Appeal, Fourth District, California.

Nov. 18, 1933.

1. Appeal and error ⚷82(3).

Order vacating default judgment *held* not interlocutory in nature, but an "appealable order."

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

2. Appeal and error ⚷161.

Generally, party cannot accept benefit of order and then seek to have it reviewed, except where benefit received is one to which he was entitled in any event.

3. Appeal and error ⚿163.

Where costs amounted to only $14.50 and order vacated default judgment on condition that defendant pay plaintiff $15, without designating what the sum was for, plaintiff's acceptance of such sum prevented review of order.

4. Appeal and error ⚿957(1).

Order vacating default must be affirmed whenever it appears trial court was called upon to exercise any discretion.

5. Judgment ⚿162(4).

Facts justified vacation of default judgment against defendant.

> Facts disclosed that action was filed on October 21, 1931, and that after defendant explained matters to plaintiff's attorney, nothing further was done until March 21, 1933, when another attorney served copy of summons in complaint and promised to communicate with insurance carrier direct if, upon investigation, defendant found that he had insurance on date of accident; that on March 26, defendant consulted with attorney and requested attorney to examine records to ascertain if suit could be dismissed for lack of prosecution; that summons and complaint were taken to attorney on April 3d, but the summons given attorney was dated October 21, 1931; that no answer was filed within statutory time after service of second summons on defendant on March 21, 1933; and that on discovery of facts on April 11th, timely application for relief was made.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Dona Paul against H. C. Walburn. From an order vacating default judgment against defendant, plaintiff appeals. On appellee's motion to dismiss appeal.

Appeal dismissed.

H. C. Ellis, of Los Angeles, and Stickney & Stickney, of San Diego, for appellant.

William J. Collard, of San Diego, for respondent.

BARNARD, Presiding Justice.

In this action for damages, arising out of a collision between two automobiles, the plaintiff was given judgment for $3,500 after the default of the defendant had been entered. The defendant moved to vacate and set aside the default and judgment on the ground of excusable inadvertence and neglect. The court granted the motion and entered an order vacating and setting aside the default and judgment, from which order the plaintiff appealed. After the appellant's opening brief was filed, the respondent moved to dismiss the appeal under section 3 of Rule V of the rules governing District Courts of Appeal on the ground that the question presented by the appeal is so unsubstantial as not to need further argument; that the order appealed from is an interlocutory order from which no appeal lies; and that the appellant by accepting a benefit under the order has waived the right to appeal therefrom.

[1] Without going into detail in the matter, we are of the opinion that the order appealed from was not interlocutory in nature and that the same was an appealable order.

[2, 3] The order in question provided that the default and judgment theretofore entered "be and the same is hereby vacated and set aside upon the following terms: payment by the defendant to plaintiff of the sum of Fifteen ($15) Dollars on or before June 22, 1933." It is conceded that this $15 was paid to and accepted by the appellant's attorney. It is a general rule that a party cannot accept the benefit or advantage given him by an order and then seek to have it reviewed. An exception to the general rule exists where the benefit received is one to which the party was entitled in any event. San Bernardino County v. Riverside County, 135 Cal. 618, 67 P. 1047, 1048. The appellant maintains that the acceptance of the usual taxable costs constitutes another exception to the general rule, and relies upon the case of Tyson v. Wells, 1 Cal. 378. That case, which seems not to have been referred to in later opinions, was decided before the general rule and its recognized exception were established in this state. In San Bernardino County v. Riverside County, supra, the court said: "Accordingly it is held that, where an order is made upon the condition of payment of costs, an acceptance of such costs is the waiver of the right to appeal from the order." In that case $250 was ordered paid "as for costs and expenses." In the case before us the order did not designate the $15 as a payment of costs. In fact, it appears from the judgment which was set aside that the costs allowed amounted to $14.50. If the order were set aside the judgment would still include the costs. The appellant, therefore, has accepted a benefit to which she was not certainly entitled, and to which she has no right, except upon the condition that the default and judgment should be set aside. In San Bernardino County v. Riverside County, the court further said: "The plaintiff had no right to the $250 paid it by the defendant, except upon the condition that the default and judgment should be set aside, and by its acceptance of the money is deemed to have assented to the order setting aside the default and judgment."

A further consideration is that it appears from the opening brief filed and from the papers and records upon which the motion to dismiss is based, that the only question raised by the appeal is so unsubstantial as not to require further argument. That question is whether the court abused its discretion in holding that the negligence and inadvertence of the respondent, which lead to the entering of his default, were excusable.

In Jergins v. Schenck, 162 Cal. 747, 124 P. 426, the general rules applying to such a question are thus set forth: "An application to be relieved from a default under section 473 of the Code of Civil Procedure, is addressed to the sound discretion of the trial court; and the action of that court will not be set aside on appeal, unless an abuse of discretion clearly appears. Any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits. The appellate court will therefore be less inclined to reverse an order granting, than one refusing, an application to open a default. Indeed, the cases in which this court has held that such relief was improperly granted are very rare; while in a number of instances an order refusing to open the default has been reversed."

[4, 5] The appellant concedes that under the general rule such an order must be affirmed wherever it appears that the trial court was called upon to exercise any discretion, but insists that the facts here were such as to leave the court no discretion and to compel a denial of the relief requested. It is insisted that the only material fact is that the respondent did not appear within the time named in the summons. However, we think some of the facts indicate that the neglect in failing to appear was not so obviously without excuse as to deprive the court of all discretion in the matter.

The action was filed on October 21, 1931. The respondent learned of this through the newspapers and communicated with the attorney who filed the action, telling him why he thought he was not liable, including the fact that the coroner's jury had placed the blame on the appellant's son, who was the driver of the other car. Nothing further was done until March 21, 1933, when another attorney served a copy of the summons and complaint upon the respondent. The respondent repeated his explanation of the circumstances surrounding the accident, after which the attorney asked him if he was covered by insurance. He replied that he thought his insurance expired the day of the accident, but would look up his papers, whereupon the attorney told him that if he found he had insurance and would let him know, he would "communicate with the insurance carrier direct."

On March 26 the respondent consulted an attorney, telling him that suit had been filed against him in October, 1931; that he had explained the circumstances to the plaintiff's then attorney and they had dropped it; that another attorney had called on him on March 21 and asked him to "make a settlement"; that he thought they could not now "reopen" the case; and that he desired him to examine the records to see if the suit could be dismissed for lack of prosecution. At this attorney's request the copy of the summons and complaint was brought to him on April 3. He observed that the summons was issued on October 21, 1931, and, believing it had been served shortly thereafter, did not file an answer within the statutory time. He examined the records in the clerk's office on April 11, and then learned for the first time that the summons had been served on March 21, and that default had been entered on April 5, two days after time for appearance had expired. Timely application for relief was then made.

The facts justify the conclusion that the respondent at all times desired and intended to contest the appellant's claim, and that he hired an attorney for the purpose of attempting to secure a dismissal of the action. Doubtless, his mistaken idea of the law led to his failure to state all of the facts to his attorney and to his request that a wrong course be pursued. Apparently, this misled the attorney, and it can be understood how an attorney who believed that the time for appearance had already long expired might not act with the promptness to be expected of him had he known a limited time remained in which to appear. While it must be admitted that the highest degree of diligence was not shown, some of the circumstances tend, in greater or less degree, to show a measure of excuse for the neglect. In addition to other considerations, the offer of the appellant's attorney to take the matter up directly with any insurance carrier, though not intended to be misleading, was somewhat calculated to lead the respondent to believe that his recital of facts relied upon as showing he was not liable, had been at least temporarily accepted, especially since a similar statement had previously resulted in a delay of a year and a half. The trial court was justified in resolving all doubts in favor of a trial of the case on its merits, and no abuse of discretion appears.

For the reasons given the appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.